



2012 Report to the Legislature: Statewide Progress on Setting Instream Flows

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2012 Report to the Legislature: Statewide Progress on Setting Instream Flows

*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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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 tenth 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 & 4, Lower and Upper Skagit (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, and mitigation to offset the impacts of new water use.

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.

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.

- **Funding** - Budget cuts at local governments and Ecology hamper our progress on instream flow rulemaking.
- **State-wide precedent** – As each rule is developed to implement the recommendations of locally-developed watershed management plans we have encountered challenges with unintentional precedent-setting that can have state-wide implications. These broader issues are another influence on the pace of rulemaking.

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. Executive Order 11-03 extended the rule suspension through December 31, 2012. It will be up to the next governor to decide if a rule suspension should continue into 2013. The latter executive order also allowed rulemaking to go forward under certain exceptions. One exception allowed rule making to proceed if the rule was beneficial to or requested by the regulated entities, local governments, or small businesses that it would affect.

The executive orders suspended progress on Instream Flow Rule adoption. Ecology proactively addressed and complied with the Executive Orders. Decisions are posted on Ecology’s webpage at: http://www.ecy.wa.gov/laws-rules/rulemaking_suspension.html about:

- What rules would move ahead.
- What rules would be delayed.
- What rules in progress are “to be determined.”

Ecology has maintained the list of the agency’s pending rules and their status under the executive order. Two rules (Grays/Elochoman, and Cowlitz) have remained 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 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.

2012 Rulemaking Progress

During 2012, Ecology proposed adoption of one new rule, WAC 173-518, for the Dungeness portion of WRIA 18, the Elwha-Dungeness watershed. Ecology and Washington Department of Fish and Wildlife (WDFW) staff continued work with the WRIA 25 Grays-Elochoman and the WRIA 26 Cowlitz watershed planning unit as they revise plan recommendations regarding closures and water management. 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 also continued 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 Supreme Court.

For additional information on the Skagit rule, read the section on Rule Implementation beginning on page 7.

WRIA 18 - Dungeness

During 2012, Ecology filed the CR-102 Notice of Proposed Rule Making with the Office of the State Code Reviser. This notice is accompanied by the proposed rule language and signals Ecology's intention to adopt the rule within the 180-day period authorized under the Administrative Procedures Act, RCW 34.05. Approximately 300 people attended a public hearing held on June 28, 2012, in Sequim, and Ecology received over 950 comments from approximately 250 individuals, government entities, and organizations on the proposed rule. Rule adoption is scheduled for November 28, 2012.

Adoption of a rule for the Dungeness watershed is the culmination of local, state, and Tribal collaborative efforts that began in 1992 with the Dungeness-Quilcene pilot watershed planning process, and continued through watershed planning under RCW 90.82 (Watershed Planning Act). The Elwha-Dungeness Watershed Plan was adopted by the Clallam County Board of Commissioners in 2005. In 2011, Clallam County, the Dungeness Water Users Association

(irrigators), and Ecology signed an Agreement in Principle (AIP), with an accompanying letter of support from the Jamestown S’Klallam Tribe. 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.

Building on the AIP, a Local Leaders Work Group met through 2011 and was successful in making progress toward finding water to start a water bank for mitigating new water uses, explored possible water supply projects, and worked on a flow restoration strategy for the Dungeness and other streams.

A new agreement negotiated with the Dungeness Water Users Association (DWUA) will provide certainty for DWUA water rights well into the future. The agreement sets the amount of water the DWUA has available to sell for mitigation of new water uses, as required under the new rule. This agreement was signed by Director Sturdevant and representatives of the DWUA on September 6, 2012.

As Ecology approaches rule adoption, Clallam County Commissioners and others requested the state seek funding to capitalize the start-up of the bank. On September 10, 2012, Ecology submitted a proposed capital budget request of \$2,050,000 from the State Building Construction Account to develop mitigation options, alternative water sources, and tools to make water available for stream flows and to mitigate for rural development in the basin. The purpose of these funds is to assist in capitalizing or “hydrating” the water bank.

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 WRIsAs 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 WRIAs. During 2011 and 2012, 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, and discussion of possible plan amendments. Proposals include a more limited area for instream flow limitations and increased reservation sizes for permit-exempt wells. Re-opener language for the proposed rule has also been discussed. During the Fall of 2012, Ecology has been involved in stakeholder meetings with local governments and the Lower Columbia Fish Recovery Board.

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 2013.

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	May 2012 (Dungeness only)	November 2012
Grays-Elochoman/25	2005	To be determined	Target: 2013
Cowlitz/26	2005	To be determined	Target: 2013
Sequim Bay/part of 17	postponed	To be determined	

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.

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.

In April 2012, the Washington State Legislature appropriated \$2.225 million in state funds to develop mitigation options, alternative water sources, and tools to make water available for stream flows and for rural domestic permit-exempt uses within the Carpenter- Fisher, East Nookachamps, and Upper Nookachamps subbasins. The budget allocation specified that up to \$100,000 of the funds shall be used to develop a rural domestic demonstration project to determine if best management practices can meet the mitigation requirements of the Skagit. Ecology is working with local government, tribal leaders, and stakeholders to determine the best and most cost-effective package of actions to address both instream and out-of-stream needs in these subbasins.

Ecology is pursuing a number of projects to find water supplies and solutions for property owners in the Carpenter-Fisher and Upper and East Nookachamps subbasins:

- Ecology retained the non-profit organization Washington Water Trust (WWT) to identify existing rights that Ecology might acquire to offset new groundwater uses.
- Ecology retained the RH2 engineering firm to inventory and review the water rights of existing public water systems. The goal of this effort is to identify the capability of the local public water systems to serve new customers. The assessment will also evaluate whether they can provide water from sources outside of the Carpenter-Fisher and Nookachamps basins to deliver water for improving streamflow.
- Ecology is evaluating water storage projects that could capture and store surface or groundwater during the wet season and then release this water during the dry summer months.
- Ecology is reviewing mitigation plans developed by individual property owners in the Carpenter-Fisher subbasin.

Ecology is encouraging Skagit and Snohomish counties to remove any remaining obstacles to the use of captured rainwater or trucked-in water by property owners in the Carpenter-Fisher Basin who wish to build without delay. Additionally, Ecology will be working with willing property owners to develop and implement site-specific land development and water conservation practices to mitigate for new development consistent with legislative directive.

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 will be heard by the State Supreme Court on November 13, 2012.

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 and 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.

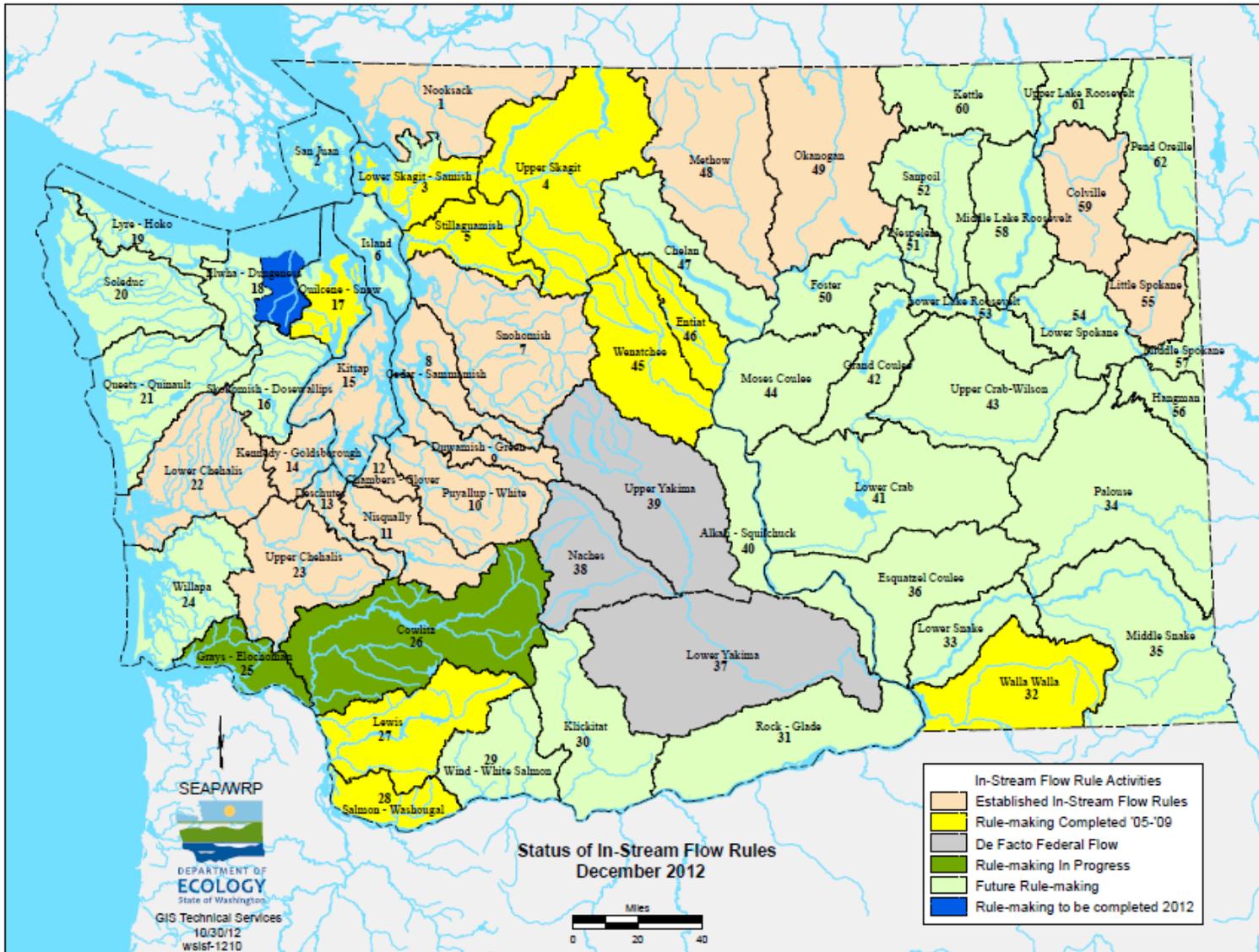
Open houses and other public meetings create opportunities for the public to learn about local water issues, voice their concerns, and take part in water management decisions. Ecology has developed question and answer documents, rule overviews, videos, and posters, which we can re-use or tailor to future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

Statewide Map of Instream Flows Set by Rule



Statewide Map of Instream Flows Set by Rule