

REPORT TO THE LEGISLATURE



Statewide Progress on Setting Instream Flows

Introduction

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.”

Instream Flow Progress

Ecology has not adopted any instream flow rules since January of 2015.² Significant rulings of the Washington State Supreme Court have limited Ecology’s progress on adopting new rules. While recent rulings do not directly restrict Ecology’s authority to adopt instream flow protection in rule, they limit tools the agency has to protect instream flows in ways that do not preclude all other uses. In anticipation of legislative action, Ecology is not proposing to commence new rule making to adopt instream flows.

On October 6, 2016, the Washington State Supreme Court ruled in *Whatcom County v. Hirst*³ that Whatcom County has obligations to determine the physical and legal availability of water before issuing a building permit, beyond relying on Ecology’s instream flow rule as the basis for determining that water is available for permit-exempt wells in the Nooksack watershed. The court ruled that the County has an independent responsibility under the Growth Management Act to adequately protect water resources and prevent impairment of adopted instream flows. This

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 WAC 173-557 Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer.

³ *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016)

decision has limited rural home construction in Whatcom County and other counties with instream flow rules.

Even before the decision in *Hirst*, a series of significant court decisions critically influenced Ecology's instream flow protection and water management framework. These decisions have:

- Clarified that instream flows must be protected from any impairment by junior water users, and that there is no differentiation between *de minimis* or significant impairment (*Postema*⁴, *Foster*⁵, and now *Hirst*);
- Brought groundwater withdrawals squarely within the scope of potential causes of impairment that must be addressed (*Postema*);
- Clarified that the Overriding Consideration of the Public Interest (OCPI) authority in RCW 90.54.020(3)(a) may not be used to establish reservations of water for new uses that could impair senior instream flows. In addition, OCPI may be used only to allow temporary impairment of instream flows. Authorizing permanent withdrawals of water, including new domestic use, cannot rely on OCPI. (*Swinomish*⁶, *Foster*);
- Determined that mitigation of the legal injury (or impairment) to the senior instream flow water right cannot be done through providing ecological benefit, such as out-of-kind mitigation to aquatic habitat (*Foster*);
- Established mitigation standards that require “perfect” in-place, in-time and in-kind mitigation (*Foster*); and
- Verified local governments’ obligation under the Growth Management Act to ensure legal as well as physical water availability when determining whether water is available for new development (*Kittitas*⁷, and *Hirst*).

Taken together, these decisions affect Ecology's progress on adopting instream flow rules. Previous approaches used by Ecology to provide limited out-of-stream uses included using OCPI and establishing mitigation structures. Adopting rules relying on OCPI to establish a reservation of water for new uses would be vulnerable to legal challenges. Without reservations, adopting instream flow rules can preclude rural development if mitigation for streamflow impacts is not available.

⁴ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000)

⁵ *Foster v. Dep't of Ecology*, 142 Wn.2d 465, 362 P.3d 959 (2015)

⁶ *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013)

⁷ *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011)

Because of the *Foster* decision, developing adequate mitigation has become more challenging. Mitigation is especially difficult in tributary areas, where smaller streams provide valuable spawning habitat, late summer streamflows are often below instream flow levels, and few, if any senior water rights are present. Mitigation for rural water use that relies on acquiring senior seasonal (agricultural) water rights to offset the impact of new year-round domestic use is legally vulnerable.

Rule Implementation

Ecology staff are engaged in implementing instream flow rules throughout the state. Here are highlights from particularly challenging watersheds:

WRIAs 3 & 4 - Skagit

The effect of the *Swinomish* 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, which had relied on reservations of water, without an assured legal water supply when the reservations were invalidated in 2013. Ecology has exercised enforcement discretion and not curtailed the water use of these homes and businesses. The Swinomish Tribe agrees existing water uses should not be curtailed while mitigation is being developed.

Ecology is making progress on water supply solutions for the estimated 475 homes and 8 businesses that had relied on the invalidated Skagit reservations for their water supplies. 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.

Ecology has explored all possible mitigation strategies to offset the impacts of new permit-exempt well withdrawals, including:

- In January 2017, Ecology completed an assessment of groundwater flow in the Bayview area. This work delineated a 56-square-mile “water availability zone” where groundwater flows to saltwater and new water uses would not impact the protected Skagit River.
- Ecology is in the final stages of developing a mitigation plan that will allow for new development within the Big Lake/Nookachamps area. This proposed plan uses water rights acquired from the Big Lake Water Association to mitigate for new domestic uses.
- Ecology is in discussions with a public utility that holds senior water rights on the main stem of the Skagit River. We completed a hydrogeological analysis to determine an allowable mitigation area and are in ongoing discussions with the utility, area tribes, and stakeholders on next steps.

- We are working with a public utility that has pipeline running close to the headwaters of Carpenter Creek to assess the feasibility of a localized stream augmentation project. The intent of the project is to provide mitigation for downstream development in the Carpenter Creek subbasin.

WRIA 18 - Dungeness

The water resources management rule for the Dungeness was adopted on November 16, 2012, and took effect on January 2, 2013. 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. Over 218 mitigation certificates for domestic use have been sold since the rule took effect.

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. These funds have been used to purchase water rights to establish the Dungeness Water Exchange; to construct aquifer recharge projects that will mitigate impacts to smaller streams (four aquifer recharge projects have been completed and were recharged this past spring as a pilot test); and to investigate mitigation options for the southern portion of the watershed.

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 through a reserve of water established in the rule. The reserve does not provide water for outdoor uses. Ecology and the Washington Department of Fish and Wildlife conducted a fish habitat flow sensitivity study that provides information on the feasibility of additional mitigation for that area. While the report indicates habitat-based approaches to mitigation might be feasible in some areas, the recent *Foster* Supreme Court decision eliminates the possibility that any out-of-kind mitigation may be implemented.

Litigation

Appeal of the Dungeness rule

On December 31, 2014, Magdalena T. Bassett, Denman J. Bassett, Judy Stirton, and Olympic Resource Protection Council (ORPC) filed an appeal seeking to invalidate the Dungeness water management rule, adopted in November 2012. Prior to filing a judicial appeal of the rule, ORPC filed a petition to amend the Dungeness water management rule under the Administrative

Procedures Act, [RCW 34.05.330](#). After thoroughly evaluating and considering the issues raised, Ecology chose to not amend the rule.

The appeal was heard in Thurston County Superior Court on October 21, 2016. The court denied the petitioners' challenge to the rule. On January 4, 2017 the petitioners filed an appeal of the Superior Court decision with a request for direct review by the State Supreme Court. The Supreme Court issued an order on September 6, 2017 declining to hear the case and transferring it to the Court of Appeals. We are awaiting a court date with the Court of Appeals.

Appeal of the Spokane rule

On May 27, 2016, the Center for Environmental Law and Policy, American Whitewater, and Sierra Club filed an appeal of the Spokane River instream flow rule, adopted in January 2015. The petitioners claim the summer instream flow levels in the rule are not protective of instream resources. Prior to filing a judicial appeal of the rule, petitioners filed a petition to amend the Spokane River Instream Flow rule under the Administrative Procedures Act, [RCW 34.05.330](#). After thoroughly evaluating and considering the issues raised, Ecology chose to not amend the rule.

The appeal was heard in Thurston County Superior Court on June 9, 2017. The court denied the petitioners' challenge to the rule. On July 28, 2017 the petitioners filed an appeal of the Superior Court decision with a request for direct review by the State Supreme Court. We are awaiting a response from the Supreme Court.

Next Steps

Ecology will continue to work with the Legislature, key stakeholders and the Governor's office to help with developing legislative solutions to the water management challenges posed by recent court decisions.

Appendix

Statewide Map of Instream Flows Set by Rule

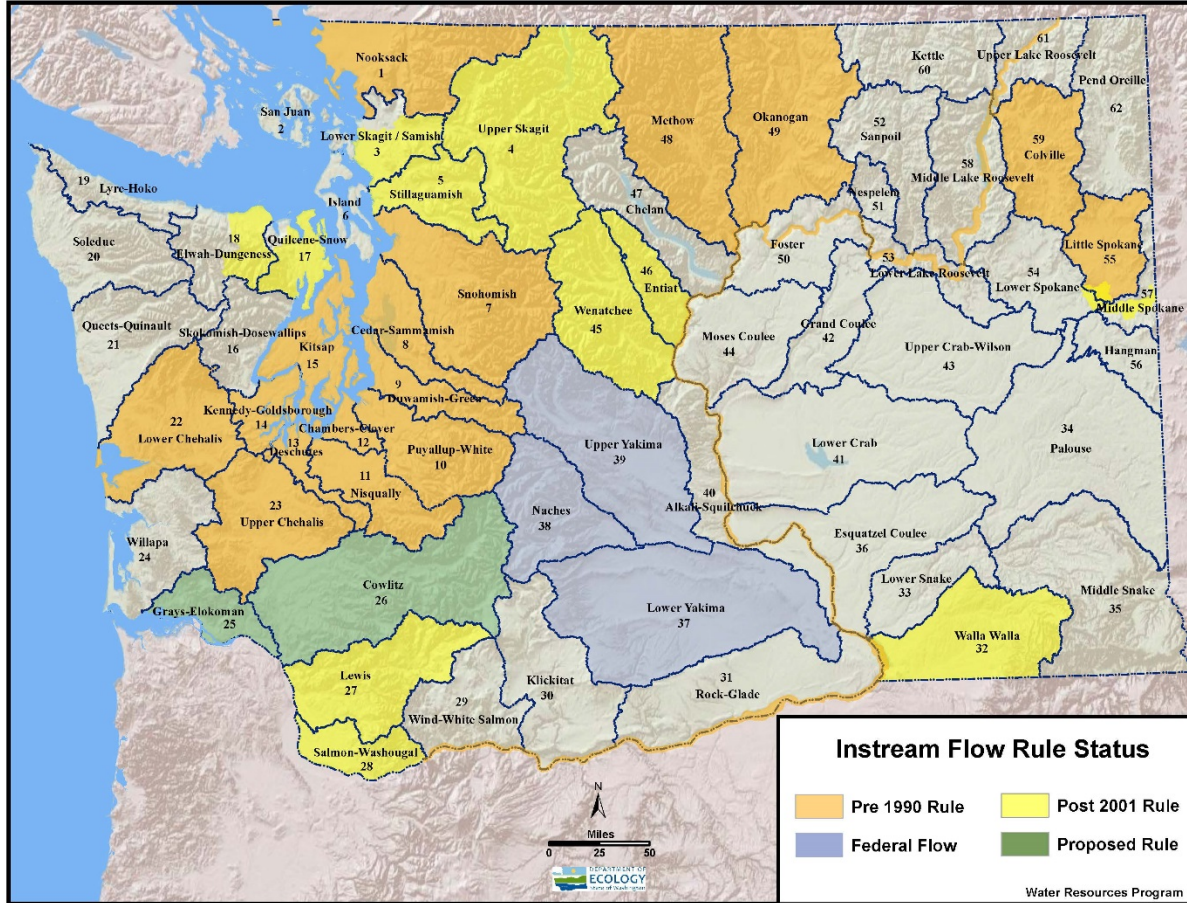


Figure 1. Instream Flow Rule Status

Publication information

This report is available on the Department of Ecology's website at <https://fortress.wa.gov/ecy/publications/SummaryPages/1711012.html>

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