



2010 Report to the Legislature: Statewide Progress on Setting Instream Flows



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*by
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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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Executive Summary

The Department of 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 eighth annual report.

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 the instream flows in rule when the local jurisdictions adopt the plan.

Of the 34 watershed planning units working under the WPA, 27 planning units chose to examine instream flows as part of their plan development. There is a broad range of progress within these watersheds, varying 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 Rule making

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:

- Determinations of seasonal and year-round closures²
- 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 five years has been much slower than anticipated. In most cases, developing instream flow recommendations through the Watershed Planning process has occurred with minimal controversy. In other instances, however, a range of factors affect the timeframe for rule adoption:

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

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.

- **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 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 rule making.
- **Funding** - Budget cuts at local governments and Ecology hamper our progress on instream flow rule making.

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.

On November 17, 2010, Governor Chris Gregoire signed an executive order (Executive Order 10-06) suspending and limiting state rule making to help small businesses and local governments as the state continues its economic recovery. The Department of Ecology reviewed the list of pending instream flow rules to make a determination if these proposed rules met any of the exemption criteria contained in the executive order. Three of these rules (Grays/Elochoman, Cowlitz, and Dungeness) have been placed on a “to be determined” list for the near-term. One other proposed rule (Samish) has been delayed under the executive order.

During 2010, Ecology made continued progress on instream flow rule making, but did not adopt any new rules. Ecology, WDFW, and contractors hired by watershed planning units continued to collect field data and conduct instream flow studies in many statewide watersheds. Several planning units continue to work with Ecology on determining recommendations for, or adopting, instream flows.

2010 Rulemaking Progress

WRIA 3a—Samish Sub-basin

Ecology filed a pre-proposal statement of inquiry (CR-101) in February 2005 to begin development of a water management rule. When a suit was filed challenging the Skagit rule for WRIs 3 and 4, Ecology suspended rulemaking until the outcome of that litigation was decided. The case is currently under appeal.

For additional information on the Samish rule, read the section on Rule Implementation beginning on page 5. This rule has been delayed due to the recent Governor’s executive order on rulemaking.

WRIA 18—Dungeness

In 2010 Ecology continued working with local stakeholders to develop a water management rule for the Dungeness portion of WRIA 18.

In November 2010 discussions began with local leaders about moving beyond setting instream flows and working towards restoring flows in the Dungeness River. Currently, there are discussions about how to move this idea forward. If successful, this effort could result in rule adoption by mid 2012.

Ecology, Clallam County, and Washington Water Trust continued developing a water bank to accompany this rule. It is intended to provide sustainability to the rule and support ongoing water management in the watershed. This work is being funded through an Ecology grant to Clallam County. A portion of the grant will allow Ecology and Clallam County to develop a Memorandum of Agreement related to implementing the instream flow rule and water bank. This rule has been placed on the “to be determined” list for proceeding with rulemaking, in respect to the Governor’s November 2010 executive order.

WRIA 25 - Grays-Elochoman & WRIA 26 - Cowlitz

Rule making has also advanced in the southwest corner of the state. Ecology adopted two rules in 2008, for the Salmon-Washougal River watershed (WAC 173-528) and the Lewis River watershed (WAC 173-527). Ecology has continued rule making for other major tributaries to the Lower Columbia River (below Bonneville Dam). During 2009 and 2010, this work focused on the WRIA 25 Grays-Elochoman basin and the WRIA 26 Cowlitz basin. Both of these watersheds are important fish habitat areas that contribute to the health of the Columbia River estuary.

Ecology filed proposed rules for WRIsAs 25 and 26 with the State Code Reviser’s Office and held public hearings in May 2010. Ecology announced in July it would remove language about its legal authority to meter private wells because the language had been widely misinterpreted. The watershed plan does not call for metering. On August 27, Ecology announced that it would let the current rulemaking window expire for the Grays-Elochoman and Cowlitz watersheds (WRIA 25 and 26) without adopting either rule. Ecology agreed to slow rulemaking until the local watershed planning unit could thoroughly review its plan and update recommendations.

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

Table 2 summarizes projected rule making progress through 2012.

Table 2. 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	March 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: Winter 2012 (Dungeness only)	Target: Summer 2012
Grays-Elochoman/25	2005	To be determined	Target: 2012
Cowlitz/26	2005	To be determined	Target: 2012
Sequim Bay/part of 17	Target: 2012	Target: 2012	Target: 2013
Carbon River/part of 10	Target: 2012	Target: 2012	Target: 2013

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

- Stillaguamish (WRIA 5) — New rule adopted August 2005.
- Upper and Lower Skagit (WRIsAs 3 & 4) — Rule amendment adopted May 2006.
- Lower Skagit-Samish (WRIA 3) — Rule making started 2005. The rule adoption process is on hold pending legal action on the Skagit sub-basin instream flow rules.

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

The following watershed planning units are moving forward toward rule making:

- 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 Moratorium

Governor's Executive Order 10-06 suspended non-critical rule development and adoption through December 31, 2011. This 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 2011.
- What rules in process are "to be determined."

Watershed plan implementation groups working under RCW 90.82 on discreet components or 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.

Rule Implementation

WRIA 3 and 4 – Skagit

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

Later in 2006, the Swinomish Indian Tribal Community (Tribe) challenged the 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 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.

In addition to the recent court decision, Ecology welcomes a new water-resource tool for the Skagit basin produced by the U.S. Geological Survey (USGS). The study provides a computer model that will aid implementation of the water-management rule. The model provides a useful tool to determine how water consumed from wells affects stream flows. We will use the model to determine if we should change how we calculate reservation water use.

WRIA 14 – Kennedy-Goldsborough

The Squaxin Island Tribe raised concerns in 2008 and again in late 2009 that 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 their 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 has filed a lawsuit demanding that Ecology amend WAC 173-514 to restrict new well use in the Johns Creek subbasin of WRIA 14. The outcome of this litigation may affect Ecology's future rulemaking priorities.

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 kind of work is time consuming and slow, but is necessary to building 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 rule making. 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 rule making.

Ecology is increasing its reliance on electronic media communication to disseminate information and to interact directly with community members. E-mail 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.

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

Appendix A

