



2011 Report to the Legislature: Statewide Progress on Setting Instream Flows



DEPARTMENT OF
ECOLOGY
State of Washington

May 2012
Publication no. 12-11-002

Publication and Contact Information

This report is available on the Department of Ecology's website at www.ecy.wa.gov/biblio/1211002.html

For more information contact:

Water Resources Program
P.O. Box 47600
Olympia, WA 98504-7600

Phone: 360-407-6872

Washington State Department of Ecology - www.ecy.wa.gov

- Headquarters, Olympia 360-407-6000
- Northwest Regional Office, Bellevue 425-649-7000
- Southwest Regional Office, Olympia 360-407-6300
- Central Regional Office, Yakima 509-575-2490
- Eastern Regional Office, Spokane 509-329-3400

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2011 Report to the Legislature: Statewide Progress on Setting Instream Flows

*by
Ann Wessel*

Water Resources Program
Washington State Department of Ecology
Olympia, Washington

Program Mission

The mission of the Water Resources Program is to support sustainable water resources management to meet the present and future water needs of people and the natural environment, in partnership with Washington communities.

Authorizing Laws

- *RCW [18.104](#), Water Well Construction Act (1971)*
- *RCW [43.21A](#), Department of Ecology (1970)*
- *RCW [43.27A](#), Water Resources (1967)*
- *RCW [43.83B](#), Water Supply Facilities (1972)*
- *RCW [43.99E](#), Water Supply Facilities – 1980 Bond Issue (Referendum 38) (1979)*
- *RCW [86.16.035](#), Department of ecology control of dams and obstructions (1935)*
- *RCW [90.03](#), Water code (1917)*
- *RCW [90.08](#), Stream patrolmen (1925)*
- *RCW [90.14](#), Water rights claims registration and relinquishment (1967)*
- *RCW [90.16](#), Appropriation of water for public and industrial purposes (1869)*
- *RCW [90.22](#), Minimum water flows and levels (1969)*
- *RCW [90.24](#), Regulation of outflow of lakes (1939)*
- *RCW [90.28](#), Miscellaneous rights and duties (1927)*
- *RCW [90.36](#), Artesian wells (1890)*
- *RCW [90.38](#), Yakima river basin water rights (Trust Water) (1989)*
- *RCW [90.40](#), Water rights of United States (1905)*
- *RCW [90.42](#), Water resource management (Trust Water) (1991)*
- *RCW [90.44](#), Regulation of public groundwaters (1945)*
- *RCW [90.46](#), Reclaimed water use (1992)*
- *RCW [90.54](#), Water resources act of 1971 (1971)*
- *RCW [90.66](#), Family farm water act (1977)*
- *RCW [90.80](#), Water conservancy boards (1997)*
- *RCW [90.82](#), Watershed planning (1997)*
- *RCW [90.86](#), Joint legislative committee on water supply during drought (2005)*
- *RCW [90.90](#), Columbia River basin water supply (2006)*
- *RCW [90.92](#), Pilot local water management program (Walla Walla) (2009)*

Case law

Washington case law plays a vital role in providing determinations and rulings that also govern water resources management. The Water Resources Program's website on laws, rules, and case law can be found at <http://www.ecy.wa.gov/programs/wr/rules/rul-home.html>.

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Purpose

The Department of Ecology (Ecology) has prepared this report to the Legislature on the progress of setting instream flows as required by RCW 90.82.080(6), which states:

“The department shall report annually to the appropriate legislative standing committees on the progress of instream flows being set under this chapter, as well as progress toward setting instream flows in those watersheds not being planned under this chapter. The report shall be made by December 1, 2003, and by December 1st of each subsequent year.”

This is the ninth annual report prepared by Ecology.

Instream Flow Progress

The Watershed Planning Act (WPA) provided local planning units the option of addressing instream flows¹ as part of their watershed management plans. If planning units recommend instream flow levels and other water management schemes, state law directs Ecology to adopt instream flows in rule when the local jurisdictions adopt the plan.

Of the 34 watershed planning units working under the WPA, 27 chose to examine instream flows as part of their plan development. There is a broad range of progress within these watersheds, ranging from preliminary scientific studies to rule adoption and implementation.

The WPA also reaffirmed Ecology’s authority to adopt instream flows by rule in basins where watershed planning units could not reach consensus on flow recommendations or where there was no formal watershed planning. Ecology has adopted two water management/instream flow rules in basins not planning under the WPA:

- WAC 173-505 for WRIA 5, Stillaguamish (August 2005).
- WAC 173-503 for WRIA 3, Lower Skagit-Samish (Amendment May 2006).

Overall Progress on Rulemaking

Although often referred to as “instream flow rules,” it is more accurate to call them “water management rules.” In addition to setting instream flow levels and stream management control points (points along a watercourse where instream flows are measured), today’s rules include:

¹ Instream flows are water rights that protect and preserve instream resources such as wildlife, fish, recreation, navigation, aesthetics, water quality, and livestock watering.

- Determinations of seasonal and year-round closures.²
- Management of groundwater withdrawals to protect surface water resources, including groundwater withdrawals from permit-exempt wells.
- Water management tools to ensure reliable future water supply, including water reservations³ for new consumptive uses.

Adopting new rules during the last several years has been much slower than anticipated. In most cases, developing instream flow recommendations through the Watershed Planning process has occurred with minimal controversy. However, when undertaking rule making based on the Plan recommendations, a range of factors affect the timeframe:

- **Local Conditions** - Our changing physical and social environment—shrinking snow packs, increased frequency of drought years, continued population growth, and ongoing land use development—combine to increase demand and reduce water availability. At the same time, water levels and flows for needs such as fish habitat, recreation, and Endangered Species Act (ESA) listed fish must also be maintained or improved.
- **Unique Characteristics** - Since there is great geographic diversity in Washington State, each watershed requires site-specific assessments of stream flow characteristics, hydrogeology, and future water demand.
- **Local Agreement** - The responsiveness of local communities, and the extent of local cohesiveness or conflict on related issues such as land use management, critical areas protection, or economic development, influences rule development.
- **Groundwater Management Issues**- Scientific studies have increased our understanding of the physical connection between surface water and groundwater. Water resource professionals refer to this physical connection as “hydraulic continuity.” Court decisions also recognize hydraulic continuity, and watershed planning units now address water supply and demand needs from a more comprehensive and holistic management perspective than in the past. Including groundwater management in rules—given the importance of groundwater in sustaining late summer flows—is very challenging, in particular the need to manage permit-exempt well withdrawals.
- **Legal Issues** - Questions about the extent of permit-exempt well water rights take additional time to evaluate. Recent legal interpretations limit the use of more flexible water management strategies in these rules. These legal considerations contribute to a slower pace of rulemaking.
- **Funding** - Budget cuts at local governments and Ecology hamper our progress on instream flow rulemaking.

² During seasons and in locations where water is not reliably available above the instream flow levels, streams and aquifers are closed to new appropriations and future uses. The purpose of a closure is to avoid impairment to existing water rights, including instream flows.

³ A reservation, or reserve, of water is a one-time, finite amount of water set aside for specific future uses.

Comprehensive water management strategies offer the best approach to achieve sustainable long-term planning goals and objectives. Examples of water management strategies include mitigation of new water uses, processing water rights in open water markets, and innovative groundwater storage projects. Experience has shown these activities occurring after rule adoption are often as complex as the rules themselves. However, we cannot ignore these water management strategies, as they are the cornerstone of implementing the rule.

The water management rules being developed today focus on protection of existing water rights and instream resources, while providing water for future urban and rural needs. The complexity and number of factors involved slow the rule development processes. However, the result provides Washington citizens with more comprehensive rules that effectively manage water into the future.

Rule Moratorium

Governor's Executive Order 10-06 suspended non-critical rule development and adoption through December 31, 2011. The rule suspension has been extended through December 31, 2012 (Executive Order 11-03). The Executive Order also allows rulemaking to go forward under certain exceptions. One exception allows rule making to proceed if the rule is beneficial to or requested or supported by the regulated entities, local governments or small businesses that it affects.

This Executive Order suspends progress on Instream Flow Rule adoption. Ecology is proactively addressing and complying with the Executive Order. Decisions are posted on Ecology's webpage at: http://www.ecy.wa.gov/laws-rules/rulemaking_suspension.html about:

- What rules will move ahead.
- What rules will be delayed through 2012.
- What rules in process are "to be determined."

Ecology maintains the list of the agency's pending rules and their status under the executive order. At this time, two rules (Grays/Elochoman, and Cowlitz) remain on the "to be determined" list as negotiations and outreach continue with local entities. Ecology's Director removed the Dungeness rule from the suspended list in November of 2011 under the exemption 3(e), "beneficial to or requested by the regulated entities, local governments, or small businesses that it affects."

Watershed plan implementation groups working under RCW 90.82 on elements of future instream flow rules and using state grants to do so, may continue their efforts without contradicting the intent of the Executive Order.

2011 Rulemaking Progress

During 2011, Ecology made continued progress on instream flow rulemaking, but did not adopt any new rules. Ecology, Washington Department of Fish and Wildlife, and contractors hired by watershed planning units continued to collect field data and conduct instream flow studies in many statewide watersheds. Several planning units also continue to work with Ecology on determining recommendations for, or adopting, instream flows.

WRIA 3a—Samish Subbasin

Ecology filed a pre-proposal statement of inquiry (CR-101) in February 2005 to begin development of a water management rule in the Samish river subbasin. When a lawsuit was filed challenging the Skagit rule for WRIs 3 and 4, Ecology suspended Samish rulemaking until the outcome of that litigation was decided. On November 9, 2010, Thurston County Superior Court Judge Carol Murphy issued a [letter opinion](#) upholding the Skagit rule. The case is currently under appeal before the Washington State Court of Appeals.

For additional information on the Skagit rule, read the section on Rule Implementation beginning on page 6.

WRIA 18—Dungeness

In November 2010, Ecology offered to delay adoption of this rule for one year if local leaders in Clallam County's Dungeness watershed would opt to collaboratively develop broader solutions for water supply and stream flow restoration outside the scope of a rule. In December 2010, Ecology's Director put this rulemaking on the "to-be determined" list while consensus building continued with stakeholders. Clallam County, the Dungeness Water Users Association (irrigators), and Ecology signed an Agreement in Principle (AIP) in February 2011. The Jamestown S'Klallam Tribe sent a letter in support, of the AIP. The AIP includes five elements:

- Prevent permanent reductions in Dungeness River flows or small streams due to new uses.
- Supply adequate and reliable water for new uses.
- Ensure sustainable agriculture in the Dungeness Valley.
- Restore stream flows in the main-stem Dungeness and, where feasible, in small streams.
- Have in place an instream flow rule that protects instream resources and existing water rights within 18 months after the agreement is signed.

When the AIP was signed, Ecology announced that work on the Dungeness instream flow rule would recommence in January 2012 or when sufficient progress had been made in achieving the agreement's goals – whichever came first. A Local Leaders Work Group has been meeting to implement the AIP. In November 2011, local community leaders and Ecology's director agreed that sufficient progress has been made to re-start rule development, and this rulemaking effort was restarted.

During 2011, the Local Leaders Work Group made progress toward finding water to start a water bank for mitigating new water uses, and explored possible water supply projects. They also agreed to a flow restoration target for the Dungeness River and continue to work on a restoration strategy for the Dungeness and other streams. Ecology and the Dungeness Water Users Association (DWUA) negotiated an agreement that will provide certainty for DWUA water rights into the future.

WRIA 25 - Grays-Elochoman & WRIA 26 - Cowlitz

Rulemaking has also advanced in the southwest corner of the state. After adopting two rules in 2008, for the Salmon-Washougal River watershed (WAC 173-528) and the Lewis River watershed (WAC 173-527), Ecology has continued rulemaking for other major tributaries to the Lower Columbia River (below Bonneville Dam). Since 2009, this work has focused on the WRIA 25 Grays-Elochoman and the WRIA 26 Cowlitz watersheds. Both of these watersheds are important fish habitat areas that contribute to the health of the Columbia River estuary.

Ecology filed proposed rules for WRIs 25 and 26 with the State Code Reviser’s Office and held public hearings in May 2010. Rulemaking was discontinued after receiving strong community opposition. The opposition was primarily over the level of local participation, supply for rural water users in WRIA 26 (Cowlitz watershed), and concerns over groundwater well metering. Ecology agreed to slow future rulemaking until the local watershed planning unit could thoroughly review its plan and update recommendations for both WRIs. During 2011, the local planning unit broadened its base of citizen representation and public outreach. The renewed effort involves a closer investigation of fish habitat needs and future community demands by taking a stream-by-stream approach to planning.

This rule has been placed on the “to be determined” list for proceeding with rulemaking, in respect to the Governor’s November 2010 and October 2011 executive orders.

Table 1 summarizes projected rulemaking progress through 2012.

Table 1. Rule Development Progress under the Watershed Planning Act

Water Resource Inventory Name/Number	Start Rule Development (File CR-101)	Rule Proposal (File CR-102)	Rule Adoption (File CR-103)
Entiat/46	2004	March 2005	August 2005
Walla Walla/32	2004	February 2007	August 2007
Wenatchee/45	2007	July 2007	December 2007
Lewis/27	2005	July 2008	December 2008
Salmon-Washougal/28	2005	July 2008	December 2008
Quilcene-Snow/17	2004	May 2009	November 2009
Elwha-Dungeness/18	2004	Target: March 2012 (Dungeness only)	Target: August 2012
Grays-Elochoman/25	2005	To be determined	Target: 2012
Cowlitz/26	2005	To be determined	Target: 2012
Sequim Bay/part of 17	Target: 2013	Target: 2013	Target: 2014

In addition to instream flow rulemaking under the WPA, Ecology has completed or started rulemaking in three basins that are not planning under the Act:

- Stillaguamish (WRIA 5) — New rule adopted August 2005.
- Upper and Lower Skagit (WRIAs 3 & 4) — Rule amendment adopted May 2006.
- Lower Skagit-Samish (WRIA 3) — Rulemaking started 2005. The rule adoption process is on hold pending legal action on the Skagit instream flow rule, WAC 173-503.

Appendix A has a map showing the statewide status of instream flow rulemaking activities.

The following watershed planning units are moving forward toward rulemaking:

- Skokomish-Dosewallips (WRIA 16)
- Middle Snake (WRIA 35)
- Wenatchee (WRIA 45) (amendment)
- Moses Coulee/Foster (WRIAs 44 and 50)
- Spokane (WRIA 57)
- Colville (WRIA 59)

Rule Implementation

WRIAs 3 and 4 – Skagit

Ecology amended WAC 173-503 in 2006 to allocate “reservations” of surface and groundwater that provide uninterrupted water supplies for future agricultural, residential, commercial/industrial, and livestock uses throughout the Skagit watershed. Before this amendment, water usage under water rights issued after June 2001 could be restricted if stream flows fell below adopted instream flow levels.

The Carpenter-Fisher subbasin water reservation is now closed to new uses. New development between 2001 and 2009 used the water up more quickly than anticipated. According to the Skagit rule, once a subbasin’s reserved water is used up, the area is closed to new water uses unless they are mitigated. A mitigated water use is one whose impact on streams is offset or compensated for. Several property owners have appealed Ecology’s announcement closing the Carpenter-Fisher subbasin water reservation.

In 2006, the Swinomish Indian Tribal Community (Tribe) challenged the Skagit rule amendments, asserting that the amended rule established improperly large reservations of water. The City of Anacortes intervened and, together with the Tribe, asserted that Ecology failed to comply with the State Environmental Policy Act (SEPA). A decision on this challenge was issued by Thurston County Superior Court on November 9, 2010. The Court concluded that Ecology’s amended rule does not exceed its statutory authority, is not arbitrary and capricious, and that Ecology did not violate SEPA. The decision has since been appealed by the Tribe, and the case is pending before the Court of Appeals.

Water available for new uses in the Nookachamps subbasin water reservation is nearly used up. This is a serious problem in that there are many more undeveloped lots than there is water

available from the reservation. Ecology will continue to work with the Skagit County Water Resources Advisory Committee, Skagit Public Utility District, and Skagit County to develop long term solutions for water supply in the subbasin.

WRIA 14 – Kennedy-Goldsborough

The Squaxin Island Tribe raised concerns in 2008 and again in late 2009 that groundwater wells in the area are hurting stream flows in the Johns Creek subbasin of WRIA 14. The Tribe twice petitioned Ecology to amend the rule to limit future well use. Ecology denied both petitions, and instead pursued an agreement with Mason County to require new wells put to use near Johns Creek to serve in-home needs only. The current rule language allows this action if warranted.

The Tribe then appealed to the Governor for reconsideration of Ecology’s denial of the second petition. The Governor did not change Ecology’s decision to deny the petition, but did direct Ecology to meet with the Tribe to discuss future rulemaking priorities.

Still dissatisfied with Ecology’s actions, the Tribe filed a lawsuit demanding that Ecology amend WAC 173-514 to restrict new well use in the Johns Creek subbasin of WRIA 14. On March 16, 2011, Thurston Superior Court Judge Paula Casey determined that Ecology acted arbitrarily and capriciously when it denied the Squaxin Island Tribe’s rulemaking petition. In September, the Court remanded this matter to Ecology to engage in rulemaking in accordance with the Tribe’s 2009 petition. Ecology has filed an appeal of this decision to the Court of Appeals.

Public Outreach and Involvement

Outreach and communication are integral to developing and implementing instream flow rules. Communicating rule concepts and issues to the public is essential to maintaining steady progress. This is time consuming and slow, but is necessary to build local awareness, acceptance, and to foster future governance.

Strong communication and coordination with local county and city governments are also essential. Rule implementation depends upon effective shared governance, and requires close coordination between Ecology and the local entities that are responsible for managing growth and water demand.

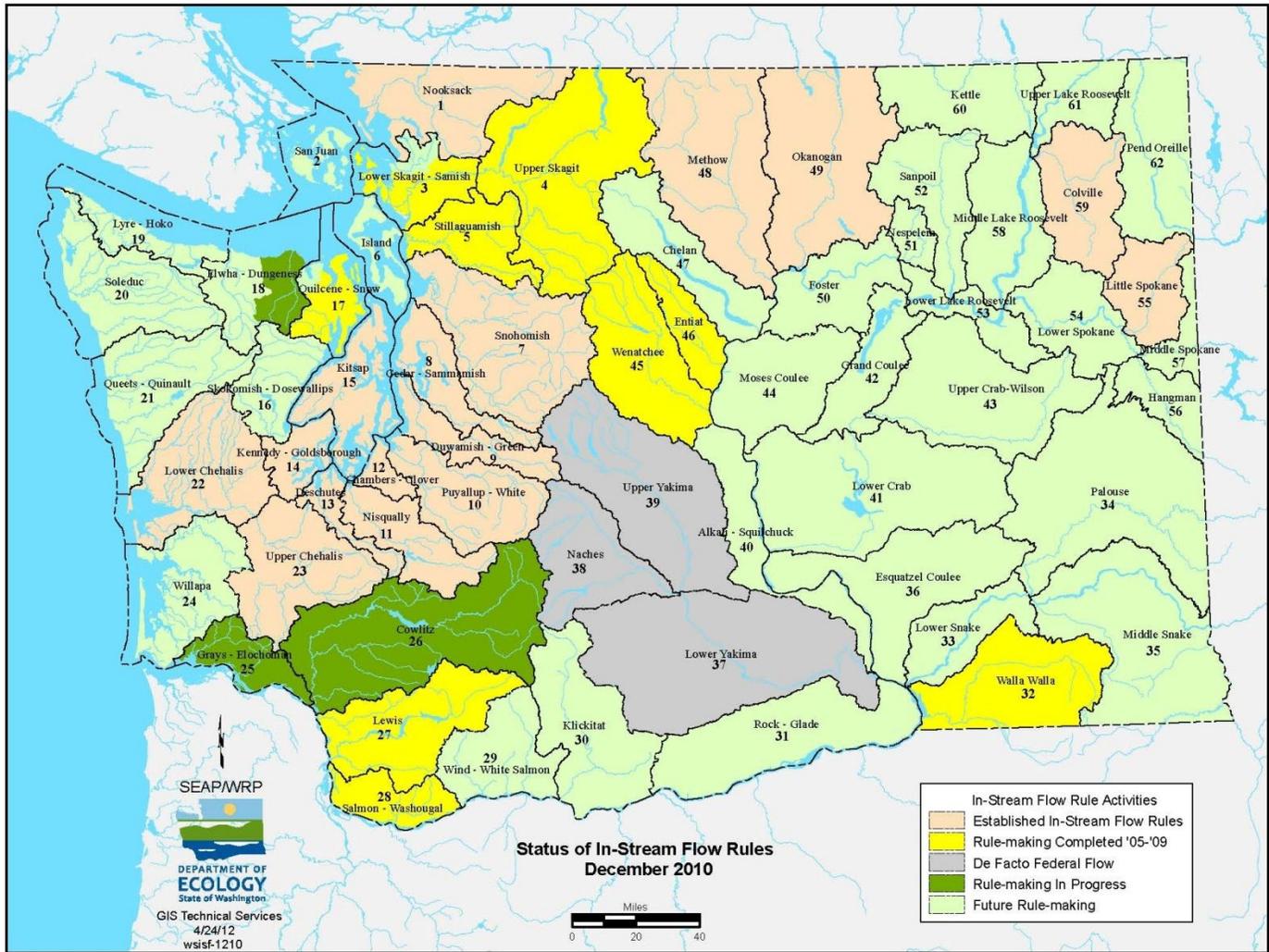
Ecology’s outreach approach is to establish early, open, and ongoing communication with watershed planning units and interested stakeholders in each watershed involved in rulemaking. Ecology staff works with key decision makers in each WRIA, including elected officials, tribal representatives, realtors, farmers, environmental organizations, business communities, and other interested parties.

Open houses and other public meetings create opportunities for the public to learn about local water issues, voice their concerns, and take part in water management decisions. Ecology has developed question and answer documents, rule overviews, videos, and posters, which we can re-use or tailor to future rulemaking.

Ecology is increasing its reliance on electronic media to disseminate information and to interact directly with community members. Email communication is popular with the public and local government representatives. Regular updates to rule-specific Web pages provide technical and procedural information on water management. For example, Ecology has recently filmed interviews with community leaders in the Dungeness watershed about water management issues that we intend to post on the Web as YouTube videos.

Ecology's goal is to improve the public's overall understanding of complex water resource issues and to include the public in the rulemaking process. This approach helps gain local ownership and buy-in when instream flows are set in rule.

Appendix A



Appendix A. Statewide Map of Instream Flows Set by Rule