

---

HOUSE BILL 2393

---

State of Washington

58th Legislature

2004 Regular Session

By Representatives Hunt, McDermott, Rockefeller, Cooper, Simpson, G.,  
Upthegrove, Dickerson, Lantz, Romero, Chase, Miloscia, Dunshee, Wood,  
McIntire, Moeller and Wallace

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

1 AN ACT Relating to watershed health; amending RCW 77.85.040,  
2 43.06.220, 43.21B.110, and 90.82.080; adding a new section to chapter  
3 43.27A RCW; adding new chapters to Title 90 RCW; and providing an  
4 effective date.

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

6 NEW SECTION. **Sec. 1.** The legislature finds that the waters of the  
7 state are among the most valuable and fragile of the public's natural  
8 resources and that there is great concern throughout the state relating  
9 to their utilization, protection, restoration, and preservation. In  
10 addition it finds that ever increasing pressures of additional  
11 consumptive uses are being placed on the rivers, streams, and ground  
12 waters, necessitating increased coordination in the management of the  
13 waters of the state. The legislature declares that the common interest  
14 of all of the people, as the owners of the waters of the state, shall  
15 be paramount in the management of water; and that the department's role  
16 as steward of the state's water resources require it to have the  
17 ability to exercise sound planning and oversight powers that will  
18 enable it to protect the interests of today's and tomorrow's citizens.  
19 In the implementation of this policy the public's opportunity to enjoy

1 the physical and aesthetic qualities of the waters of the state shall  
2 be preserved to the greatest extent feasible consistent with the  
3 overall best interest of the state and the people generally. To this  
4 end, uses shall be preferred that are consistent with water resource  
5 sustainability, control of pollution, and prevention of damage to the  
6 natural environment.

7 **Sec. 2.** RCW 77.85.040 and 2000 c 107 s 94 are each amended to read  
8 as follows:

9 (1) The governor shall request the national academy of sciences,  
10 the American fisheries society, or a comparable institution to screen  
11 candidates to serve as members on the independent science panel. The  
12 institution that conducts the screening of the candidates shall submit  
13 a list of the nine most qualified candidates to the governor, the  
14 speaker of the house of representatives, and the majority leader of the  
15 senate. The candidates shall reflect expertise in habitat requirements  
16 of salmon, protection and restoration of salmon populations, artificial  
17 propagation of salmon, hydrology, or geomorphology.

18 (2) The speaker of the house of representatives and the majority  
19 leader in the senate may each remove one name from the nomination list.  
20 The governor shall consult with tribal representatives and the governor  
21 shall appoint five scientists from the remaining names on the  
22 nomination list.

23 (3) The members of the independent science panel shall serve four-  
24 year terms. Vacant positions on the panel shall be filled in the same  
25 manner as the original appointments. Members shall serve no more than  
26 two full terms. The independent science panel members shall elect the  
27 chair of the panel among themselves every two years. Based upon  
28 available funding, the governor's salmon recovery office may contract  
29 for services with members of the independent science panel for  
30 compensation under chapter 39.29 RCW.

31 (4) The independent science panel shall be governed by generally  
32 accepted guidelines and practices governing the activities of  
33 independent science boards such as the national academy of sciences.  
34 The purpose of the independent science panel is to help ensure that  
35 sound science is used in salmon recovery efforts. The governor's  
36 salmon recovery office shall request review of salmon recovery plans by  
37 the science review panel. The science panel does not have the

1 authority to review individual projects or habitat project lists  
2 developed under RCW 77.85.050, 77.85.060, and 75.46.080 or to make  
3 policy decisions. The panel shall periodically submit its findings and  
4 recommendations under this subsection to the legislature and the  
5 governor.

6 (5) The independent science panel, in conjunction with the  
7 technical review team, shall recommend standardized monitoring  
8 indicators and data quality guidelines for use by entities involved in  
9 habitat projects and salmon recovery activities across the state.

10 (6) The independent science panel, in conjunction with the  
11 technical review team, shall also recommend criteria for the systematic  
12 and periodic evaluation of monitoring data in order for the state to be  
13 able to answer critical questions about the effectiveness of the  
14 state's salmon recovery efforts.

15 (7) The recommendations on monitoring as required in this section  
16 shall be provided in a report to the governor and to the legislature by  
17 the independent science panel, in conjunction with the salmon recovery  
18 office, no later than December 31, 2000. The report shall also include  
19 recommendations on the level of effort needed to sustain monitoring of  
20 salmon projects and other recovery efforts, and any other  
21 recommendations on monitoring deemed important by the independent  
22 science panel and the technical review team. The report may be  
23 included in the biennial state of the salmon report required under RCW  
24 77.85.020.

25 (8) An instream flow committee must be established consisting of  
26 five individuals with the expertise to provide scientific and technical  
27 review of the state's instream flow program. Candidates must possess  
28 expertise in hydrology, fluvial geomorphology, fisheries biology,  
29 aquatic ecology, or a similar scientific discipline that confers  
30 expertise on instream flow. The instream flow committee must include  
31 members who have expertise in instream flow assessment methodologies.  
32 The purpose of the instream flow committee is to assess and provide  
33 recommendations on the state's program to establish and achieve  
34 instream flows. The instream flow committee will provide  
35 recommendations to ensure the state's instream flow program relies on  
36 generally accepted, peer-reviewed methods, and that appropriate  
37 applications are identified, and that policies are scientifically  
38 defensible and credible. The instream flow committee will review

1 instream flow rules submitted before the enactment of an instream flow  
2 guidance rule adopted by the department. The instream flow committee  
3 also will review those instream flow rules and streamflow  
4 implementation performance programs that are appealed and are part of  
5 the formal record of a program or rule.

6 NEW SECTION. Sec. 3. By December 2007, the department must adopt  
7 by rule instream flow standards that must be used in developing or  
8 modifying instream flows established by the department by rule. In  
9 developing the standards, the department must consult with the  
10 department of fish and wildlife. Instream flow rules must establish  
11 flow requirements for normal, low, and high water years that achieve  
12 hydrologic integrity, considering both the biology and hydrology of the  
13 watershed. Once guidance has been provided by the instream flow  
14 committee under RCW 77.85.040(8), the standards must be consistent with  
15 that guidance and subsequently must be updated to be consistent with  
16 any further guidance provided by the committee.

17 Until such time as the standards required by this section are  
18 adopted, the department must use the policies provided in the guidance  
19 document the department published in response to the requirements of  
20 RCW 90.82.085 in establishing instream flows by rule or amending the  
21 rules.

22 NEW SECTION. Sec. 4. (1) Once standards have been adopted under  
23 section 3 of this act, the department must review all minimum water  
24 flows or base flows established by rule prior to the effective date of  
25 this section under chapter 90.22 or 90.54 RCW to determine whether they  
26 are consistent with the standards. By 2009, the department must modify  
27 any such flow requirements that are inconsistent with the standards so  
28 that they are consistent with the standards.

29 (2) By the end of 2010, the department must establish by rule  
30 instream flows that are consistent with the standards adopted under  
31 section 3 of this act for all mainstems and key tributaries of the  
32 streams in the state. The order of priority for doing so is the  
33 schedule for setting instream flows contained in the December 12, 2002,  
34 document prepared by the department entitled "Work Plan for Instream  
35 Flow Setting Through 2010" for the streams scheduled in the work plan.  
36 For any mainstem stream or key tributary for which flows are not

1 scheduled to be developed in the work plan or under RCW 90.82.080, the  
2 department must establish the order of priority for establishing such  
3 flows.

4 The key tributaries to streams must be identified by the department  
5 of fish and wildlife, in consultation with tribes, and must include  
6 streams important to the protection of fish and other environmental  
7 values.

8 (3) Once instream flows have been established or amended by rule  
9 under this section or existing flows have been found to be consistent  
10 with the standards adopted under section 3 of this act, the terms  
11 "minimum water flows" as used in chapter 90.22 RCW, "base flows" as  
12 used in RCW 90.54.020, "minimum instream flows" as used in chapter  
13 90.82 RCW, and "instream flows" as used in this chapter are to be  
14 considered to be synonymous with regard to the flows necessary for  
15 fish.

16 (4) After 2011, the instream flows established by rule shall be  
17 reviewed at least every seven years and updated as necessary to be  
18 consistent with any further guidance provided by the instream flow  
19 committee under RCW 77.85.040.

20 NEW SECTION. **Sec. 5.** (1) A streamflow implementation performance  
21 program must be developed for each watershed in the state. The program  
22 may be developed by a planning unit conducting planning under chapter  
23 90.82 RCW, a locally based entity requested by the department to advise  
24 it under RCW 90.54.040(1), or by the department. Each plan must  
25 satisfy the requirements of the rules adopted under section 6(1) of  
26 this act by providing implementation, maintenance, and assurance  
27 measures to achieve the instream flows established or amended for  
28 streams in the watershed under section 3 of this act or flows reviewed  
29 and found to satisfy state standards under section 3 of this act.

30 (2)(a) Except as provided in section 8(1) of this act and (b) of  
31 this subsection, such a plan must be developed for each watershed  
32 within one year of adoption of a new or amended instream flow rule.  
33 Each program must be consistent with the rules adopted by the  
34 department under subsection (1) of this section.

35 (b) If neither a planning unit created under chapter 90.82 RCW nor  
36 a locally based entity providing advice to the department under RCW  
37 90.54.040(1) is developing a streamflow implementation performance

1 program for a stream's watershed, the department must develop such a  
2 program within one year of the date an instream flow for a stream is  
3 established, amended, or reviewed and found to be consistent with state  
4 standards under section 3 of this act.

5 NEW SECTION. **Sec. 6.** (1) The department, in consultation with the  
6 board, and the departments of fish and wildlife, health, and community,  
7 trade, and economic development, must adopt rules to ensure streamflow  
8 implementation performance programs are consistent with the  
9 requirements of this section and will be adequate to achieve designated  
10 instream flows according to the schedule set forth in this chapter.  
11 The instream flow committee of the independent science panel  
12 established in RCW 77.85.040(8) must evaluate the draft rule to ensure  
13 that it is technically sound, and relies on accepted, proven, and  
14 effective practices. The department and department of fish and  
15 wildlife must formally respond to the findings and recommendations of  
16 the committee in their written determination accepting or rejecting a  
17 proposed rule. The rules must be adopted by December 2007. As a  
18 minimum, each streamflow implementation performance program must  
19 contain the following elements:

20 (a) Actions to be taken to achieve instream flows, and the schedule  
21 for those actions;

22 (b) The estimated quantity of streamflows to result from each  
23 action;

24 (c) Actions that will improve instream flows upon approval of the  
25 streamflow implementation performance program;

26 (d) The roles and responsibilities for each action, and the funding  
27 amount and source;

28 (e) Performance benchmarks to be achieved over time, the monitoring  
29 of performance, and periodic reporting;

30 (f) Provisions for streamflow implementation performance program  
31 review and change;

32 (g) Provisions for the collection and reporting of information on  
33 streamflow and water use measurement, including a description of how  
34 the information will be made accessible to the public;

35 (h) A summary of current information and an analysis of the effect  
36 of land use on streamflows, an identification of gaps in information,  
37 and an assessment program to fill those data gaps. The analysis shall

1 focus on whether and to what extent urbanization and development in  
2 urban and urbanizing counties and forest practices, development, and  
3 agricultural practices in rural counties affect streamflows;

4 (i) A summary of existing and planned water use conservation and  
5 efficiency programs and projects, and an assessment program for  
6 determining the conservation potential within the watershed;

7 (j) Supplemental actions that would be taken if planned actions do  
8 not meet the identified benchmarks; and

9 (k) Water use compliance requirements consistent with statewide  
10 compliance programs in section 7 of this act.

11 Streamflow implementation performance program actions that are  
12 consistent with natural hydrologic conditions and minimize disruption  
13 of those conditions shall be preferred over those that do not.

14 (2) A streamflow implementation performance program may optionally  
15 contain elements for: Acquiring water rights, pro rata water use  
16 reduction agreements, and storage projects.

17 (3) Streamflow implementation performance programs must describe  
18 the obligations and agreements necessary to achieve and protect  
19 instream flows. Streamflow implementation performance programs may  
20 include measures such as the following: Interlocal agreements,  
21 contracts, voluntary programs, local ordinances, and state rules. At  
22 a minimum, the streamflow implementation performance program must  
23 consist of a state rule detailing the state's responsibilities,  
24 authorities, and actions needed to achieve the instream flow.

25 NEW SECTION. **Sec. 7.** (1) By 2006, the department, in consultation  
26 with the departments of fish and wildlife and health, must implement  
27 the following programs on a statewide basis to support the successful  
28 implementation of streamflow implementation performance programs:

29 (a) Publicly accessible information including access to a web site  
30 providing data on streamflows and water use;

31 (b) Water rights acquisition;

32 (c) Water conservation funding;

33 (d) Changes in water conveyance to benefit instream flows;

34 (e) Drought response;

35 (f) A water code compliance program that regulates illegal and  
36 wasteful water use. This program shall include consultation with the

1 department of health with respect to the conservation requirements for  
2 municipal water providers; and

3 (g) A mediation program and other means to facilitate voluntary  
4 shared use agreements and other cooperative mechanisms to achieve  
5 instream flows.

6 (2) If streamflow implementation performance programs do not  
7 achieve instream flows established by rule or if, during the two or  
8 four-year reviews of the programs, the department finds that the  
9 timelines and benchmarks in a program are not met, the department and  
10 the department of fish and wildlife must take actions that will satisfy  
11 the timelines and benchmarks to achieve and protect such flows through  
12 the use of any and all tools available under law. These tools include,  
13 but are not limited to the following legal authorities:

- 14 (a) Chapters 43.27A, 90.03, 90.14, 90.22, 90.44, and 90.54 RCW;
- 15 (b) Chapter 90.48 RCW; and
- 16 (c) Chapters 43.21C, 36.70A, and 90.58 RCW.

17 (3) Any person may file an action in Thurston county superior court  
18 or the superior court for the county in which the affected watershed  
19 exists to compel any agency action required by this chapter.

20 NEW SECTION. **Sec. 8.** (1) Each streamflow implementation  
21 performance program must be reviewed for approval by the department.  
22 The department with the concurrence of the department of fish and  
23 wildlife, and following consultation with the departments of health,  
24 and community, trade, and economic development, must approve,  
25 conditionally approve, or disapprove such a program based on its  
26 compliance with the department's rules adopted under section 6 of this  
27 act. Each approval, conditional approval, or disapproval is subject to  
28 appeal to the pollution control hearings board under chapter 43.21B  
29 RCW. Streamflow implementation performance programs that are appealed  
30 to the pollution control hearings board on technical merits or methods  
31 must be reviewed by the instream flow committee of the independent  
32 science panel created under RCW 77.85.040. The purpose of the instream  
33 flow committee review must be to determine if the proposed program is  
34 technically sound and whether the proposed actions are likely to  
35 achieve the instream flows set by rule. If the committee finds that  
36 the program will not likely achieve the instream flows, the committee  
37 must identify the deficiencies with the proposed program and recommend



1 measures to remedy those deficiencies. The pollution control hearings  
2 board's review is de novo and the committee's findings and  
3 recommendations must be considered by the board during the appeal. The  
4 department and the department of fish and wildlife must formally  
5 respond in writing to the committee's findings and recommendations. If  
6 the performance program is not consistent with the rules adopted under  
7 section 6 of this act, the plan cannot be approved. If such a  
8 performance program is disapproved by the department or is disapproved  
9 or found upon appeal not to be in compliance with the rules adopted  
10 under section 6 of this act, the department must develop a streamflow  
11 implementation performance program for the watershed within one year of  
12 the date of the disapproval or finding. The processing of new water  
13 rights applications must be held in abeyance in a watershed until a  
14 streamflow implementation performance program has been approved by the  
15 state for the watershed.

16 (2) The department, in consultation with the departments of fish  
17 and wildlife, health, and community, trade, and economic development,  
18 must review each approved or conditionally approved streamflow  
19 implementation performance program every two years to assess progress  
20 in complying with the requirements of the program and the timelines  
21 established in the program and must classify watersheds and their  
22 subbasins as making or failing to make reasonable progress in achieving  
23 the instream flows adopted for the streams in the watersheds or  
24 subbasins.

25 (3) In watersheds currently meeting required instream flows, the  
26 streamflow implementation performance program must describe those  
27 actions that will be taken to ensure that the required instream flow  
28 will continue to be met. In watersheds not currently meeting required  
29 instream flows, streamflow implementation performance programs must  
30 achieve instream flows as soon as practicable, but no later than six  
31 years from state approval, unless this deadline is extended under  
32 subsection (4) of this section. Reasonable progress must be defined  
33 according to the following benchmarks:

34 (a) At year two of implementation, scheduled actions have been  
35 taken, pending actions are on schedule for implementation, and initial  
36 improvement to instream flows has occurred;

37 (b) At year four of implementation, significant progress in  
38 achieving and protecting instream flows has occurred, and it is

1 determined that current and planned actions are likely to achieve the  
2 instream flows established by rule within the established timeline. If  
3 it is determined that current and planned actions are not likely to  
4 achieve the instream flows, supplemental actions must be identified to  
5 achieve the instream flows; and

6 (c) At year six of the program, instream flows have been achieved.

7 (4) Extensions to the six-year performance benchmark provided by  
8 subsection (3) of this section may be granted by the department, but  
9 are not favored and may be granted only under extraordinary  
10 circumstances. Extensions may not be granted where watershed or stream  
11 conditions are poor, which includes but is not limited to situations  
12 where water quality standards as established under chapter 90.48 RCW  
13 are not being met, aquatic species are listed under the federal  
14 endangered species act, or aquatic species are listed on the state  
15 salmon and stock inventory as critical or depressed. Further, it must  
16 be demonstrated at the time of initial approval by the state, and at  
17 the required two and four-year reviews, that there is a high likelihood  
18 that the proposed actions being relied on to achieve instream flows  
19 will be fully funded and effective.

20 (5) Six years after the approval or conditional approval of a  
21 streamflow implementation performance program or on the extended date  
22 granted under subsection (4) of this section, the department, in  
23 consultation with the departments of fish and wildlife, health, and  
24 community, trade, and economic development, must declare whether the  
25 instream flows of the streams governed by the program satisfy the  
26 instream flow rules adopted for them. The department's declaration is  
27 subject to appeal to the pollution control hearings board under chapter  
28 43.21B RCW.

29 (6) Once streamflows are achieved, and by 2017, review and updates  
30 to streamflow implementation performance programs must occur in concert  
31 with land use plan updates.

32 NEW SECTION. **Sec. 9.** The definitions in this section apply  
33 throughout this chapter unless the context clearly requires otherwise.

34 (1) "Department" means the department of ecology.

35 (2) "Director" means the director of ecology.



1 year for such distribution from the project and is the financial  
2 responsibility of the person or entity receiving the water for  
3 distribution.

4 (3) The department must collect the fees imposed by this section  
5 and deposit them in the streamflow implementation performance account,  
6 created in section 13 of this act, less the costs incurred by the  
7 department in collecting the fees. The provisions of chapter 82.32 RCW  
8 that are not inconsistent with this section apply to the fees imposed  
9 by this section in the same manner prescribed for taxes and the due  
10 dates, reporting periods, and return requirements of chapter 82.04 RCW  
11 apply except that the fee is to be collected annually.

12 NEW SECTION. **Sec. 13.** The streamflow implementation performance  
13 account is created in the state treasury. All receipts from section 12  
14 of this act must be deposited in the account. The account is subject  
15 to appropriation. Expenditures from the account may be used only to  
16 provide funding to the department of ecology for administering the  
17 instream flow and streamflow implementation performance programs  
18 provided by chapter 90.-- RCW (sections 1 and 3 through 9 of this act).

19 NEW SECTION. **Sec. 14.** Sections 11 through 13 of this act  
20 constitute a new chapter in Title 90 RCW.

21 **Sec. 15.** RCW 43.06.220 and 2003 c 53 s 222 are each amended to  
22 read as follows:

23 (1) The governor after proclaiming a state of emergency and prior  
24 to terminating such, may, in the area described by the proclamation  
25 issue an order prohibiting:

26 (a) Any person being on the public streets, or in the public parks,  
27 or at any other public place during the hours declared by the governor  
28 to be a period of curfew;

29 (b) Any number of persons, as designated by the governor, from  
30 assembling or gathering on the public streets, parks, or other open  
31 areas of this state, either public or private;

32 (c) The manufacture, transfer, use, possession or transportation of  
33 a molotov cocktail or any other device, instrument or object designed  
34 to explode or produce uncontained combustion;

1 (d) The transporting, possessing or using of gasoline, kerosene, or  
2 combustible, flammable, or explosive liquids or materials in a glass or  
3 uncapped container of any kind except in connection with the normal  
4 operation of motor vehicles, normal home use or legitimate commercial  
5 use;

6 (e) The possession of firearms or any other deadly weapon by a  
7 person (other than a law enforcement officer) in a place other than  
8 that person's place of residence or business;

9 (f) The sale, purchase or dispensing of alcoholic beverages;

10 (g) The sale, purchase or dispensing of other commodities or goods,  
11 as he or she reasonably believes should be prohibited to help preserve  
12 and maintain life, health, property or the public peace;

13 (h) The use of certain streets, highways or public ways by the  
14 public; and

15 (i) Such other activities as he or she reasonably believes should  
16 be prohibited to help preserve and maintain life, health, property or  
17 the public peace.

18 (2) If the state of emergency is proclaimed in response to an  
19 imminent danger to the public health or the environment caused by  
20 insufficient water supplies, the governor must order the director of  
21 ecology to issue orders regulating water users as is necessary to  
22 alleviate the danger.

23 (3) In imposing the restrictions provided for by RCW 43.06.010, and  
24 43.06.200 through 43.06.270, the governor may impose them for such  
25 times, upon such conditions, with such exceptions and in such areas of  
26 this state he or she from time to time deems necessary.

27 ((+3)) (4) Any person willfully violating any provision of an  
28 order issued by the governor under this section is guilty of a gross  
29 misdemeanor.

30 NEW SECTION. Sec. 16. A new section is added to chapter 43.27A  
31 RCW to read as follows:

32 The purpose of this section is to set forth the powers of the  
33 department to regulate the withdrawal or diversion of public waters and  
34 water or water rights related thereto, including regulation based on  
35 dates of priority or other pertinent factors. Regulatory actions taken  
36 under this section shall be based on examination and determination by  
37 the department or the court, as applicable, of the various water rights

1 involved according to the department's records and other records and  
2 pertinent facts. The powers set forth in this section may be exercised  
3 whether or not a general adjudication relating to the water rights  
4 involved has been conducted.

5 (1) In a regulatory situation: (a) Where a water right or all  
6 water rights proposed for regulation by the department, as well as any  
7 right or rights of a senior priority that the proposed regulation is  
8 designed to protect, is or are embodied in a certificate or  
9 certificates issued under RCW 90.03.240, 90.03.330, 90.38.040,  
10 90.42.040, or 90.44.060 or a permit or permits issued under RCW  
11 90.03.290 or 90.44.060; (b) where a flow or level has been established  
12 by rule under chapter 90.22, 90.54, or 90.-- RCW (sections 1 and 3  
13 through 9 of this act); or (c) where it appears to the department that  
14 public waters are being withdrawn without any right or other  
15 appropriate authority whatsoever, the department in its discretion is  
16 authorized to regulate the right or rights under either RCW 43.27A.190  
17 or subsection (2) of this section.

18 (2) In a regulatory situation where one or more of the water rights  
19 proposed for regulation by the department, as well as any right or  
20 rights of a senior priority that the proposed regulation is designed to  
21 protect, is not or are not embodied in a permit or certificate as  
22 described in subsection (1) of this section, the department, in its  
23 sole and exclusive power to regulate, is authorized to bring an  
24 appropriate action at law or in equity, including seeking injunctive  
25 relief, as it may deem necessary. Where actions are brought in a state  
26 court, the actions must be initiated in the superior court of the  
27 county where the point or points of diversion of the water right or  
28 rights proposed for regulation are located. If the points of diversion  
29 are located in more than one county, the department may bring the  
30 action in a county where a point of diversion is located.  
31 Notwithstanding the general adjudication procedures in RCW 90.03.110  
32 through 90.03.245 and 90.44.220, the superior court shall make findings  
33 and a determination of the validity and priority of the water rights  
34 held by the parties to resolve the regulatory situation. The superior  
35 court shall issue any necessary orders to implement its findings and  
36 determination, including injunctive relief, that it determines is  
37 necessary to regulate among the water rights.

1 (3) Nothing in this section authorizes the department or the  
2 superior court to accomplish a general adjudication of water rights  
3 proceeding or the substantial equivalent of a general adjudication of  
4 water rights. The exclusive procedure for accomplishing a general  
5 adjudication of water rights is under RCW 90.03.110 through 90.03.245  
6 or 90.44.220.

7 (4) Nothing in this section amends, revises, or repeals RCW  
8 90.14.130 or 90.14.200.

9 (5) This section does not in any way modify regulatory powers  
10 previously placed with the department except as provided in subsections  
11 (1) and (2) of this section.

12 **Sec. 17.** RCW 43.21B.110 and 2003 c 393 s 19 are each amended to  
13 read as follows:

14 (1) The hearings board shall only have jurisdiction to hear and  
15 decide appeals from the following decisions of the department, the  
16 director, local conservation districts, and the air pollution control  
17 boards or authorities as established pursuant to chapter 70.94 RCW, or  
18 local health departments:

19 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,  
20 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and  
21 90.56.330.

22 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,  
23 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,  
24 90.14.130, 90.48.120, and 90.56.330.

25 (c) Except as provided in RCW 90.03.210(2), the issuance,  
26 modification, or termination of any permit, certificate, or license by  
27 the department or any air authority in the exercise of its  
28 jurisdiction, including the issuance or termination of a waste disposal  
29 permit, the denial of an application for a waste disposal permit, the  
30 modification of the conditions or the terms of a waste disposal permit,  
31 or a decision to approve or deny an application for a solid waste  
32 permit exemption under RCW 70.95.300.

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

35 (e) Decisions of local health departments regarding the issuance  
36 and enforcement of permits to use or dispose of biosolids under RCW  
37 70.95J.080.

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

4 (g) Decisions of local conservation districts related to the denial  
5 of approval or denial of certification of a dairy nutrient management  
6 plan; conditions contained in a plan; application of any dairy nutrient  
7 management practices, standards, methods, and technologies to a  
8 particular dairy farm; and failure to adhere to the plan review and  
9 approval timelines in RCW 90.64.026.

10 (h) Decisions of the department of ecology to approve,  
11 conditionally approve, or disapprove a streamflow implementation  
12 performance program made under section 8(1) of this act and  
13 declarations of the department made under section 8(5) of this act.

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

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

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

21 (b) Hearings conducted by the department pursuant to RCW 70.94.332,  
22 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

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

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

27 (e) Appeals of decisions by the department as provided in chapter  
28 43.21L RCW.

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

32 **Sec. 18.** RCW 90.82.080 and 2003 1st sp.s. c 4 s 4 are each amended  
33 to read as follows:

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



1 (i) If minimum instream flows have already been adopted by rule for  
2 a stream within the management area, unless the members of the local  
3 governments and tribes on the planning unit by a recorded unanimous  
4 vote request the department to modify those flows, the minimum instream  
5 flows shall not be modified under this chapter. If the members of  
6 local governments and tribes request the planning unit to modify  
7 instream flows and unanimous approval of the decision to modify such  
8 flow is not achieved, then the instream flows shall not be modified  
9 under this section;

10 (ii) If minimum stream flows have not been adopted by rule for a  
11 stream within the management area, setting the minimum instream flows  
12 shall be a collaborative effort between the department and members of  
13 the planning unit. The department must attempt to achieve consensus  
14 and approval among the members of the planning unit regarding the  
15 minimum flows to be adopted by the department. Approval is achieved if  
16 all government members and tribes that have been invited and accepted  
17 on the planning unit present for a recorded vote unanimously vote to  
18 support the proposed minimum instream flows, and all nongovernmental  
19 members of the planning unit present for the recorded vote, by a  
20 majority, vote to support the proposed minimum instream flows.

21 (b) The department shall undertake rule making to adopt flows under  
22 (a) of this subsection. The department may adopt the rules either by  
23 the regular rules adoption process provided in chapter 34.05 RCW, the  
24 expedited rules adoption process as set forth in RCW 34.05.353, or  
25 through a rules adoption process that uses public hearings and notice  
26 provided by the county legislative authority to the greatest extent  
27 possible. Such rules do not constitute significant legislative rules  
28 as defined in RCW 34.05.328, and do not require the preparation of  
29 small business economic impact statements.

30 (c) If approval is not achieved within four years of the date the  
31 planning unit first receives funds from the department for conducting  
32 watershed assessments under RCW 90.82.040, the department (~~may~~) must  
33 promptly initiate rule making under chapter 34.05 RCW to establish  
34 flows for those streams and shall have two additional years to  
35 establish the instream flows for those streams for which approval is  
36 not achieved.

37 (2)(a) Notwithstanding RCW 90.03.345, minimum instream flows set  
38 under this section for rivers or streams that do not have existing

1 minimum instream flow levels set by rule of the department shall have  
2 a priority date of two years after funding is first received from the  
3 department under RCW 90.82.040, unless determined otherwise by a  
4 unanimous vote of the members of the planning unit but in no instance  
5 may it be later than the effective date of the rule adopting such flow.

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

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

16 (3) Before setting minimum instream flows under this section, the  
17 department shall engage in government-to-government consultation with  
18 affected tribes in the management area regarding the setting of such  
19 flows.

20 (4) Nothing in this chapter either: (a) Affects the department's  
21 authority to establish flow requirements or other conditions under RCW  
22 90.48.260 or the federal clean water act (33 U.S.C. Sec. 1251 et seq.)  
23 for the licensing or relicensing of a hydroelectric power project under  
24 the federal power act (16 U.S.C. Sec. 791 et seq.); or (b) affects or  
25 impairs existing instream flow requirements and other conditions in a  
26 current license for a hydroelectric power project licensed under the  
27 federal power act.

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

31 (6) The department shall report annually to the appropriate  
32 legislative standing committees on the progress of instream flows being  
33 set under this chapter, as well as progress toward setting instream  
34 flows in those watersheds not being planned under this chapter. The  
35 report shall be made by December 1, 2003, and by December 1st of each  
36 subsequent year.

1        NEW SECTION.   **Sec. 19.**   Section 15 of this act takes effect July 1,  
2   2004.

--- END ---