Response to Comments (June 22, 2006) WRIA 35 Instream Flow Assessment Technical Memoranda		
No.	**Comment**	**Response**
James Pacheco, Instream Flow Biologist, Department of Ecology		
1	TM #1, 1.0 Introduction: 2nd paragraph "requires that planning units…and provide water for future out-of-stream needs". This is misleading as there is no requirement to provide water for future out-of-stream uses. Instead, as you correctly mention in other areas of the report (e.g. 1.1), the planning is to develop strategies to meet future demands. To accomplish this, the planning unit needs to refer to their water quantity estimation to see if there is any additional water that could be appropriated: The Water Quantity assessment (which is required) SHALL include, "An estimate of the surface and ground water available for further appropriation, taking into account the minimum instream flows…" RCW 90.82.070 (1)(g).	Text in final memo will be revised to state that the planning is to develop strategies to meet future demands rather than being "required" to meet future out-of-stream needs.
2	TM #1, Sec. 1.1, 2nd bullet "…strategies to improve instream flows". You are misusing the term. To improve an instream flow would mean changing the flow number. If you are talking about adding water to the stream then you should say, "improve stream flow". If you are trying to achieve the instream flow then say, :strategies to achieve instream flows".	Use of the term "instream flow" will be revised as suggested in the final memo.
3	TM #1, 3rd bullet "…strategies to improve instream flows". Same as above.	See No. 2.
4	TM #1, Sec. 3.1, 2nd set of bullets, "Continue to allow exempt wells under the existing statutory exemption". This is not a viable strategy. Exempt wells are exempt only from the permit process. They are not exempt from the priority date system, closures, or impairment restrictions. However, exempt wells could get water from the reserve.	Comment noted. This strategy option will be revised to state that a reservation can be defined to provide for future withdrawals for exempt wells.
5	TM #1, General note. Your strategies do not mention water availability. Before additional water can be appropriated, you need to refer to your determination of how much is available. Again, the Water Quantity assessment (which is required) SHALL include, "An estimate of the surface and ground water available for further appropriation, taking into account the minimum instream flows…" RCW 90.82.070 (1)(g). It would also be nice to see a strategy for making existing water use go further.	Water availability is considered implicit in developing the recommendations for minimum instream flows and the overall stream flow management strategies selected. A discussion will be included that both estimates of water demands and water availability will be considered.
6	TM #1, Sec. 3.2, 3rd paragraph, "With respect to target flows…". Metering can show how much less is being taken. So although the flow improvement may be hidden by the stream's yearly variability, you could have clearly measured flow improvement. This is one reason why I like your approach to target flows.	Comment noted. A reference to metering to account for changes in the flow regime will be added to the text.
7	TM #2b: Sec. 1.1, 4th paragraph "Ecology has suggested that the use of instream flow rules are preferred over closures…" Not exactly. <u>When a closure is warranted, we prefer closures backed up with instream flows…so we prefer both. This is because a closure by itself cannot protect the stream from the potential harm caused by water right transfers or changes.</u> 2nd bullet "Apply year around closures…" A closure means that water is unavailable for further appropriation. If a seasonal water use would not interrupt habitat forming flows (2nd sub-bullet) then water is available. Therefore, a seasonal closure during the dry season and a defined amount of water available during the wet season would be more appropriate.	Change will be made as suggested, as necessary in final memo.

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8	TM #2b, Sec. 2.0, 3rd bullet: "Continue to allow exempt wells under the existing statutory exemption". This is not a viable strategy. Exempt wells are exempt only from the permit process. They are not exempt from the priority date system, closures, or impairment restrictions. However, exempt wells could get water from the reserve.	See response to No. 4.
Mimi Wainwright and Bill Neve, Department of Ecology		
9	TM #1, Section 1.0, Pg 1 2nd Pp – The Watershed Planning Act (Chapter 90.82 RCW) does not "require that planning units address the instream flow component…" rather it gives planning units the "option" of choosing the instream flow component. Chapter 90.82 RCW provides the statutory framework for planning units to formally recommend instream flows for adoption to Ecology and gives Ecology the authority to set those flows in regulation under that Chapter. Planning Units are *required* to assess water availability, future use and to develop strategies that work toward meeting instream and out of stream demands.	Comment noted. Text in final memo will state that the Watershed Planning Act gives planning units the "option" of choosing the instream flow component.
10	TM #1, Section 1.0, Pg 1 4th bullet – might be more concise to say "strategies" instead of policies.	Comment noted.
11	TM #1, Section 1.1, Pg 1st bullet – not understanding the benefit of "updating" the SWSLs?? Could you elaborate on what you are recommending? If this translates into an obligation or recommendation for WDFW and Ecology to complete instream work on a particular stream, under what circumstances would it make sense to update a SWSL in lieu of rulemaking?	Updating SWSLs in this sense means reviewing whether the limitations are appropriate based on current information and whether they should be adopted into rule.
12	TM #1, Section 2.1, Pg 4 Table 1 – Is the Instream Flow Study category limited to those streams with IFIM/PHABSIM data only?	Yes.
13	TM #1, Section 2.2, Pg 8 1st Pp – might be better to use "draft" instead of "pilot" management points and "target flows may…." instead of will.	Change will be made as suggested, as necessary in final memo.
14	TM #1, Section 2.2, Pg 8 2nd & 3rd bullet – consider adding an action recommendation for instream flow analysis and or hydrologic data collection.	Recommendation for instream flow analysis and hydrologic data collection will be added to the final memo.
15	TM #1, Section 2.2, Pg 8 4th bullet – better to say closed by SWSL instead of administrative closure in case folks confuse it with a regulatory closure.	Change will be made as suggested, as necessary in final memo.
16	TM #1, Section 2.2, Pg 8 last Pp – why focus on updating administrative closures (assuming you mean SWSLs here) instead of closures in rule?	The approach assumes that as part of the review, any updates or changes to SWSLs will be included as closures in rule.
17	TM #1, Section 3.1, Pg 9 1st Pp – should use "statutory" instead of "regulatory" – there are 4 primary statutes that provide a legal basis related to instream flows: Chapter 90.22 RCW, Chapter 90.54 RCW, Chapter 75.20 RCW & Chapter 90.82 RCW. Might want to add that Ecology is obligated to consult with WDFW on instream flows per MOA.	Change will be made as suggested, as necessary in final memo.

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18	TM #1, Section 3.1, Pg. 9 1st P: ...defining surface water source limitations or "administrative closures". A SWSL is not an "administrative closure" in and of itself; it is a compilation of flow limiting actions/recommendations that have been taken on a particular body of water. The Walla Walla River SWSL has an "administrative closure" listed through rule in a Basin Management Project, WAC 173-532. Asotin Creek has low flows recommended to Ecology by F&G, but these are not "administrative closures or minimum flows". These are low flow recommendations made to Ecology by F&W pursuant to RCW 75.20.050 (re-codified as RCW 77.57.020) with respect to a particular water right application.	Change will be made as suggested, as necessary in final memo.
19	TM #1, Section 3.1, Pg. 9, last P, 1st Bullet: Minimum instream flows do not affect existing water rights. I would add at the end ..."with a priority date senior to that of the minimum instream flow".	Change will be made as suggested, as necessary in final memo.
20	TM #1, Sec. 3.1, Pg. 10, 1st Bullet: Any water right issued after the priority date for the minimum instream flow will be junior to it, and therefore, will include restrictions or conditions; I would suggest changing this language to read, "Any new water right issued after the priority date of the minimum instream flow will be junior to it, and may include restrictions or conditions with respect to the minimum instream flow."	Change will be made as suggested, as necessary in final memo.
21	TM #1, Sec. 3.1, Pg. 10, 2nd P, Last Bullet: Provision that allows for changes to existing water rights. I'm not sure how this pertains to establishing allowances or exceptions to future minimum instream flows? Is this meant to mean a provision to allow changes to existing water rights that would impair that instream flow? If so, that should be clarified - maybe just by adding the language specifying what they mean. "... that would otherwise create impairment to that minimum instream flow."	Change will be made as suggested, as necessary in final memo.
22	TM #1, Sec. 3.1, Pg. 10, 3rd P 1st sentence - Discussion of SWSL: Why "..predecessor agencies (Ecology)..." when WA Dept of Ecology has been a) Walter Pollution Control Commission b) Department of Water Resources?	Comment noted. This was referring to those SWSLs issued before being the agency that it is presently.
23	TM #1, Sec. 3.1, Pg. 10, 3rd P - Discussion of SWSL. A SWSL is a compilation of agency actions and recommendations with respect to water diversions and instream flows on a particular stream. The SWSL may include an administrative closure or minimum flow, it may include recommendations for a closure or low flow by F&W, it will indicate whether an adjudication is complete or in process; in short the SWSL is not an administrative action in and of itself, it is just a summary of what flow related actions and recommendations have been made with reference to a particular stream. Ecology is not required to accept the recommendations made to Ecology with respect to closures and minimum flows. Using the terms "administrative minimum flow" and "administrative closure" should be reserved for use in those instances where they have been formally adopted by rule. The closures and minimum flows recommended by F&W pertain to specific applications, are not necessarily generally applicable to all applications from that source, and Ecology is not legally bound to accept them when evaluating a particular application.	Comment noted. Changes will be made in text for clarification as suggested.
24	TM #1, Sec. 3.1, Pg. 11, 1st P, 1st Bullet: A F&W recommendation for a minimum flow or closure pertains specifically to the application to which they are commenting on; Ecology will consider the recommendation with respect to the water body at the applied for point of diversion.	Comment noted. Changes will be made in text for clarification as suggested.
25	TM #1, Table A-1, Pg A-5 MP 5 Meadow Creek: should note the adjudication	Adjudication will be noted as suggested.
26	TM #1, Table A-1, Pg A-8 MP 17 Grande Ronde: should note the SWSL	SWSL will be noted as suggested.

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27	TM #1, Table A-2, Pg A-10: "Alpowa" instead of "Alpoa"	Change will be made to the typo.
28	TM #1, Table A-3, Pg A-13 Water Conservation: use state "guidance" instead of state "requirements"	Change will be made as suggested, as necessary in final memo.
29	TM #1, Table 1-3, Pg A-14 Enforcement: WRIA 35 has a watermaster	Reference to establishing a watermaster will be removed.
30	TM #2b, Section 1.1, Pg 2, 1st Pp – could include at the end of the first sentence "….including water rights for temporary, seasonal and storage uses."	Change will be made as suggested, as necessary in final memo.
31	TM #2b, Section 1.2,Pg 2, 1st Pp – this paragraph could confuse folks unless it's made a bit more clear. Ecology refers to regulatory flows as administrative flows also so it may help if you add something about SWSLs being utilized in making water right decisions in the absence of flows/water management regulations.	Comment noted. Changes will be made in text for clarification as suggested.
32	TM #2b, Section 2.0, Pg 5 Note: this statement is not correct, water reservations or allocations may be for irrigation, commercial/industrial or municipal use.	Comment noted. Changes will be made in text.
33	TM #2b, Section 2.1, Pg 6 1st Pp: The court case should be cited here; 1994 WA State Supreme Court decision, John Postema vs. Pollution Control Hearings Board.	Change will be made as suggested.
34	TM #2b, Section 2.2, Pg 6 1st Pp: should be "city" of Asotin?	Change will be made as suggested.
35	TM#3, a general comment is consideration for adding a recommendation for evaluating the success of irrigation efficiency projects; i.e.. metering, collecting flow data.	Comment noted. Changes will be made in text.
Terra Hegy, Washington Department of Fish and Wildlife		
36	TM#1: Table 3, page 15: This table would be more useful if the name of the stream were included with each numbered MP.	Change will be made as suggested, as necessary in final memo.
37	TM#1: We request that Joseph Creek, trib to the Grande Ronde, be included as a management point. Glen Mendel of Fish Program concurs. Dave Karl suggested perhaps instead of Penawawa (MP 8), which is a lower priority as regards fish resources.	During the February 9, 2006 Planning Unit meeting, the Planning Unit confirmed that Joseph Creek would be included as a management point. The Planning Unit will be asked whether MP-8 Penawawa should be retained as a management point.
38	TM#1: Concern was voiced about withdrawal of water at our Wildlife Area. WDFW staff checked water right records and talked with the Wildlife Manager at Chief Joseph. They use a very small percentage of Joseph Creek, even in low flow of summer. Because it is a substantial tributary of the Grande Ronde, we still feel Joseph Creek should be considered for instream flow setting.	Comment noted. See response to comment #37.
39	TM#1: Neither Ecology nor USGS has a gauge on George Creek (MP 13), however, it might be possible to use hydrology from 2 gauges on Asotin Creek. In addition, George Creek experienced a lot of flooding a few years ago and even changed channels. It appears to be in a state of dynamic change. You might wish to leave this one till the later stage.	Comment noted. The Planning Unit will be asked whether to leave MP-13 George Creek for a later stage for setting minimum instream flows.

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40	TM#1: WDFW recommends that 10 mile Creek (MP 15) and possibly Couse Creek (MP 16) be moved up in the schedule. 10 mile has good steelhead spawning and Couse has some too.	The Planning Unit will be asked whether to move MP-15 and MP-16 forward in priority for setting minimum instream flows. However, the one of the issues with these management points is the lack of instream flow studies and historical stream flow data.
41	TM#1: You might want to check with Oregon to see if they have any instream flows on the Grande Ronde.	ODFW and OWRD will be contacted to ask about any instream flows in the Grande Ronde and its tributaries.
42	TM#2a: There is redundancy in Table 4 (in the text) and Table B-1 (in the appendix). Might be good to have just one set of the same tables to avoid confusion.	Table B-1 is included as a quick reference for the discussion included in the appendix.
43	TM#2a: Appendix A and B: I notice there are some months in the fish priority table for which there are 2's, but no 1's. sometimes there are 4 or 5 Number 2 priorities. The text indicates that "A value of 1 for a species during a particular month indicates that it should receive the highest priority for flow setting consideration." Therefore, there should always be a number 1.	The number not only indicates priority, but also the level of "activity" or "presence" during that month for the lifestage or species. If no "1" appears, this indicates that there is moderate to low activity or presence during that month for all species and lifestages of concern, and that no single species stands out as a clear priority species for pueposes of flow-setting.

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44	TM#2a: It's a little bit confusing to label a column "Spawn" when the column includes 3 life stages, spawning, migration, and incubation. As an example, in Table 3, there is a note that spring Chinook is migration only, no actual spawning occurs for chinook. But it is listed in the Spawn column. Please repeat this note for Table 4.	The PHABSIM modeling that was performed for these management points included species preference curves for spawning, but not for migration or incubation. We included these related life-stages in the table to make sure that they are not forgotten in the subsequent analysis. For example, while spawning may end in December, instream flows must ensure that sufficient flows are present to support incubation for several months after that. Similarly, ensuring sufficient flow for adult migration in the late summer is very important, although the PHABSIM model doesn't address it directly. After all, if flows are insufficient for spring chinook to reach the upper basin before the high temperatures of August and September, we may not have any spawners to benefit from suitable flows in November. So, our highlighting the migration and incubation needs is an effort to make up for the deficiencies of a fairly blunt tool in PHABSIM.
45	TM#2a: Re: Under the column "Chinook spawning" in October and November, I assume the life stage is incubation. Incubation of eggs in the gravel is an extremely important life stage for the survival of a fish species. For a period of 3 to 4 months, if eggs do not receive clean, oxygenated water and the gravel remain covered with water, the eggs will not survive. Instream flows must also consider that water not drop quickly (as a management step), thus leaving eggs high and dry. Since Chinook are the priority as evidenced by migration (June, July) and spawning (Aug, Sept), then Incubation (Oct, Nov) should also be priority #1. The specific months that this applies to are: • Tucannon at Starbuck, MP1, Fall Chinook Jan through March, change 2's to 1. • Tucannon at Marengo, MP3, Spring Chinook, October to December. Change 2's to 1.	See note above(#44) regarding importance of incubation flows. Note, however, that incubation flows do not need to be as high as spawning flows. While the specific flow level required to keep redds watered depends on the shape of the stream bed, it is often estimated (by rule of thumb) as one-third to one-half of spawning flows. This is due to the fact that while spawning requires a certain amount of depth, incubation can be maintained with lower flows, as long as water remains oxygenated and the gravel substantially free of fine sediments.

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46	TM#2a: You state that PHABSIM spawning flows will be used as a surrogate for migration flows. WDFW does not discourage watershed groups from using spawning flows from PHABSIM as a surrogate for migration flows. However, I would urge the Planning Unit to gather and to consider any other data such as field observations in order to determine appropriate migration flows.	The Planning Unit is using available resources and information to develop the minimum instream flow levels. If additional funding is available, stream survey and field observations will also be considered.
47	TM#2a: In table A-4, for MP 3, the months of October through January have no #1. This creates a problem in balancing the various life stages. I recommend the planning unit choose one as a priority, then that life stage would be considered highest.	See response to comment #43.
48	TM#2a: Table 5 and 6: There is very limited hydrologic data available (Ecology has a telemetered gauge since June 2002). This could be a problem, since an accurate 10% exceedance may be difficult to derive.	Comment noted. This is a particular issue for MP-3 at Marengo. The Planning Unit will need to decide whether to recommend an "interim" flow level because of this shorter period of record. One option that has been discussed is to reconsider the flow levels, as necessary every five years to ten years as the flow record increases.
49	TM#2a: References: Please footnote the tables in the appendices as to their sources.	Comment noted. Change will be made as suggested, as necessary in final memo.
Paul Kraynak, Nez Perce Tribe (note: comments 50-56 are for Table A-2 "Closures Analysis" distributed on April 13, 2006).		
50	This is basically a question regarding Tucannon MP-1a & b; if we use the suggestion of a MIF which, previous to the instream flow groups recommendations was 79cfs, can we still attach the SWSL which provides enhanced protection? This is important as I am lead to believe MIF's are junior water rights. Replacing the SWSL would potentially lower flow protection. Am I correct on this?	A closure (not a SWSL) can be "attached" to an instream flow for added protection. However, both closure and instream flow would only apply to new water rights applications (or junior water rights). Based on the current and projected demands on Pataha and the historical flows, the closures were considered adequate protection.
51	The same concerns apply to MP-4 Pataha	An instream flow is not proposed for MP-4 since there is no instream study data available. However, the entire Pataha Creek has been recommended for seasonal closure.

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52	I would like suggest we create MIF's for Penewawa & Almota as funds become available. These streams will be important protection/restoration areas in the near future	Penewawa and Almota creeks have been recommended for seasonal closure. At this time, no specific recommendations has been included for developing instream flows for these two creeks, but the general management approach accounts for identifying other streams for future studies to be conducted to develop the instream flows.
53	Regarding Alkalai Flat and Almota; I agree we should adopt SWSL into rule and also create MIF's with future funding should it become available, for the same reasons listed in #3 (#52) above.	See response for No. 52. General reasoning also applies to Alkali Flat and Almota creeks.
54	Tenmile & Couse should be recommended for closure, then MIF's with future funding since it seems we are investing lots of money in these watersheds and, w/o water regulations, we may be throwing our enhancements away	See response for No. 52. General reasoning also applies to Tenmile and Couse Cr. There was focused debate on these two creeks during the May Planning Unit meeting, but no consensus as to whether instream flows should be developed.
55	Overall it is a pretty good table (plan) to start	Comment acknowledged.

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56	I am in the process of writing up comments on the Table 2-A Closure Analysis form. I have a question which perhaps you can answer; just what exactly is the definition of Administrative Closure, and, how would it apply to stream diversions? (via email received April 25, 2006)	Regarding "administrative closure" Ecology uses this term to refer to a rule (included in a WAC - Washington Adminstrative Code) that restricts any NEW water rights appropriations from being issued by Ecology to a particular stream or basin. This does not affect existing water rights (diversions) prior to the adoption of the closure rule. The closure can be defined with various types of provisions that allow certain types and quantities of water use (e.g. domestic well use). "Administrative closures" are different than the SWSLs (surface water source limitations), which are simply a compilation of action/recommendations that have been taken on a particular body of water. These recommendations are made to Ecology by WDFW with respect to a particular water right application. Ecology is not bound to apply these SWSLs generally to all subsequent water rights applications.

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57	>>> "Paul Kraynak" <pkraynak@nezperce.org> 02/23/2006 10:48:56 AM >>> After a meeting yesterday with the RTT of the SRSRB there is some concern by tribal, state and federal members over the accuracy of the PeriodicityTables. I do not have personal knowledge of the accuracy of these tables as I rely on the state and federal biologists in SE Washington to fill in the details. But I was concerned, as I mentioned at the Watershed meeting, about the "methodology" used to fill in these tables. I was concerned about reference materials to verify the table numbers but found them lacking. I know a lot of hard work at short notice went into this table by Dave Karl and I commend him, but, as I said, others with more knowledge than I regarding these tables have concerns also. As instream flows will be "suggested" relying on this table, it needs to be as accurate as possible. I requested the RTT to review these tables and make recommendations as to their reliability and accuracy. I would like the WRIA #35 PU to comment on this proposal. Perhaps we can get tables that everybody feels comfortable with so we can move forward with instream flow.	Dave Karl provided the bulk of the technical basis for the fish periodicity tables. His response to this question: "WDFW sends all of our reports to our co managers (CTUIR & Nez Perce Tribe) with the reference material you are speaking about. You can also find much of it on the BPA website, or give our biologists a phone call." As Dave Karl noted, the purpose purpose of the periodicity table was to have a reference table about fish use in WRIA 35, not a scientific report for peer review. Dave Karl's opinion is that the information in the table is based on solid foundation. Since complete agreement from all members on the information may be difficult to achieve, HDR proposed that the information be considered "95% complete." It can be used to recommend the instream flows and closures, with opportunities for all stakeholders to comment on the recommendations as a whole (not only the periodicity information). This was generally agreed to by the Planning unit members.