

**Basics of Water Law
as it Applies to
Instream Flows in North Carolina**

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**As population and offstream uses
increase**

**Pressures on instream flows and
instream uses also increase**

Instream Uses

- **Aquatic Habitat**
- **Water Quality**
- **Recreation**
- **other**







North Carolina is a Riparian Rights State

- **A riparian owner owns property along at least one side of a water body**
- **Riparian owners have the right to “reasonable” use of water**

**This is in contrast to states
where water is allocated in
specific amounts to each
recognized use**

The exception in NC is

Water Use Act of 1967

- **Water availability concerns**
- **Ground or surface water**
- **Designation of Capacity Use Area**
- **Rules to regulate water withdrawals**
- **Examples – Eno River voluntary agreement; coastal phosphate mining**

In NC, the vast majority of instream flow concerns are addressed by including conditions in environmental review comments and permits required for water resource projects.

These Include:

- **Federal Energy Regulatory Commission (FERC) licensing**
- **State Environmental Policy Act (SEPA)**
- **NC Dam Safety Permits**
- **Clean Water Act section 401**
- **Clean Water Act section 404**

FERC Licensing

- **Stakeholder settlement agreements are one approach to resolving issues**
- **These agreements may include offstream users in the watershed, particularly those using water in hydropower reservoirs**
- **Signatories agree to follow a “low Inflow protocol” to reduce water use during drought**

State Environmental Policy Act (SEPA)

- **Development of new or expanded potable water supply requires EA or EIS, if**
- **Total design withdrawal is $\geq 20\%$ of 7Q10 or is ≥ 1.0 mgd**
- **Requires consideration of instream flows**
- **Conditional approval of FONSI**

NC Dam Safety Law

- **Administered by Division of Land Resources**
- **Jurisdictional if ≥ 15 feet high AND ≥ 10 acre-feet of storage**
- **ALL high hazard dams are jurisdictional**
- **Rules stipulate how flow to maintain aquatic habitat is determined**
- **Water quality of release may also be addressed**

Clean Water Act Section 401

- **Administered by Division of Water Quality**
- **Water quality certification required to place fill in navigable waters**
- **Applied only in conjunction with another federal permit such as section 404 or FERC licensing**
- **Can include instream flow conditions**

Clean Water Act Section 404

- **Administered by US Army Corps of Engineers**
- **Required for construction in, or placing fill in, waters of the United States**
- **Can include instream flow conditions to be maintained during construction and operation of a new project**







Water Quality Violations

- **Activities that result in:**
 - **Violations of water quality standards**
 - **Fish kills**
 - **Death of endangered species**
- **May result in penalties under state and/or federal law**

Riparian Rights Lawsuits

- Riparian owners may sue for damages or injunctive relief
- Are their riparian rights impaired by another parties' use of water
- Is that use “reasonable”?

Questions?