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HOUSE BILL 2396

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2004 Regular Session

By Representatives Linville, Kirby, Rockefeller, Lantz, Clibborn, Hunt, Quall, Wallace, Haigh, Miloscia, Wood and Moeller; by request of Governor Locke

Read first time 01/13/2004. Referred to Committee on Agriculture & Natural Resources.

1 AN ACT Relating to instream flow; amending RCW 90.03.247,  
2 90.82.080, 47.12.330, 90.42.080, 43.21B.110, and 39.34.190; adding a  
3 new section to chapter 77.85 RCW; adding new sections to chapter 90.54  
4 RCW; adding a new section to chapter 77.15 RCW; adding a new section to  
5 chapter 47.12 RCW; adding a new section to chapter 43.27A RCW; and  
6 creating new sections.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 NEW SECTION. **Sec. 1.** The legislature finds that watershed plans  
9 and similar water resource programs being developed across the state  
10 will include strategies to secure sufficient water to meet both the  
11 future water supply needs of people and the stream flow requirements  
12 for fish. The legislature also finds that the state has invested in a  
13 variety of state programs to secure adequate stream flows for fish. It  
14 is therefore the intent of the legislature to direct state agencies to  
15 work with watershed planning units and other local groups to develop  
16 action programs that implement responsibilities for achieving and  
17 protecting instream flows.

18 To accomplish this objective, the legislature intends to:

- 1 (1) Commit the state to achieving and protecting instream flows  
2 statewide;
- 3 (2) Identify stream flows that are needed to ensure a healthy  
4 watershed and that can be achieved, and establish these as instream  
5 flows;
- 6 (3) Require the development of instream flow programs that identify  
7 and schedule the actions needed to achieve and protect instream flows;
- 8 (4) Build on the implementation of watershed plans and similar  
9 programs, and make the state agencies accountable to work jointly with  
10 governments and water users to achieve and protect instream flows; and
- 11 (5) Evaluate funding for state water management programs, including  
12 for the public share of instream flow programs.

13 NEW SECTION. **Sec. 2.** A new section is added to chapter 77.85 RCW  
14 to read as follows:

15 (1)(a) The independent science panel created under RCW 77.85.040  
16 must provide guidance to the director of the department of ecology on  
17 the following:

18 (i) Rules to be proposed by the department of ecology establishing  
19 detailed policies for setting instream flows under the criteria  
20 established by section 4(2) of this act;

21 (ii) Peer-reviewed flow setting methodologies that would identify  
22 the flows that would satisfy the requirements of the proposed rules;  
23 and

24 (iii) Actions which, if taken in a watershed, would likely provide  
25 measurable progress in providing stream flows to satisfy instream flow  
26 requirements established for a watershed, based on the conditions in  
27 the watershed and the flows to be achieved.

28 (b) The independent science panel must provide the guidance  
29 required by (a)(i) and (ii) of this subsection to the department before  
30 developing any other guidance under this section.

31 (2) The independent science panel must also provide guidance to be  
32 used by the department of ecology in evaluating interim progress in  
33 implementing the instream flow programs approved under section 6 of  
34 this act and in reviewing a program for possible revision at the end of  
35 six years under section 6(4) of this act.

36 (3) If the independent science panel believes that its membership  
37 should be expanded to provide the expertise to provide the guidance

1 required under subsections (1) and (2) of this section, the panel may,  
2 by majority vote, recommend a list of six of the most qualified  
3 scientists as candidates to provide that expertise. Each candidate  
4 must have practical experience with stream flows, hydrology, or the  
5 evaluation of water requirements for fish. The panel must submit any  
6 such list to the governor, the speaker of the house of representatives,  
7 and the senate majority leader. The speaker of the house of  
8 representatives and the senate majority leader may each remove one name  
9 from the list. The governor must consult with tribal representatives  
10 and must appoint two scientists from the remaining names on the list.  
11 The provisions of RCW 77.85.040 regarding members, including their  
12 terms, apply to the members appointed under this section except that  
13 these added members may act only with regard to the guidance required  
14 by this section. If two members are added to the independent science  
15 panel under this section, the membership of the panel includes the  
16 members appointed under this section only with regard to guidance to be  
17 provided under this section.

18 NEW SECTION. **Sec. 3.** The definitions in this section apply  
19 throughout sections 4 through 11 of this act.

20 (1) "Instream flow program" means a program developed or to be  
21 developed under sections 5 and 6 of this act.

22 (2) "Mainstem river" and "key tributary" mean a mainstem river and  
23 a key tributary identified by rule under section 4 of this act.

24 (3) "Watershed" means a water resource inventory area established  
25 in chapter 173-500 WAC as it exists of the effective date of this  
26 section.

27 NEW SECTION. **Sec. 4.** (1)(a) If a planning unit has received, by  
28 the effective date of this section, funding assistance from the  
29 department under RCW 90.82.040 for the establishment of instream flows  
30 for a mainstem river or key tributary under the procedures provided in  
31 RCW 90.82.080, the flows must be established by the deadlines provided  
32 in RCW 90.82.080. Instream flows must be adopted by the department by  
33 rule for all other mainstem rivers and their key tributaries in the  
34 state by 2010.

35 (b) The department must adopt by rule the standards that must be  
36 used in establishing instream flow rules that satisfy the criteria

1 established by subsection (2) of this section. The department must  
2 submit any rules it intends to propose under this subsection to the  
3 independent science panel for guidance under section 2 of this act.  
4 The department must discuss with the panel its guidance and, if the  
5 panel and the department disagree as to the rules that should be  
6 proposed, the department must submit the disagreement to mediation.  
7 The rules implementing this subsection that are formally proposed by  
8 the department for adoption under chapter 34.05 RCW must be consistent  
9 with the outcome of the mediation.

10 (2) The instream flows adopted after the effective date of this  
11 section must be hydrologically achievable under natural conditions and  
12 biologically defensible for each of the various periods of the year  
13 they apply and must provide variation to reflect changes in climate  
14 from wet to normal to drought years. In identifying the flows to be  
15 established, the department must use generally accepted, peer-reviewed  
16 methodologies. Such instream flows must incorporate the current  
17 requirements regarding instream flows of any habitat conservation plan  
18 approved under the federal endangered species act (16 U.S.C. Sec. 1531  
19 et seq.) or of a federal license for a hydroelectric power project  
20 issued under the federal power act (16 U.S.C. Sec. 791 et seq.) within  
21 the watershed to the extent those requirements are not inconsistent  
22 with the provisions of sections 3 through 11 of this act.

23 (3) By July 2005 the department must adopt by rule a list of the  
24 mainstem rivers and their key tributaries for which instream flows must  
25 be adopted under this section. The key tributaries for the mainstem  
26 rivers include those important to the protection of fish and other  
27 instream environmental values. The department of fish and wildlife  
28 must develop, in consultation with affected Indian tribes, planning  
29 units under chapter 90.82 RCW, and local groups conducting planning for  
30 the department under RCW 90.54.040(1), a list of the key tributaries to  
31 the mainstem rivers and must provide the list to the department of  
32 ecology for its rule making. Following the adoption of the list and  
33 until an instream flow program is approved under section 6 of this act  
34 for the watershed containing a mainstem river or key tributary on the  
35 list, no water right permits may be issued by the department for new  
36 withdrawals of water from the mainstem river or key tributary except  
37 such permits as are required for the public health or safety or for

1 proposals that benefit stream flows or have no net effect on stream  
2 flows.

3 (4) This section may not be construed as automatically requiring  
4 the adoption of new instream flows for any stream for which minimum  
5 instream flows are in effect under chapter 90.22 RCW or for which base  
6 flows are in effect under this chapter prior to the effective date of  
7 this section. However, once rules have been adopted establishing  
8 standards for instream flows under subsection (1) of this section, the  
9 department must review each of the existing minimum instream flow or  
10 base flow rules to determine whether the stream flow requirements of  
11 those rules satisfy the standards adopted under subsection (1) of this  
12 section and must revise the rules as necessary to bring them into  
13 conformity with the standards.

14 (5) As used in this chapter and chapter 90.22 RCW, the terms  
15 "minimum instream flows," "base flows," and "instream flows" are  
16 synonymous except that such flows adopted by the department after the  
17 effective date of this section must be referred to as instream flows.

18 NEW SECTION. **Sec. 5.** (1) An instream flow program must be  
19 prepared, approved, and implemented for each watershed in the state.

20 (2) The department must adopt rules establishing minimum  
21 requirements for instream flow programs. The rules must require each  
22 instream flow program to specify:

23 (a) The actions to be taken to achieve the instream flow  
24 requirements established for mainstem rivers and their key tributaries  
25 in the watershed and the estimated amount of water to be provided to  
26 stream flows from each such action;

27 (b) Timelines for taking the actions and for achieving the flows;

28 (c) An entity or entities responsible for taking each action;

29 (d) Benchmarks to be used to measure the progress in achieving the  
30 instream flows;

31 (e) Actions that will be taken in the near term, upon the approval  
32 of the program, and actions that will be taken to make ongoing  
33 improvements to secure progress over time. When instream flows are not  
34 achieved, priority must be given to actions that place the most water  
35 in the stream in the near term;

36 (f) Monitoring that will be conducted to measure progress;

1 (g) Actions to be taken any time a drought order is issued under  
2 RCW 43.83B.405 for the watershed;

3 (h) Funding required to implement the program and the sources of  
4 that funding;

5 (i) Contingency actions that are to be taken if progress in  
6 achieving the instream flows established by rule is not made as  
7 specified in the timelines and benchmarks; and

8 (j) How the program will be reviewed and altered as a part of  
9 adaptive management as necessary.

10 (3) Each instream flow program must incorporate the current  
11 requirements regarding instream flows of any habitat conservation plan  
12 approved under the federal endangered species act (16 U.S.C. Sec. 1531  
13 et seq.) or of a federal license for a hydroelectric power project  
14 issued under the federal power act (16 U.S.C. Sec. 791 et seq.) within  
15 the watershed to the extent those requirements are not inconsistent  
16 with the provisions of sections 3 through 11 of this act.

17 (4) Each instream flow program must also contain: A description of  
18 how land use practices in the watershed affect stream flows; a summary  
19 of existing and planned water use conservation and efficiency programs  
20 and projects; and an assessment program for determining the water  
21 conservation potential within the watershed.

22 (5) Instream flow programs must be designed to achieve instream  
23 flows within ten years of program approval.

24 (6) The department must identify how such progress in achieving the  
25 instream flows for a stream is to be reported to the department.  
26 Beginning in 2008, the department must report to the governor and  
27 legislature by December 31st of each even-numbered year on the progress  
28 made in achieving and maintaining instream flows in the watersheds of  
29 the state and whether the timelines and benchmarks identified in the  
30 instream flow programs are being met. For any watersheds in which such  
31 timelines and benchmarks are not being met, the report must identify  
32 the actions that will be taken to meet those timelines and benchmarks.  
33 Reports through 2012 must identify the watersheds for which such  
34 programs have been developed and adopted and those for which they have  
35 not.

36 (7) If the department finds as part of a two-year review under  
37 subsection (6) of this section that interim timelines and benchmarks  
38 are not being met in a watershed, the department must, as its initial

1 response, prepare and distribute technical assistance and educational  
2 information to the general public in the watershed to assist the public  
3 in complying with the requirements of their water rights and applicable  
4 water laws and to the general public and the units of local government  
5 in the watershed to assist them in implementing adaptive management  
6 strategies for meeting future timelines and benchmarks.

7 (8) If a watershed plan is in effect under chapter 90.82 RCW for  
8 the watershed, the instream flow program for the watershed must be  
9 based on the watershed plan. Such an instream flow program must  
10 subsequently be revised to reflect any revision in such a plan.

11 (9) The departments of ecology and fish and wildlife must jointly  
12 develop a programmatic environmental impact statement under chapter  
13 43.21C RCW for the rules required under this section. The statement  
14 must include an environmental review of the various types of actions  
15 that might be proposed in an instream flow program.

16 NEW SECTION. **Sec. 6.** (1)(a) An instream flow program that  
17 satisfies the requirements of section 5 of this act and this section  
18 must be approved for a watershed within one year of the date instream  
19 flows are established by rule for all of the mainstem rivers and their  
20 key tributaries in the watershed under sections 3 through 11 of this  
21 act. If a minimum instream flow or base flow has been adopted by rule  
22 under this chapter or chapter 90.22 RCW prior to the effective date of  
23 this section for a mainstem river or its key tributaries, such a  
24 program for the watershed containing the stream must be developed  
25 within one year of the date rules for establishing instream flows are  
26 adopted under section 4(1) of this act unless the flow adopted by rule  
27 is to be revised under section 4(3) of this act. If the instream flows  
28 are to be revised, an instream flow program that satisfies the  
29 requirements of section 5 of this act and this section must be approved  
30 within one year of the effective date they are revised.

31 (b) Each instream flow program developed under section 5 of this  
32 act and this section must be submitted to the department of ecology and  
33 to the department of fish and wildlife. The departments must review,  
34 in consultation with the departments of health and community, trade,  
35 and economic development, the programs for compliance with the  
36 requirements established by rule for the programs by the department of  
37 ecology. The key elements of the review must be the answers to the

1 following questions: Is the deadline for achieving stream flows that  
2 satisfy the instream flow rule requirements reasonable; and will  
3 conducting the activities specified in the program result in achieving  
4 those flows by the deadline? By an action taken jointly, the  
5 department of ecology and the department of fish and wildlife must  
6 approve, conditionally approve, or disapprove such a program based on  
7 its compliance with the department of ecology's rules. The failure of  
8 the departments to take such an action jointly within ninety days of  
9 the date a program is submitted to the department of fish and wildlife  
10 under this subsection constitutes a disapproval of the program. Each  
11 approval, conditional approval, or disapproval is subject to appeal to  
12 the pollution control hearings board under chapter 43.21B RCW.

13 (c) As part of their review of each instream program submitted to  
14 the departments of ecology and fish and wildlife, the departments must:  
15 Consider the guidance provided by the independent science panel under  
16 section 2(1)(a)(iii) of this act; and, following public notice, jointly  
17 conduct a public hearing on the program.

18 (d) For purposes of compliance with chapter 43.21C RCW, the  
19 departments of ecology and fish and wildlife are designated as colead  
20 agencies for conducting environmental review of proposed instream flow  
21 programs.

22 (2)(a) A planning unit that has conducted planning in a watershed  
23 under chapter 90.82 RCW may choose to develop an instream flow program  
24 for the watershed jointly with the department under sections 3 through  
25 11 of this act. To jointly develop the program, the planning unit must  
26 notify the department within three months of the date instream flows  
27 are established by rule for a mainstem river or its key tributaries in  
28 the watershed of its intention to do so. If an instream flow program  
29 is not to be developed jointly by the department and such a planning  
30 unit for a watershed, such a program must be developed for the  
31 watershed under this chapter as a segment of a comprehensive state  
32 water resources program under RCW 90.54.040(1) and sections 3 through  
33 11 of this act.

34 (b) An instream flow program developed under RCW 90.54.040(1) must  
35 be developed by the department jointly with or through the advice of a  
36 local group of citizens that represents at least the wide range of  
37 interests referred to for conducting planning under chapter 90.82 RCW.  
38 The department may select such a local group to develop an instream

1 flow program for a watershed jointly with the department from among the  
2 groups that have petitioned it to do so within three months of the date  
3 instream flows are established by rule for a mainstem river and its key  
4 tributaries in the watershed. If no qualifying local group so  
5 petitions for a watershed, the department must develop the instream  
6 flow program and must appoint such a local group to advise the  
7 department in its development.

8 (3) If a planning unit notified the department of its intention to  
9 jointly develop an instream flow program for a watershed or if a local  
10 group of citizens was, as the result of a petition, designated by the  
11 department to jointly develop a program for a watershed, but a program  
12 that satisfies the requirements of section 5 of this act is not  
13 developed and submitted to the department and the department of fish  
14 and wildlife within one year of the date instream flows are adopted by  
15 rule for a mainstem river and its key tributaries within the watershed,  
16 the department must develop an instream flow program for the watershed  
17 with the advice of a local group of citizens within the following year.

18 (4) Each instream flow program must be reviewed and modified as  
19 needed every six years after it is initially approved.

20 (5) A local group of citizens developing or providing advice for  
21 the development of an instream flow program under this chapter must  
22 consider the guidance provided by the independent science panel under  
23 section 2(1)(a)(iii) of this act and any recommendations for priority  
24 actions provided by the department of fish and wildlife under section  
25 13 of this act.

26 NEW SECTION. **Sec. 7.** If an instream flow program has been  
27 approved or conditionally approved for a watershed under section 6 of  
28 this act, the department of transportation may expend funds for  
29 environmental mitigation as provided in section 17 of this act.

30 NEW SECTION. **Sec. 8.** (1) To achieve instream flows or otherwise  
31 to implement the provisions of an instream flow program, the department  
32 may:

33 (a) Provide departmental resources for and adopt rules facilitating  
34 voluntary agreements for sharing the use of water that have been  
35 developed through or as part of watershed plans developed and approved  
36 under chapter 90.82 RCW, regional water initiatives conducted under RCW

1 90.54.040(1), habitat conservation plans approved under the federal  
2 endangered species act (16 U.S.C. Sec. 1531 et seq.), trust water  
3 agreements under chapter 90.38 or 90.42 RCW, or watershed agreements  
4 under RCW 90.03.590;

5 (b) Expend funds to purchase or lease water rights or to secure low  
6 water easements or other interests in water rights;

7 (c) Provide financial assistance to water right holders for  
8 projects or activities that conserve the use of water under a water  
9 right as long as the portion of the net water savings, as defined in  
10 RCW 90.38.010, derived from the portion of the funding provided by the  
11 department for the project or activity is placed in the trust water  
12 program of chapter 90.38 or 90.42 RCW and dedicated to instream flows  
13 for the life of the project or activity;

14 (d) Provide funding for water conveyance infrastructure projects  
15 that benefit instream flows, including but not limited to those  
16 projects that substitute one source of water for another or provide for  
17 the conjunctive use of water rights;

18 (e) Provide funding for multipurpose water storage projects.

19 (2) The department may redirect or prioritize the use of any  
20 capital or operating moneys appropriated to the department for  
21 administrative purposes or for the department's water resources  
22 program, not including water quality programs, to use for establishing  
23 instream flows or developing or approving instream flow programs.

24 (3) The department may prioritize its compliance activity regarding  
25 water rights and the unauthorized use of water to emphasize compliance  
26 in areas governed by a drought emergency order issued under RCW  
27 43.83B.405 or in a watershed for which instream flows are required  
28 under section 4 of this act but have not yet been established by rule.

29 (4) By December 1, 2004, the department must recommend to the  
30 legislature and the governor tax incentives for water conservation  
31 projects or activities. The recommendation must include the  
32 implementing legislation in bill form.

33 NEW SECTION. **Sec. 9.** (1) In determining where to concentrate the  
34 use of departmental resources for reviewing and approving applications  
35 for permits for new appropriations of water, the department must give  
36 priority to such applications in watersheds for which an instream flow

1 program has been approved under section 6 of this act and in which the  
2 timelines and milestones identified in the program are being met.

3 (2) The variations in the flow level requirements in an instream  
4 flow rule for a stream that reflect seasonal and climatic variations  
5 must be used by the department in determining whether to approve  
6 applications for new water use permits or for transfers, changes, or  
7 amendments of existing water rights in the watersheds.

8 NEW SECTION. **Sec. 10.** If at the conclusion of the six-year review  
9 of an instream flow program provided under section 6(4) of this act,  
10 the program is not being implemented, instream flows have not been  
11 achieved, and the deadline for achieving instream flows approved as  
12 part of the program has passed, the departments of ecology and fish and  
13 wildlife must take actions to achieve instream flows within the  
14 specified watershed, using any and all powers granted to the  
15 departments under current law as needed to achieve the instream flows.  
16 These actions may include additional state funding of water programs  
17 and projects described in section 8 of this act and actions taken  
18 through other authorized agency programs.

19 NEW SECTION. **Sec. 11.** (1) Any citizen of the state may commence  
20 a civil action in superior court on his or her own behalf against the  
21 director of the department for the department's alleged failure to  
22 perform any of the following:

23 (a) Meet the deadlines provided by this chapter or chapter 90.82  
24 RCW for establishing instream flows by rule;

25 (b) Meet the deadline provided by this chapter for approving or  
26 developing an instream flow program for a watershed;

27 (c) Implement the responsibilities of the department specified in  
28 an approved instream flow program; and

29 (d) Implement the provisions of section 10 of this act.

30 (2) The court may issue a writ of mandamus to order the director to  
31 perform the duty. No action may be commenced under this section prior  
32 to sixty days after the plaintiff has given notice of the alleged  
33 failure to the director. A copy of the complaint must be served on the  
34 attorney general. The court, in issuing a final order in an action  
35 brought under this section, may award costs of litigation, including  
36 reasonable attorneys' fees and expert witness fees, to a prevailing or

1 substantially prevailing party as the court deems appropriate. The  
2 court may, if a temporary restraining order or preliminary injunction  
3 is sought, require the filing of a bond or equivalent security.

4 **Sec. 12.** RCW 90.03.247 and 2003 c 39 s 48 are each amended to read  
5 as follows:

6 Whenever an application for a permit to make beneficial use of  
7 public waters is approved relating to a stream or other water body for  
8 which minimum flows or levels have been adopted and are in effect at  
9 the time of approval, the permit shall be conditioned to protect the  
10 levels or flows. No agency may establish minimum flows and levels or  
11 similar water flow or level restrictions for any stream or lake of the  
12 state other than the department of ecology whose authority to establish  
13 is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and  
14 90.54.040. The provisions of other statutes, including but not limited  
15 to RCW 77.55.100 and chapter 43.21C RCW, may not be interpreted in a  
16 manner that is inconsistent with this section. In establishing such  
17 minimum flows, levels, or similar restrictions, the department shall,  
18 during all stages of development by the department of ecology of  
19 minimum flow proposals, consult with, and carefully consider the  
20 recommendations of, the department of fish and wildlife, the department  
21 of community, trade, and economic development, and the department of  
22 agriculture, and, regarding such flows and instream flow programs  
23 proposed for approval under section 6 of this act, representatives of  
24 the affected Indian tribes. Nothing herein shall preclude the  
25 department of fish and wildlife, the department of community, trade,  
26 and economic development, or the department of agriculture from  
27 presenting its views on minimum flow needs at any public hearing or to  
28 any person or agency, and the department of fish and wildlife, the  
29 department of community, trade, and economic development, and the  
30 department of agriculture are each empowered to participate in  
31 proceedings of the federal energy regulatory commission and other  
32 agencies to present its views on minimum flow needs.

33 NEW SECTION. **Sec. 13.** A new section is added to chapter 77.15 RCW  
34 to read as follows:

35 The department must recommend to a planning unit or local group of  
36 citizens preparing an instream flow program for a watershed under

1 section 6 of this act and to the department of ecology the priority  
2 watersheds, tributaries, and stream reaches that require earlier  
3 attention in an instream flow program.

4 NEW SECTION. **Sec. 14.** Sections 3 through 11 of this act are each  
5 added to chapter 90.54 RCW and codified with the subchapter heading of  
6 "Instream Flows."

7 **Sec. 15.** RCW 90.82.080 and 2003 1st sp.s. c 4 s 4 are each amended  
8 to read as follows:

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

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

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

32 (b) The department shall undertake rule making to adopt flows under  
33 (a) of this subsection. The department may adopt the rules either by  
34 the regular rules adoption process provided in chapter 34.05 RCW, the  
35 expedited rules adoption process as set forth in RCW 34.05.353, or  
36 through a rules adoption process that uses public hearings and notice

1 provided by the county legislative authority to the greatest extent  
2 possible. Such rules do not constitute significant legislative rules  
3 as defined in RCW 34.05.328, and do not require the preparation of  
4 small business economic impact statements.

5 (c) If approval is not achieved within four years of the date the  
6 planning unit first receives funds from the department for conducting  
7 watershed assessments under RCW 90.82.040, the department (~~may~~) must  
8 promptly initiate rule making under chapter 34.05 RCW to establish  
9 flows for those streams and shall have two additional years to  
10 establish the instream flows for those streams for which approval is  
11 not achieved.

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

19 (b) Any increase to an existing minimum instream flow set by rule  
20 of the department shall have a priority date of two years after funding  
21 is first received for planning in the WRIA or multi-WRIA area from the  
22 department under RCW 90.82.040 and the priority date of the portion of  
23 the minimum instream flow previously established by rule shall retain  
24 its priority date as established under RCW 90.03.345.

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

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

33 (4) Nothing in this chapter either: (a) Affects the department's  
34 authority to establish flow requirements or other conditions under RCW  
35 90.48.260 or the federal clean water act (33 U.S.C. Sec. 1251 et seq.)  
36 for the licensing or relicensing of a hydroelectric power project under  
37 the federal power act (16 U.S.C. Sec. 791 et seq.); or (b) affects or

1 impairs existing instream flow requirements and other conditions in a  
2 current license for a hydroelectric power project licensed under the  
3 federal power act.

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

7 (6) The department shall report annually to the appropriate  
8 legislative standing committees on the progress of instream flows being  
9 set under this chapter, as well as progress toward setting instream  
10 flows in those watersheds not being planned under this chapter. The  
11 report shall be made by December 1, 2003, and by December 1st of each  
12 subsequent year.

13 **Sec. 16.** RCW 47.12.330 and 1998 c 181 s 2 are each amended to read  
14 as follows:

15 For the purpose of environmental mitigation of transportation  
16 projects, the department may acquire or develop, or both acquire and  
17 develop, environmental mitigation sites and water management programs  
18 in advance of the construction of programmed projects. The term  
19 "advanced environmental mitigation" means mitigation of adverse impacts  
20 upon the environment from transportation projects before their design  
21 and construction. Advanced environmental mitigation consists of the  
22 acquisition of property; the acquisition of property, water, or air  
23 rights; the development of property for the purposes of improved  
24 environmental management; engineering costs necessary for such purchase  
25 and development; and the use of advanced environmental mitigation sites  
26 and water management programs to fulfill project environmental permit  
27 requirements. Advanced environmental mitigation must be conducted in  
28 a manner that is consistent with the definition of mitigation found in  
29 the council of environmental quality regulations (40 C.F.R. Sec.  
30 1508.20) and the governor's executive order on wetlands (EO 90-04).  
31 Advanced environmental mitigation is for projects approved by the  
32 transportation commission as part of the state's six-year plan or  
33 included in the state highway system plan. Advanced environmental  
34 mitigation must give consideration to activities related to fish  
35 passage(~~(r)~~) and fish habitat including but not limited to instream  
36 flows for streams in the watershed in which the project is in whole or  
37 in part located, wetlands, and flood management.

1 Advanced environmental mitigation may also be conducted in  
2 partnership with federal, state, or local government agencies, tribal  
3 governments, interest groups, or private parties. Partnership  
4 arrangements may include joint acquisition and development of  
5 mitigation sites, purchasing and selling mitigation bank credits among  
6 participants, and transfer of mitigation site title from one party to  
7 another. Water rights secured for instream flows must be placed in the  
8 trust water rights program of chapter 90.38 or 90.42 RCW and dedicated  
9 to instream flows. Specific conditions of partnership arrangements  
10 will be developed in written agreements for each other form of  
11 mitigation for each applicable environmental mitigation site.

12 As used in this section, a "water management program" includes  
13 water rights, water infrastructure, and other water programs that  
14 mitigate the project's effects and helps to implement an instream flow  
15 program approved under section 6 of this act.

16 NEW SECTION. Sec. 17. A new section is added to chapter 47.12 RCW  
17 to read as follows:

18 If an instream flow program has been approved or conditionally  
19 approved under section 6 of this act for a watershed and the department  
20 is to provide mitigation or advanced mitigation for a project that is  
21 located in the watershed, the department shall provide that mitigation  
22 in a manner that implements or assists in implementing the instream  
23 flow program. If the department is to provide mitigation or advanced  
24 mitigation for a project that is located in more than one watershed,  
25 the department shall, to the maximum extent possible, concentrate its  
26 mitigation efforts for the project as a whole by providing mitigation  
27 that implements or assists in implementing the instream flow program or  
28 programs that have been approved or conditionally approved under  
29 section 6 of this act for any of the watersheds in which the project is  
30 located.

31 As used in this section, "watershed" means a water resource  
32 inventory area established in chapter 173-500 WAC as it exists of the  
33 effective date of this section.

34 NEW SECTION. Sec. 18. A new section is added to chapter 43.27A  
35 RCW to read as follows:

36 (1) In order to prevent or remedy the impairment of a water right

1 embodied in an instream flow rule or held by the state as a trust water  
2 right, the department is authorized to bring an appropriate action at  
3 law or in equity, including seeking injunctive relief, in a state  
4 superior court, as it may deem necessary. Such an action must be  
5 initiated in the superior court of the county where the point or points  
6 of diversion or withdrawal of the water right or rights are located.  
7 If the points of diversion or withdrawal are located in more than one  
8 county, the department may bring the action in a county where a point  
9 of diversion or withdrawal is located. Notwithstanding the general  
10 adjudication procedures in RCW 90.03.110 through 90.03.245 and  
11 90.44.220, the superior court shall make findings and a determination  
12 of the validity and priority of the water rights held by the parties as  
13 needed to address any impairment of water rights. The superior court  
14 shall issue any necessary orders to implement its findings and  
15 determination, including injunctive relief, that it determines is  
16 necessary to regulate among the water rights.

17 (2) Nothing in this section authorizes the department or the  
18 superior court to accomplish a general adjudication of water rights  
19 proceeding or the substantial equivalent of a general adjudication of  
20 water rights. The exclusive procedure for accomplishing a general  
21 adjudication of water rights is under RCW 90.03.110 through 90.03.245  
22 or 90.44.220.

23 (3) This section does not in any way modify regulatory powers  
24 previously placed with the department before the effective date of this  
25 section.

26 **Sec. 19.** RCW 90.42.080 and 2002 c 329 s 9 are each amended to read  
27 as follows:

28 (1)(a) The state may acquire all or portions of existing water  
29 rights, by purchase, gift, or other appropriate means other than by  
30 condemnation, from any person or entity or combination of persons or  
31 entities. Once acquired, such rights are trust water rights. A water  
32 right acquired by the state that is expressly conditioned to limit its  
33 use to instream purposes shall be administered as a trust water right  
34 in compliance with that condition.

35 (b) If the holder of a right to water from a body of water chooses  
36 to donate all or a portion of the person's water right to the trust  
37 water system to assist in providing instream flows on a temporary or

1 permanent basis, the department shall accept the donation on such terms  
2 as the person may prescribe as long as the donation satisfies the  
3 requirements of subsection (4) of this section and the other applicable  
4 requirements of this chapter and the terms prescribed are relevant and  
5 material to protecting any interest in the water right retained by the  
6 donor. Once accepted, such rights are trust water rights within the  
7 conditions prescribed by the donor.

8 (2) The department may enter into leases, contracts, or such other  
9 arrangements with other persons or entities as appropriate, to ensure  
10 that trust water rights acquired in accordance with this chapter may be  
11 exercised to the fullest possible extent.

12 (3) Trust water rights may be acquired by the state on a temporary  
13 or permanent basis.

14 (4) A water right donated under subsection (1)(b) of this section  
15 shall not exceed the extent to which the water right was exercised  
16 during the five years before the donation nor may the total of any  
17 portion of the water right remaining with the donor plus the donated  
18 portion of the water right exceed the extent to which the water right  
19 was exercised during the five years before the donation. A water right  
20 holder who believes his or her water right has been impaired by a trust  
21 water right donated under subsection (1)(b) of this section may request  
22 that the department review the impairment claim. If the department  
23 determines that exercising the trust water right resulting from the  
24 donation or exercising a portion of that trust water right donated  
25 under subsection (1)(b) of this section is impairing existing water  
26 rights in violation of RCW 90.42.070, the trust water right shall be  
27 altered by the department to eliminate the impairment. Any decision of  
28 the department to alter or not to alter a trust water right donated  
29 under subsection (1)(b) of this section is appealable to the pollution  
30 control hearings board under RCW 43.21B.230. A donated water right's  
31 status as a trust water right under this subsection is not evidence of  
32 the validity or quantity of the water right.

33 (5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to  
34 donations for instream flows described in subsection (1)(b) of this  
35 section, but do apply to other transfers of water rights under this  
36 section.

37 (6) ~~((No funds may be expended for the purchase of water rights by~~

1 ~~the state pursuant to this section unless specifically appropriated for~~  
2 ~~this purpose by the legislature.~~

3 ~~(7))~~ Any water right conveyed to the trust water right system as  
4 a gift that is expressly conditioned to limit its use to instream  
5 purposes shall be managed by the department for public purposes to  
6 ensure that it qualifies as a gift that is deductible for federal  
7 income taxation purposes for the person or entity conveying the water  
8 right.

9 ~~((8))~~ (7) If the department acquires a trust water right by  
10 lease, the amount of the trust water right shall not exceed the extent  
11 to which the water right was exercised during the five years before the  
12 acquisition was made nor may the total of any portion of the water  
13 right remaining with the original water right holder plus the portion  
14 of the water right leased by the department exceed the extent to which  
15 the water right was exercised during the five years before the  
16 acquisition. A water right holder who believes his or her water right  
17 has been impaired by a trust water right leased under this subsection  
18 may request that the department review the impairment claim. If the  
19 department determines that exercising the trust water right resulting  
20 from the leasing or exercising of a portion of that trust water right  
21 leased under this subsection is impairing existing water rights in  
22 violation of RCW 90.42.070, the trust water right shall be altered by  
23 the department to eliminate the impairment. Any decision of the  
24 department to alter or not to alter a trust water right leased under  
25 this subsection is appealable to the pollution control hearings board  
26 under RCW 43.21B.230. The department's leasing of a trust water right  
27 under this subsection is not evidence of the validity or quantity of  
28 the water right.

29 ~~((9))~~ (8) For a water right donated to or acquired by the trust  
30 water rights program on a temporary basis, the full quantity of water  
31 diverted or withdrawn to exercise the right before the donation or  
32 acquisition shall be placed in the trust water rights program and shall  
33 revert to the donor or person from whom it was acquired when the trust  
34 period ends.

35 **Sec. 20.** RCW 43.21B.110 and 2003 c 393 s 19 are each amended to  
36 read as follows:

37 (1) The hearings board shall only have jurisdiction to hear and

1 decide appeals from the following decisions of the department, the  
2 director, local conservation districts, and the air pollution control  
3 boards or authorities as established pursuant to chapter 70.94 RCW, or  
4 local health departments:

5 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,  
6 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and  
7 90.56.330.

8 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,  
9 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,  
10 90.14.130, 90.48.120, and 90.56.330.

11 (c) Except as provided in RCW 90.03.210(2), the issuance,  
12 modification, or termination of any permit, certificate, or license by  
13 the department or any air authority in the exercise of its  
14 jurisdiction, including the issuance or termination of a waste disposal  
15 permit, the denial of an application for a waste disposal permit, the  
16 modification of the conditions or the terms of a waste disposal permit,  
17 or a decision to approve or deny an application for a solid waste  
18 permit exemption under RCW 70.95.300.

19 (d) Decisions of local health departments regarding the grant or  
20 denial of solid waste permits pursuant to chapter 70.95 RCW.

21 (e) Decisions of local health departments regarding the issuance  
22 and enforcement of permits to use or dispose of biosolids under RCW  
23 70.95J.080.

24 (f) Decisions of the department regarding waste-derived fertilizer  
25 or micronutrient fertilizer under RCW 15.54.820, and decisions of the  
26 department regarding waste-derived soil amendments under RCW 70.95.205.

27 (g) Decisions of local conservation districts related to the denial  
28 of approval or denial of certification of a dairy nutrient management  
29 plan; conditions contained in a plan; application of any dairy nutrient  
30 management practices, standards, methods, and technologies to a  
31 particular dairy farm; and failure to adhere to the plan review and  
32 approval timelines in RCW 90.64.026.

33 (h) Actions taken by the departments of ecology and fish and  
34 wildlife to approve, conditionally approve, or disapprove an instream  
35 flow program under section 6 of this act.

36 (i) Any other decision by the department or an air authority which  
37 pursuant to law must be decided as an adjudicative proceeding under  
38 chapter 34.05 RCW.

1 (2) The following hearings shall not be conducted by the hearings  
2 board:

3 (a) Hearings required by law to be conducted by the shorelines  
4 hearings board pursuant to chapter 90.58 RCW.

5 (b) Hearings conducted by the department pursuant to RCW 70.94.332,  
6 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

7 (c) Proceedings conducted by the department, or the department's  
8 designee, under RCW 90.03.160 through 90.03.210 or 90.44.220.

9 (d) Hearings conducted by the department to adopt, modify, or  
10 repeal rules.

11 (e) Appeals of decisions by the department as provided in chapter  
12 43.21L RCW.

13 (3) Review of rules and regulations adopted by the hearings board  
14 shall be subject to review in accordance with the provisions of the  
15 Administrative Procedure Act, chapter 34.05 RCW.

16 **Sec. 21.** RCW 39.34.190 and 2003 c 327 s 2 are each amended to read  
17 as follows:

18 (1) The legislative authority of a city or county and the governing  
19 body of any special purpose district enumerated in subsection (2) of  
20 this section may (~~authorize up to ten percent of its~~) expend water-  
21 related revenues to (~~be expended in the implementation of~~) implement  
22 watershed management plan projects or activities that are in addition  
23 to the county's, city's, or district's existing water-related services  
24 or activities. (~~Such limitation on expenditures shall not apply to~~  
25 ~~additional revenues for watershed plan implementation that are~~  
26 ~~authorized by voter approval under section 5 of this act or to water-~~  
27 ~~related revenues of a public utility district organized according to~~  
28 ~~Title 54 RCW.~~) Water-related revenues include rates, charges, and  
29 fees for the provision of services relating to water supply, treatment,  
30 distribution, and management generally, and those general revenues of  
31 the local government that are expended for water management purposes.  
32 A local government may not expend for this purpose any revenues that  
33 were authorized by voter approval for other specified purposes or that  
34 are specifically dedicated to the repayment of municipal bonds or other  
35 debt instruments.

36 (2) The following special purpose districts may exercise the  
37 authority provided by this section:

- 1 (a) Water districts, sewer districts, and water-sewer districts  
2 organized under Title 57 RCW;
- 3 (b) Public utility districts organized under Title 54 RCW;
- 4 (c) Irrigation, reclamation, conservation, and similar districts  
5 organized under Titles 87 and 89 RCW;
- 6 (d) Port districts organized under Title 53 RCW;
- 7 (e) Diking, drainage, and similar districts organized under Title  
8 85 RCW;
- 9 (f) Flood control and similar districts organized under Title 86  
10 RCW;
- 11 (g) Lake management districts organized under chapter 36.61 RCW;
- 12 (h) Aquifer protection areas organized under chapter 36.36 RCW; and
- 13 (i) Shellfish protection districts organized under chapter 90.72  
14 RCW.

15 (3) The authority for expenditure of local government revenues  
16 provided by this section shall be applicable broadly to the  
17 implementation of watershed management plans addressing water supply,  
18 water transmission, water quality treatment or protection, or any other  
19 water-related purposes. Such plans include but are not limited to  
20 plans developed under the following authorities:

- 21 (a) Watershed plans developed under chapter 90.82 RCW;
- 22 (b) Salmon recovery plans developed under chapter 77.85 RCW;
- 23 (c) Watershed management elements of comprehensive land use plans  
24 developed under the growth management act, chapter 36.70A RCW;
- 25 (d) Watershed management elements of shoreline master programs  
26 developed under the shoreline management act, chapter 90.58 RCW;
- 27 (e) Nonpoint pollution action plans developed under the Puget Sound  
28 water quality management planning authorities of chapter 90.71 RCW and  
29 chapter 400-12 WAC;
- 30 (f) Other comprehensive management plans addressing watershed  
31 health at a WRIA level or sub-WRIA basin drainage level;
- 32 (g) Coordinated water system plans under chapter 70.116 RCW and  
33 similar regional plans for water supply; and
- 34 (h) Any combination of the foregoing plans in an integrated  
35 watershed management plan.

36 (4) The authority provided by this section to expend revenues for  
37 watershed management plan implementation shall be construed broadly to  
38 include, but not be limited to:

- 1 (a) The coordination and oversight of plan implementation,  
2 including funding a watershed management partnership for this purpose;
- 3 (b) Technical support, monitoring, and data collection and  
4 analysis;
- 5 (c) The design, development, construction, and operation of  
6 projects included in the plan; and
- 7 (d) Conducting activities and programs included as elements in the  
8 plan.

9 NEW SECTION. **Sec. 22.** A task force composed of representatives of  
10 the department of ecology, the department of community, trade, and  
11 economic development, and the conservation commission must conduct a  
12 study of the feasibility and practical effects of storing storm water  
13 on farm lands and of designating areas into which flood waters may be  
14 diverted or allowed access for the purposes of both: Enhancing the  
15 recharge of aquifers for the release of waters to streams at times that  
16 would assist in securing needed stream flows; and as a means of  
17 reducing potential flood damage from a storm or flood event in this  
18 state. If the task force finds that such activities if taken in this  
19 state would likely reduce flood damage, the task force must also  
20 identify actions that the state should take to encourage and permit the  
21 activities, including incentives the state should provide to promote  
22 such activities. The task force must report its findings,  
23 recommendations, and proposed legislation to implement its  
24 recommendations to the governor and the appropriate committees of the  
25 legislature by December 31, 2005, at which time the task force expires.

26 NEW SECTION. **Sec. 23.** (1) The department of ecology must convene  
27 and provide staff support for a water resources administration and  
28 funding task force. The task force must review the administrative  
29 organization and activities of the departments of ecology and fish and  
30 wildlife regarding their water resources functions and the statutory  
31 requirements and authorities for those functions, including those  
32 directing the department of ecology's enforcement activities and  
33 authorizing the redirection of the use of department of ecology funding  
34 and resources. Based on its review, the task force must identify  
35 administrative policies and an organizational structure that it  
36 believes would provide an efficient and effective water resources

1 program under current law. Once the task force has identified that  
2 structure and those policies, the task force shall develop proposals  
3 for and recommend several options for funding the state's water  
4 resource programs, including both operating programs and capital costs  
5 for water program implementation. The task force must report its  
6 findings and its recommendations to the governor and the appropriate  
7 committees of the legislature by September 15, 2004.

8 (2) The task force must consist of:

9 (a) One representative from each of the following interests:  
10 Agriculture, industry, environmental, fisheries, water utilities, and  
11 power utilities;

12 (b) One representative of cities and one representative of  
13 counties;

14 (c) Two representatives of Indian tribes, one from eastern  
15 Washington and one from western Washington; and

16 (d) Three representatives of the executive branch of state  
17 government.

18 (3) The department of ecology must invite a representative of the  
19 United States bureau of reclamation to participate as a member of the  
20 task force.

--- END ---