



New ways to put water rights to work for fish and wildlife in Texas

Managing and protecting our water resources is one of the most critical issues facing Texas today. As the state's population increases, human demands for water will grow. But we still need to ensure that there is adequate water for agriculture, industry and the environment.

The challenge: Providing water for all users, including the environment

We cannot live without water. It is our most precious resource. We use water for all parts of our life; to drink, to grow our food, for boating and fishing, and for countless other uses. The availability of water in our rivers and streams and flowing into our bays and estuaries is also essential to the survival of fish and wildlife species and the healthy ecosystems that support them. Simply put, water is a vital feature of Texas' natural heritage.

The history of water rights permits and the environment

Much of the water available in Texas rivers is already committed to various uses — current and future — by way of water rights permits issued by the state. These permits, which are generally perpetual, authorize individuals or entities to use a certain amount of water, giving them the right to take it out of the river for the use(s) specified in the permit.

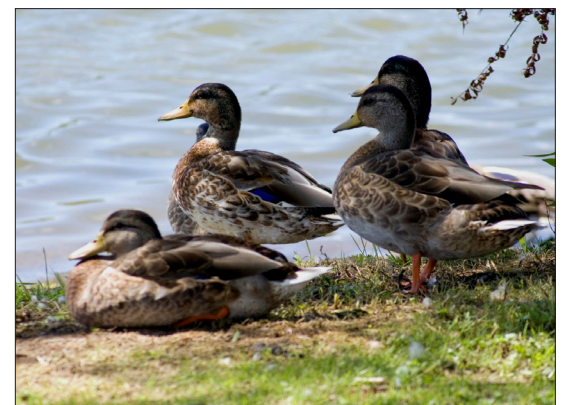
Historically, water rights permits were issued with little to no regard for maintaining the level of flows needed to sustain healthy fish and wildlife populations. In fact, not until 1985 were environmental flow issues regularly considered when issuing water permits. By then, about 85% of the

total water rights (by volume) permitted today had already been issued.

As a result, the flows in some river basins, particularly west of Interstate 35, are already fully or overcommitted — at least on paper — to municipal, agricultural and industrial uses, leaving little legally protected water for fish and wildlife. In fact, in some basins, if all water rights holders used their permits to the full extent (many currently do not), there could be very little water left to sustain healthy rivers and bays, particularly during drought years.

The environment now has a seat at the table

The state legislature has recently recognized the need to protect rivers for future generations. The challenge is to ensure that rivers and bays have



This guide provides information on how to turn existing water rights permits into instream flow permits or amend an existing water rights permit to include instream use.

PUTTING WATER RIGHTS TO WORK FOR FISH AND WILDLIFE

(Continued)

the level of flows they need, while still meeting the needs of municipal, agricultural and industrial interests. In large part, that means greatly increasing the efficiency of water use and reducing waste. It also means defining how much water rivers and bays need — and when they need it — to support healthy fish and wildlife populations. In 2007, the legislature passed Senate Bill 3 (SB3) to begin to set these “environmental flow standards” for each river basin in Texas.

SB3 also provides a tool for existing water rights owners to preserve river flows to protect fish and wildlife by allowing owners to add “instream use” to their water permit. This tool will be essential in those basins that currently have little unpermitted surface water available to meet environmental flow needs.



New law seeks to ensure that environmental water needs are met

In 2007, the Texas Legislature adopted Senate Bill 3 (SB3), which established an Environmental Flows Allocation Process for every river basin/bay system in Texas.

This law sets up a public process for soliciting recommendations from the scientists and stakeholders that are most familiar with each basin. The state will then adopt legal environmental flow standards for each river and bay system.

The law also requires that there be a *plan* for meeting the environmental flow standards. In addition to reserving nonappropriated water that might be available for this use — and other ways of finding enough water — plans can include voluntary conversion of existing water rights to instream flow purposes and adding instream use to other authorized uses of existing permits. In basins where most of the water has already been permitted, these voluntary conversion processes will be a central strategy for meeting environmental flow standards.

It is important to note that nothing in SB3 forces an existing water-rights permit holder to *give up* water for instream flows. Instead, river authorities, conservation groups, the Texas Water Trust or other entities will likely be willing to buy or lease water for instream flows, as occurs regularly throughout other Western states.



Why should someone consider adding instream flow use to a water rights permit?

Avoiding cancellation of existing rights

Texas water law provides for the possible cancellation of all or part of a surface water right if it has not been put to beneficial use in the 10 years leading up to the cancellation proceedings, though water use that does not occur because of conservation measures cannot be cancelled. The state's water rights agency, the Texas Commission on Environmental Quality (TCEQ), has infrequently cancelled rights, but the ongoing pressure on Texas water resources could change the agency's position.

One way to protect against cancellation for nonuse is to either add instream use to an existing right or to convert an existing right to instream use. Both actions require approval of a water rights amendment at the TCEQ. Adding instream use to an existing right would retain the existing underlying uses (for example, irrigation), which could benefit permit holders in agriculture who only need the rights occasionally. Adding instream use also facilitates leases or purchases of the right for instream flow purposes: that is, a water

right holder could be paid by another entity to leave water in the stream for fish and wildlife.

Preserving Texas' natural legacy for future generations

Water is a vital feature of Texas' natural heritage. Fish and wildlife depend on water flowing in rivers and streams to sustain habitat and wetland areas and supply bays along the Gulf Coast with fresh water. More than any other factor, the availability of water will determine the future of fish and wildlife in our state. If we want future generations to experience the benefits of healthy rivers and streams, taking action to preserve this heritage is critical.

As a way to help preserve this heritage, water right holders may want to voluntarily convert their existing rights to instream flow. In order to donate the right to the state-run Texas Water Trust or to a private conservation organization (such as a local water trust) for instream flow purposes, the right has to be amended at the TCEQ.

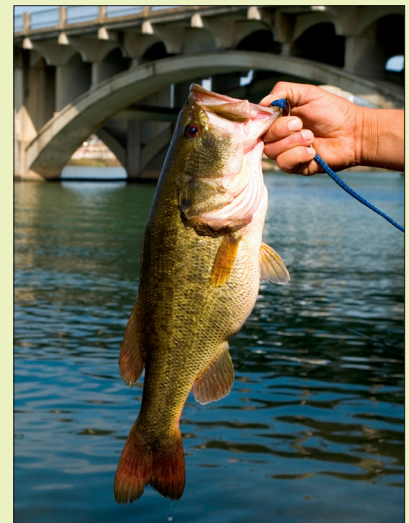


What does "instream flow" mean?

"Instream flow" means leaving water in our streams or rivers to support fish and wildlife and to refresh Texas' vital bays and estuaries in the Gulf of Mexico. These flows help maintain overall water quality and also support various recreational and commercial activities like canoeing, hunting and fishing,

A water rights permit that includes instream flow use will specify that a certain amount of water (either the full amount of the existing permit or part of it) is to be left in the river and not withdrawn for use.

Depending on the circumstance, the permit can also specify that the water remain in the river for a certain distance downstream from the permit's authorized point of diversion.



How it works: Adding instream flow use to a water rights permit

Have questions or need help?

Environmental Defense Fund's water experts are available to answer questions and to help guide water rights owners through the process of transferring the use or amending the use of an existing water rights permit to instream flow use.

Contact EDF with questions or set up a meeting to discuss this process further.

Texas law was amended in 2007 to explicitly state that the Texas Commission on Environmental Quality (TCEQ) could approve an application to amend or change an existing permit to include instream flows.

If an owner wants to lease or sell a water right for instream purposes, he or she will likely want to first look for a buyer. Potential buyers include the river authority for the basin in which the owner is located, a local water trust (if one exists for the owner's area), the Nature Conservancy of Texas (if located in one of their priority areas), or even downstream water users.

River authorities, the local water trusts and the Nature Conservancy may also be able to help if an owner is interested in *donating* a right for instream flow purposes. In addition, the Texas Parks and Wildlife Department (TPWD) can help water right holders who want to donate their rights to the state-run Texas Water Trust for instream flow purposes.

If an owner finds a potential buyer or organization to accept donation of a right for instream flow purposes, the buyer or organization will often help with the TCEQ amendment process. That process requires certain steps, including the following:

- First, the owner must have documentation of his or her underlying water right. If the owner thinks he or she has a right, but cannot find the documentation, the TCEQ Water Rights Division can help.

- Second, the owner must fill out a TCEQ water rights permit amendment application with the details of the instream flow addition or conversion request. This is generally straightforward unless the owner (or the buyer) wants to ensure the water stays in the stream to some particular downstream location. It is beyond the

scope of this guide to go into detail here, but to leave water instream to a particular location, one must often include monitoring mechanisms and ensure that no water right holders between the owner and the downstream point have a legal right to take the water out of the stream. This may require legal advice, which can be provided by potential buyers or the TPWD.

- Third, once the application has been reviewed by the TCEQ, the owner will likely be required to post public notice of the proposed change in local newspapers. The owner (or the buyer or organization taking the donation) will be responsible for paying the notice fees, but the TCEQ provides the format for the notice. Also, the TCEQ will mail notice of the proposed amendment to other water right holders that might be affected by the proposed change. While TCEQ will identify those water right holders and do the actual mailing, the owner will be responsible for postage costs. [NOTE: the TCEQ rules on water right amendment notices have been in flux recently and these procedures could change.]

- Fourth, if no protests or comments are received within 30 days of the the public notice, the executive director of TCEQ may approve the requested instream flow amendment. So far, since 2007, most requests for instream flow amendments have been approved in this manner.

If the TCEQ does receive a request for a contested case hearing from a water rights holder who claims to be adversely affected by the proposed instream flow amendment (unlikely, but possible in certain circumstances), the matter may have to go to a contested hearing if it cannot be settled. Such a hearing can be expensive and time-consuming, so the owner (and any buyer or donor organization) would have to evaluate how to proceed at that point.

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