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 >= 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 $\geq 15$ feet high AND $\geq 10$ 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”?