

WASHINGTON DEPARTMENT OF ECOLOGY LAUNCHES RULEMAKING FOR SPOKANE RIVER INSTREAM FLOW

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The Washington Department of Ecology (Ecology) has begun the process of developing a new set of water management regulations for the Spokane River and the Spokane Valley Rathdrum Prairie Aquifer, located in eastern Washington. Although proposed regulations have not yet been publicly released, Ecology has announced that it will set instream flow levels for the Spokane River. Ecology is proposing the new water resource management program partially in response to the State of Idaho's pending adjudication of the Spokane River occurring just across the border.

Ecology's Announcement

On January 21, 2014, Ecology issued a formal notice of the agency's intent to commence rulemaking to create a new rule, Chapter 173-557, in the Washington Administrative Code (WAC). According to Ecology's notice, the proposed rule will set instream flow levels for the Spokane River and establish regulations for managing future out-of-stream uses of water from the Spokane River and the Spokane Valley Rathdrum Prairie (SVRP) Aquifer.

The notice explains that the rule "is needed to protect and preserve instream resources in the Spokane River including fish, wildlife, recreation, water quality, navigation and aesthetics." Ecology states that the instream flow levels "will serve to determine whether additional water is available for future

allocation beyond the needs of existing water rights and will assist Ecology with managing future water withdrawals from the Spokane River and Spokane Valley Rathdrum Prairie Aquifer.”

The new rule will apply to the appropriation and use of surface water and groundwater in the Spokane River and SVRP Aquifer begun after the effective date of the regulation. On its website, Ecology states that the new rule “would apply to new surface water and groundwater *applications* approved within the Washington portion of the Spokane Valley Rathdrum Prairie Aquifer boundary.” Although this suggests that the new management rule would apply only to new water right permit applications, Ecology’s other recent water resources management rules also cover new groundwater rights sought under the groundwater permit exemption in RCW 90.44.050.

The new rule would 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, and existing water rights under the groundwater permit exemption. Ecology’s website explains: “An instream flow rule will also give the river a water right, much like we give individuals, farms and municipalities.” This partially illuminates the likely impetus for the new rule: the pending upstream adjudication being conducted by the State of Idaho. Ecology’s official notice refers obliquely to concern about the effect of a neighboring adjudication: “A rule will also establish Washington State legal interests in the water as it may relate to any future adjudications or interstate apportionment.”

State Legislators Call for a Time Out

Ecology’s announcement follows closely on the heels of a request by several legislators for a rulemaking hiatus. On December 2, 2013, a group of five legislators, led by Senators Barbara Bailey and Jim Honeyford, wrote to Governor Jay Inslee to request suspension of all pending and new instream flow rulemaking while the State assesses the implications of the Washington Supreme Court’s recent decision in *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

In *Swinomish*, the Supreme Court invalidated Ecology's domestic use "reservations" promulgated in 2006 to settle litigation over the 2001 Skagit basin instream flow rule, because Ecology based those reservations on "overriding considerations of the public interest." The Court held that "overriding considerations of the public interest" may be used only on a case-by-case basis, and cannot support a blanket reservation for out-of-stream uses in a basin rule. The *Swinomish* decision is also problematic for Ecology's instream flow regulations because the Court interpreted RCW 90.03.345 to require application of the four-part test for a new water right whenever Ecology establishes a reservation. The same interpretation applies to establishment of a minimum instream flow.

The five legislators reminded the Governor that many instream flow rules adopted prior to the 2001 Skagit rule included exemptions for certain small water uses, such as domestic supply. The agency's position, as articulated in a 1987 document, was that the Water Resources Act "requires that adequate and safe supplies of water be preserved and protected in potable condition to satisfy human domestic needs." The five legislators explained that "it is not at all clear how the 2001 Skagit rule [reinstated by the Supreme Court in *Swinomish*] squares with statutory requirements and legislative directives protecting permit-exempt access to these small water users."

Stressing their concern regarding the legal uncertainty created by the *Swinomish* decision and its negative impact on the economic viability of the Skagit basin and other areas, the legislators pointed out that Ecology has promulgated other basin rules that rely on the type of reservation invalidated in *Swinomish*. "The status of those reservations is now in question and could lead to litigation to challenge them. Because of this uncertainty, we think it is wise to take a time out from pending and future instream flow rulemaking so that the issues can be fully understood."

Conclusion and Implications

Ecology's launch of the Spokane rulemaking was probably in the works long before the five legislators wrote their letter to Governor, and perhaps even before the *Swinomish* decision was issued. It will be interesting to see

whether Ecology follows the Supreme Court's interpretation of RCW 90.03.345 announced in *Swinomish* by applying the four-part test to any minimum instream flow proposed as part of the new rule.

For rulemaking updates, see <http://www.ecy.wa.gov/programs/wr/rules/557-ov.html>.

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