



2015 Report to the Legislature: Statewide Progress on Setting Instream Flows



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2015 Report to the Legislature: Statewide Progress on Setting Instream Flows

by

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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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Executive Summary

Significant rulings of the Washington State Supreme Court continue to affect Ecology's instream flow protection program. While recent rulings do not directly restrict Ecology's authority to adopt instream flow protection in rule, they do affect the management of new water uses subsequent to rule adoption.

- On October 8, 2015 the court ruled in *Foster v. Department of Ecology* that the Overriding Consideration of the Public Interest (OCPI) provision in RCW 90.54.020(3)(a) may only be used to allow temporary impairment of instream flows. This ruling further constrains Ecology's ability to adopt instream flow rules that provide any water availability for new uses.
- Ecology's ability to successfully balance instream and out-of-stream water needs had already been restricted since the State Supreme Court ruling in *Swinomish Indian Tribal Community v. Department of Ecology* on Oct. 3, 2013. The ruling in *Swinomish* found that Ecology exceeded its authority by relying on a finding of OCPI to establish reservations of water for new uses which would impair the senior instream flows when amending the rule for the Skagit watershed in 2006.

Due to the *Swinomish* and *Foster* decisions, Ecology can no longer rely on OCPI to create reserves. Without reserves, adopting instream flow rules could preclude rural development where ever mitigation for streamflow impacts is not available. The challenge is especially acute in tributary subbasins, where smaller streams provide valuable spawning habitat, streamflows are typically below recommended instream flow levels in the late summer, and senior water rights are not readily available to mitigate the impacts of new water uses.

One new rule has been adopted since the *Swinomish* decision. On January 27, 2015, Ecology adopted a rule for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer. The rule establishes instream flows and helps protect Washington State interests in the water resources of the Spokane River. The *Swinomish* decision has little effect in this area as only a limited portion is not served by a public water supplier with inchoate water rights, and mitigation is available for new permit-exempt withdrawals of water.

The primary efforts of Ecology's rulemaking staff during 2015 went into preparing two reports in response to legislative interest. The first report is titled Mitigation Options for Domestic Water Use in the Yakima Basin. It implements Section 302(10) of ESSB 6052, Chapter 4, Laws of 2015. The second report is titled Options for Mitigating the Effects of Permit-Exempt Groundwater Withdrawals. This report is in response to SB 5965 which did not pass the 2015 Legislature, but Ecology agreed to prepare a similar report. Ecology's instream flow rulemaking staff is also engaged in the effort to find solutions for rural domestic water needs, responding to requests for information about instream flow protection, assisting with rule interpretation, and addressing pending litigation.

The *Swinomish* decision reinstated the 2001 Skagit Instream Flow Rule, having a profound effect on rural water supply in Skagit County. Under the 2001 rule, water rights established on or after April 14, 2001 are subject to curtailment when the senior minimum instream flow rights are unmet. Approximately 475 rural homes built since April 14, 2001 no longer have a secure water supply. Ecology has been working with local and Tribal governments, public utilities, and Washington Department of Wildlife (WDFW) to find water supply options for the Skagit watershed.

Washington Water Trust, a non-profit organization with experience in water banking, is helping Ecology establish a water exchange for the Skagit watershed that could provide mitigation. Possible mitigation sources include senior water rights from public utilities, aquifer storage and recovery projects, expanding public water service lines, and alternative water supplies such as rainwater collection and hauling water.

Ecology received a petition to amend Chapter 173-531A WAC, Water Resources Program for the John Day-McNary Pools Reach of the Columbia River, WRIA 31 and parts of WRIsAs 32, 33, 36, and 37. The petition requested amending the rule to extend the period that water would be available from the reservations established for future irrigation use (WAC 173-531A-040) and municipal use (WAC 173-531A-050) from 2020 to 2060. Ecology determined it was necessary to deny the petition. Ecology has already initiated work to evaluate future irrigation and municipal water supply needs within the John Day and McNary pools as part of the next Columbia River Long-Term Water Supply and Demand Forecast. The forecast is due to the Legislature in November 2016.

A number of other areas of the state have requested that Ecology begin instream flow rulemaking. Ecology is working with representatives in those watersheds, but has no immediate plans for rulemaking in these areas. This is primarily due to the effect of the *Swinomish* and *Foster* decisions on Ecology's ability to develop rules that would leave water available for future growth in rural areas, without a high risk of legal challenge.

Ecology continues to implement instream flow rules across the state:

- Significant Ecology resources are going towards rule implementation in the Skagit basin, focusing on solving water supply needs in rural areas.
- In response to concerns raised by the Squaxin Tribe, contractors working for Ecology and the Squaxin Tribe completed a groundwater model for the Johns Creek subbasin to determine actions to protect streamflows in the Kennedy-Goldsborough watershed, WRIA 14.
- Ecology and Clallam County are successfully implementing the rule for the Dungeness watershed. Over 75 mitigation certificates for new homes have been sold since the rule took effect on January 2, 2013.

Purpose

The Department of Ecology (Ecology) has prepared this report to the Legislature on the progress of setting instream flows¹ 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 thirteenth annual report prepared by Ecology on the setting of instream flows.

Instream Flow Progress

Streamflow protection has been in place in Washington State Law for over 65 years. The state’s Water Flow Policy, adopted in 1949, states: “It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.” (RCW 77.57.020, formerly RCW 75.20.050)

Ecology’s program to adopt streamflow protection in rules began in the 1970s after adoption of the Minimum Water Flows and Levels Act, Chapter 90.22 RCW, in 1967; and the Water Resources Act of 1971, Chapter 90.54 RCW.

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), more recent rules include:

- Determinations of seasonal and year-round closures.²
- Management of groundwater withdrawals to protect surface water resources, including regulation of permit-exempt groundwater withdrawals.
- Water management tools to ensure reliable future water supplies.

¹ Instream flows are streamflow levels, set in rule and designated as an allocation under the water code, that protect and preserve instream resources such as wildlife, fish, recreation, navigation, aesthetics, water quality, and livestock watering from future allocations of water.

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

A series of significant court decisions have critically influenced Ecology's instream flow protection and water management framework. While these rulings do not directly restrict Ecology's authority to adopt instream flow protection in rule, they do affect the management of new water uses subsequent to rule adoption. These decisions have:

- Clarified what it means to protect instream flows from impairment;
- Brought groundwater withdrawals squarely within the scope of potential causes of impairment that must be addressed; and
- Verified the obligation under the Growth Management Act to ensure legal as well as physical water availability when local jurisdictions determine whether water is available for new development.

On October 8, 2015 the Washington State Supreme court ruled in *Foster v. Department of Ecology* that the Overriding Consideration of the Public Interest (OCPI) provision in RCW 90.54.020(3)(a) may only be used to allow temporary impairment of instream flows. This ruling further constrains Ecology's ability to adopt instream flows rules that provide any water availability for new uses.

Ecology's ability to successfully balance instream and out-of-stream uses has already been restricted since the State Supreme Court ruling in *Swinomish Indian Tribal Community v. Department of Ecology* on Oct. 3, 2013. The Washington state Supreme Court ruled in *Swinomish Indian Tribal Community v. Department of Ecology* that Ecology exceeded its authority in establishing reservations of water, for new uses that could impair the senior instream flows, when amending the rule for the Skagit watershed in 2006. The Court repealed the 2006 rule amendment, leaving in place the original rule adopted in 2001.³

The *Swinomish* decision has affected Ecology's progress on adopting instream flow rules in other watersheds. Any minimum flow requirements set by rule are water rights with seniority, as of the date of the rule, over all subsequent rights. This means that adopting rules in other basins that follow the "reservation model" employed in the 2006 Skagit Rule amendment would likely be vulnerable to legal challenges. Without reservations, adopting instream flow rules can preclude rural development if mitigation for streamflow impacts is not available. The challenge is especially acute in tributary areas, where smaller streams provide valuable spawning habitat and streamflows are often below instream flow levels in the late summer.

The primary efforts of Ecology's rulemaking staff during 2015 went into preparing two reports in response to legislative interest. The first report is titled Mitigation Options for Domestic Water Use in the Yakima Basin. It implements Section 302(10) of ESSB 6052, Chapter 4, Laws of 2015. The first draft of this report was presented to Ecology's Water Resources Advisory Committee (WRAC) on September 21, 2015. It is available on Ecology's webpage at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1511020.html>.

³ See the Rule Implementation section below for more information on the effect of the Supreme Court decision on water use in the Skagit River watershed.

The second report is titled Options for Mitigating the Mitigation Options for the Impacts of New Permit-Exempt Groundwater Withdrawals. During the 2015 session of the state Legislature, SB 5965 was introduced that would have required Ecology to prepare a report evaluating options for mitigating the impacts of permit-exempt groundwater withdrawals on base flows and minimum instream flows. SB 5965 did not pass the 2015 Legislature, but Ecology agreed to prepare a similar report. The first draft of this report was presented to Ecology's Rural Water Supply Strategies Workgroup on October 19, 2015. It is available on Ecology's Water Resource Advisory Committee (WRAC) webpage at: <http://www.ecy.wa.gov/programs/wr/wrac/rwss-leg.html>.

2015 Rulemaking Progress

Spokane River – Portions of WRIAs 54, 55, & 57

On January 27, 2015 Ecology adopted a new rule for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer. Rule adoption was recommended by the watershed planning units for WRIAs 55-57, and WRIA 54 to help protect flows for public resources that rely on clean flowing water (hydropower, water quality, recreation, aesthetic values, fisheries, etc.). The rule will also help protect Washington State's interests in the event of an interstate water rights conflict with Idaho. Ecology believes interstate conflict between Washington and Idaho about the sole-source SVRP Aquifer and the hydraulically connected Spokane River is inevitable. The new rule cannot affect water management in Idaho, but can help provide a solid basis for future regional water supply decision making.

WRIA 25 - Grays-Elochoman & WRIA 26 - Cowlitz

We filed proposed rules for WRIAs 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.

We agreed to slow future rulemaking until the local watershed planning unit could thoroughly review its plan and update recommendations for both WRIAs. From 2011 through 2013, the local planning unit broadened its base of citizen representation and public outreach.

On June 17, 2014, county commissioners in Lewis, Cowlitz, Wahkiakum, and Skamania counties adopted amendments to the watershed plan recommendations. The revised recommendations affect the Cowlitz watershed.

The new recommendations reduce the number of streams that would be closed to new withdrawals and call for reservations of water better scaled to meet future demand. The watershed planning process chose to recommend establishing reservations for future water use after considering: other water supply options; the amount of expected demand for water; and the potential impacts to instream resources from new water uses, particularly impacts to fish habitat.

The planning unit found that for rural areas in the watershed a reservation appears to be the best option available for new uninterrupted water use.

Ecology has begun issuing permits for new water rights in areas without closure recommendations. Rulemaking, however, is hampered by the 2013 decision in *Swinomish* and Ecology’s lack of clear legal authority to establish reservations of water that must rely on an OCPI finding to allow limited impairment of instream flows. Since rule adoption is on hold pending a rural water supply strategy, Ecology is exploring alternatives to implement plan recommendations such as a memorandum of understanding (MOU) with the counties.

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 October 3, 2013, the Washington Supreme Court invalidated 2006 amendments to the rule for the Skagit Watershed that established reservations of water. Rule adoption in the Samish subbasin is on hold.

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

Instream flow setting under the Watershed Planning Act Chapter 90.82 RCW

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

Of the 34 watershed planning units created, 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 implementation of adopted rules.

Table 1, below, summarizes projected rulemaking progress under the WPA through 2015.

Table 1. Rule Development Progress under the Watershed Planning Act RCW 90.82

Water Resource Inventory Area Name - Number	Start of Rule Development (File CR-101)	Rule Proposal (File CR-102)	Rule Adoption (File CR-103)
Entiat - 46	2004	2005	2005
Walla Walla – 32	2004	2007	2007

Wenatchee – 45	2007	2007	2007
Lewis – 27	2005	2008	2008
Salmon-Washougal – 28	2005	2008	2008
Quilcene-Snow - 17	2004	2009	2009
Elwha-Dungeness – 18 (Dungeness portion only)	2004	2012	2012
Grays-Elochoman – 25	2005	on hold	
Cowlitz – 26	2005	on hold	
Spokane 54, 55, & 57	2014	2014	January 2015

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 (See page 6, below).

A map showing the statewide status of instream flow rulemaking activities is located in the appendix.

Petition for Rule Amendment

The Administrative Procedure Act, Chapter 34.05 RCW, allows any person to request the adoption, amendment, or repeal of any rule. The agency then has 60 days to respond to the petition. Ecology’s instream flow rulemaking staff must provide the responses to petition requests.

Ecology received a petition to amend Chapter 173-531A WAC, Water Resources Program for the John Day-McNary Pools Reach of the Columbia River, WRIA 31 and parts of WRIsAs 32, 33, 36, and 37. The petition requested amending the rule to extend the period that water would be available from the reservations established for future irrigation use (WAC 173-531A-040) and municipal use (WAC 173-531A-050) from 2020 to 2060. Ecology determined it was necessary to deny the petition. Ecology has already begun work to evaluate future irrigation and municipal water supply needs within the John Day and McNary pools as part of the next Columbia River Long-Term Water Supply and Demand Forecast. The forecast is due to the Legislature in November 2016. Ecology will consider the development period for the reservations in the forthcoming supply and demand forecast along with continued discussions with the Office of Columbia River’s Policy Advisory Group.

Requests for Future Rulemaking

In 2014 several watershed planning units requested that Ecology initiate rulemaking to implement watershed plan recommendations regarding instream flows and future water management. No additional requests for rulemaking were received in 2015, however, Ecology continues to acknowledge the need for rulemaking in these areas.

Some watersheds are requesting new rules to protect instream flows and existing water users, and to make water availability determinations that will enable processing of pending water right permit applications. Other watersheds are requesting amendments to existing rules to refine instream flow protections and water management frameworks established in earlier rules.

The following watersheds have requested rulemaking:

- Wind-White Salmon (WRIA 29)
- Middle Snake (WRIA 35)
- Wenatchee (WRIA 45) (amendment)
- Methow (WRIA 48) (amendment)
- Foster/Moses Coulee (WRIs 50 and 44)
- Colville (WRIA 59) (amendment)

Ecology has no immediate plans for rulemaking in these areas. The primary reason is the effect of the *Swinomish* decision on Ecology's ability to develop rules that would create available water for future community growth in rural areas, without a high risk of being challenged.

In addition, more work is needed in these watersheds before rule making can proceed. We are working with stakeholders in these areas to support their efforts, for example: reviewing and negotiating scopes of work for assessments to support setting instream flows in the Middle Snake; and working with partners in the Colville for potential amendments to the existing instream flow rule. However, Ecology's resources for rulemaking are limited. In addition to completing rule adoption for the Spokane River, staff is engaged in the effort to find solutions for rural domestic water needs; responding to formal petitions to amend or repeal rules; responding to requests for information about instream flow protection; assisting with rule interpretation; and addressing pending litigation.

Rule Implementation

WRIs 3 and 4 - Skagit

The Skagit River Basin Instream Resources Protection Program rule (WAC 173-503) went into effect on April 14, 2001. It established instream flows throughout the basin to protect flow levels in streams. In 2006 the rule was amended to establish finite "reservations" of surface and groundwater for future out-of-stream uses. The reservations provided uninterrupted (year-round) water supplies for new agricultural, residential, commercial/industrial, and livestock uses,

distributed among 25 subbasins. The Swinomish Tribe challenged the establishment of the reservations in 2008 and appealed a Thurston County Superior Court finding in Ecology's favor in 2010.

On Oct. 3, 2013, the Washington State Supreme Court ruled in *Swinomish Indian Tribal Community v. Department of Ecology* that Ecology exceeded its authority in establishing reservations of water when amending the rule for the Skagit watershed in 2006. The decision reinstated the 2001 Skagit Instream Flow Rule. Under the 2001 rule, water rights established on or after April 14, 2001, are subject to curtailment whenever streamflows in the river fall below the instream flow levels protected in the rule, unless the impact of that use is mitigated.

Without mitigation to offset impacts on the instream flows established under the 2001 Rule, water is not available for new year-round uninterrupted appropriations in the Skagit River Basin. As such, without mitigation or an alternative water source for use during periods of interruption, applicants for subdivision approvals and building permits cannot meet the requirements for adequate water supply under RCW 58.17.110 and RCW 19.27.097. Accordingly, Ecology has notified the County that it should not approve subdivision and building permit applications absent the approval of a mitigation proposal and/or an alternative water source by Ecology.

The effect of the Supreme Court ruling in the Skagit watershed has been a near moratorium on new homes and subdivisions in rural areas where public water supply is not available. The decision also left many homes built after April 2001, relying on the invalidated reservations without an assured legal water supply. This raises concerns about sales of existing homes, property values, and property tax revenue for the County.

Ecology is looking for water supply solutions for the 475 homes and 8 businesses that had relied on Skagit reservations for their water supplies since 2001. Ecology has decided to exercise enforcement discretion and not curtail the water use of these homes and businesses. The Swinomish Tribe agrees existing water uses should not be curtailed while mitigation is being developed.

A total of \$3.225 million in state capital funding has been allocated to address water supply needs within the Skagit watershed. Ecology is working with local governments, tribes, water utilities, and land owners to develop sustainable water supply solutions to meet current and future water needs in the Skagit basin. Solutions being explored include mitigation strategies and alternative water supply options that avoid the need for mitigation.

Ecology, with assistance from Washington Water Trust (a non-profit organization with water banking experience) is working to develop the Skagit Water Exchange that is exploring all possible mitigation strategies to offset the impacts of new permit-exempt well withdrawals. As Ecology's Skagit Water Exchange adopts mitigation strategies in different stream reaches, property owners will be able to purchase mitigation credits for new uses that would impact that specific reach. However, there is no guarantee that a mitigation option will be found for every tributary.

While water supply solutions for the whole basin are being developed, water supply proposals for several individual residences have been approved by Ecology. All approvals have included communication with Skagit County and Tribal governments. The following water supply options are currently available to property owners in the Skagit Basin:

- Rainwater collection and/or trucking water, with a cistern for storage
- Hook up to a public water supply where available in a timely and reasonable manner
- Build in areas where the well will not be in hydraulic continuity with the Skagit River and not impact Skagit River flows (i.e. Padilla Bay area)
- Propose a mitigation plan for an individual site or group of sites (private mitigation plan)

Some homeowners have chosen to tear down and rebuild an existing house. The water supply for the older home becomes available for the new home.

A complete description of water supply solutions for the Skagit watershed is available on Ecology's webpage at <http://www.ecy.wa.gov/programs/wr/nwro/skagit-wtrsolut.html>.

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 streamflows in the Johns Creek subbasin of WRIA 14. The Tribe twice petitioned Ecology to amend the rule to limit future well use, and subsequently filed a lawsuit when Ecology denied both petitions. The Court of Appeals found that Ecology's decision not to engage in rulemaking was *not* arbitrary and capricious given the agency's contemplation of the petition, our competing priorities, and budgetary and staffing concerns.

A groundwater model has been developed to help determine management actions to protect streamflow in Johns Creek. Golder Associates (working for Ecology) and Keta Waters (working for the Squaxin Island Tribe) jointly developed a steady state, groundwater-flow model for the Johns Creek and Goldsborough Creek watersheds in Mason County.

Golder Associates assessed eight groundwater management scenarios to investigate the effects of future permit-exempt groundwater withdrawals on surface water in the Johns Creek watershed. The results indicate that instead of reducing stream flows, groundwater withdrawals will primarily decrease groundwater discharge to Oakland Bay. The percent change in streamflow modeled within reaches of Johns Creek ranged from a gain of 0.09 percent to a loss of 0.15 percent, with the slight increases of streamflows in the upper watershed due to the redistribution of water from septic return flows.

WRIA 18 - Dungeness

The water resources management rule for the Dungeness was adopted on November 16, 2012, and took effect on January 2, 2013. On December 21, 2012, Ecology and Clallam County signed an agreement to implement the new Dungeness water management rule. The agreement helps ensure that implementation of the Dungeness rule is integrated into the county's building permit process.

To help building permit applicants meet the new mitigation requirements, Ecology worked with Clallam County to establish the Dungeness Water Exchange, commonly called a "water bank." The exchange makes mitigation credits (water rights or portions of water rights) available to rural landowners and developers drilling wells or putting groundwater to a new beneficial use after the rule took effect. The mitigation credits guarantee that new water uses are both reliable and will not harm streamflows.

The Dungeness Water Exchange has been actively selling mitigation packages for new water uses. Twenty-four mitigation certificates for new homes were sold in 2015, and over 75 mitigation certificates have sold since the rule took effect. The mitigation cost of indoor domestic water for individual users has been offset by \$100,000 of state capital funds granted to Clallam County. \$9,000 of this grant funding remains as of October 14, 2015. Recently the Water Exchange created mitigation packages for new stockwatering use, in response to demand. Mitigation packages for marijuana growing are also being developed.

Since rule adoption, Ecology and Clallam County jointly hosted 10 rule implementation public forums, held about every two months. The forums provided an opportunity to explain implementation of the new rule, answer questions, discuss glitches and solutions, and monitor overall progress of the various elements of the new rule.

In 2013, the Legislature approved spending \$2.05 million of capital funds to develop projects and acquire water rights to enhance streamflows and provide mitigation water for rural development in the Dungeness watershed on the Olympic Peninsula. Work has been proceeding to put this funding to use.

There is strong local interest in developing mitigation for new outdoor water uses in the southern portion of the watershed. Presently mitigation is available for indoor domestic use only in that area. Mitigation for domestic use is currently available through a reserve of water established in the rule. The reserve does not provide water for outdoor use, hence the need for additional mitigation. Ecology and the Washington State Department of Fish and Wildlife are initiating a one year fish habitat flow sensitivity study that will provide information on the feasibility of additional mitigation for that area. A workgroup was convened to evaluate options for the southern portion of the watershed. Work was delayed over the summer due to the statewide drought impacting priorities. Ecology is expecting to re-convene the workgroup later this fall, but, the recent *Foster* decision diminishes the likelihood that mitigation for this area is possible.

Appeal of the Dungeness rule:

On December 31, 2014, The Olympic Resource Protection Council (ORPC) and two property owners in the Dungeness watershed on the Olympic Peninsula filed a lawsuit in Thurston County

Superior Court seeking to invalidate the Dungeness Instream Flow Rule. Ecology staff resources have been required to assist the Attorney General's Office with assembling the record for the court, and defending the adopted rule.

Judge Tabor has agreed to consider summary judgment on one legal issue raised by the appellants. The hearing on the summary judgment request will occur on December 18, 2105.

Appendix

Statewide Map of Instream Flows Set by Rule

