

# 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 flows<sup>1</sup> 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.”*

### Progress on Setting New Instream Flows

In 2020 Ecology updated an instream flow rule for the Nooksack River basin<sup>2</sup> to meet the rulemaking requirements established in 2018 under Chapter 90.94 RCW. This rule did not modify the instream flow levels for the watershed; rather, it added provisions to offset the impacts of new permit exempt domestic wells and achieve a net ecological benefit.

Previously, Ecology last updated an instream flow rule in January of 2015 when the Spokane River and Spokane Valley Rathdrum Prairie rule was finalized.<sup>3</sup>

Ecology is not proposing to commence rulemaking to adopt new instream flows at this time. We are focusing our rulemaking resources on supporting the watershed management work in the fifteen water resource inventory areas (WRIAs) falling under new requirements in Chapter 90.94 RCW. These fifteen WRIAs (see Figure 1) already have instream flow levels in their rules, so any rulemaking under Chapter 90.94 RCW will likely focus on other elements of watershed management to address projected new permit-exempt domestic wells.

No new instream rules are planned for WRIAs not covered by Chapter 90.94 RCW. Recent court decisions, such as *Postema*<sup>4</sup>, *Kittitas*<sup>5</sup>, *Swinomish*<sup>6</sup>, and *Foster*<sup>7</sup>, will continue to make it challenging for Ecology to adopt new instream flow rules. While these cases do not directly

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<sup>1</sup> Under Chapters 90.22 and 90.54 RCW, Ecology establishes minimum flows. Minimum flows, also called instream flows, are streamflow levels set in rule that protect and preserve instream resources such as wildlife, fish, recreation, navigation, aesthetics, water quality, and livestock watering from future allocations of water.

<sup>2</sup> WAC 173-501 Instream Resources Protection Program - Nooksack Water Resource Inventory Area (WRIA) 1

<sup>3</sup> WAC 173-557 Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer.

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

<sup>5</sup> *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011)

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

<sup>7</sup> *Foster v. Dep't of Ecology*, 142 Wn.2d 465, 362 P.3d 959 (2015)

restrict Ecology’s authority to adopt instream flow protection in rule, they limit the available tools to balance water needs of diverse users.

### **Instream Flows and Streamflow Restoration under Chapter 90.94 RCW**

In January 2018, the Washington State Legislature passed a law in response to the *Hirst*<sup>8</sup> decision addressing streamflow protection and rural water availability. Chapter 90.94 RCW, Streamflow Restoration, provides Ecology and local governments with tools to protect and enhance stream flows while ensuring that water is available for homes in rural Washington.

The 2018 law requires planning efforts in fifteen specific WRIsAs that have existing instream flow rules adopted under Chapters 90.22 and 90.54 RCW. Although rules adopted in the past for these fifteen WRIsAs did establish instream flows, these existing rules did not regulate permit-exempt uses. The combined effect of the rules and recent court cases made it challenging for landowners to find water supply solutions for new homes.

Changes to current instream flows may be requested as part of the planning processes required under the new Chapter 90.94 RCW adopted in 2018; however, the new law does not require setting new instream flow levels or modifying existing instream flow levels in order to address the impacts of groundwater withdrawals for new rural homes. Instead, the law specifies several short rulemaking timelines which may limit the scope of any rule amendment and may preclude sufficient time to revise the already-established instream flows.

### **Status of Chapter 90.94 RCW Planning and Rulemaking**

Chapter 90.94 RCW set deadlines in early 2019 for two of the fifteen WRIsAs to complete their planning work. WRIA 11 (Nisqually) completed the planning requirements and no rulemaking was necessary under the plan.

Planning in WRIA 1 (Nooksack) did not result in an adopted plan by the statutory deadline. Per requirements in RCW 90.94.020, Ecology started rulemaking for WRIA 1 on February 5, 2019. Under the law, the rule amendment must be completed by August 1, 2020. On May 27, 2020 Ecology adopted an amended rule for WRIA 1 rule that adds restrictions on water use from new permit-exempt domestic wells, and adds flexibility for projects that retime high flows for instream resource benefits. The scope of the rule amendment did not include changing the instream flow levels in WRIA 1.

Planning groups in the remaining thirteen WRIsAs covered by Chapter 90.94 RCW must meet deadlines in 2021. In June 2020 Ecology adopted the watershed plan update developed by the WRIA 59 (Colville) planning group. The WRIA 49 (Okanogan) and WRIA 55 (Little Spokane) planning groups have also completed their watershed plan updates and submitted them to Ecology for our review and adoption, ahead of the deadline in the law. The other watershed planning groups continue to work towards their respective deadlines. Rulemaking may be requested as part of these planning efforts, or rulemaking may be required for a WRIA if the planning requirements are not met by the deadline. More information on the [status of the work under Chapter 90.94 RCW](#)<sup>9</sup> is available online and will be described in a separate report to the Legislature due in 2020.

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<sup>8</sup> *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016)

<sup>9</sup> <https://ecology.wa.gov/Water-Shorelines/Water-supply/Streamflow-restoration>

# Litigation

Litigation was resolved in a challenge to the 2015 Spokane instream flow rule.<sup>10</sup> In 2016, environmental and recreation groups appealed the rule, challenging the summer instream flow levels. On August 6, 2020 the Washington Supreme Court, in a unanimous decision, upheld Ecology’s approach to setting the instream flow to benefit fish and other beneficial uses of the Spokane River. This outcome underscores that Ecology’s work to protect instream resources is sound.

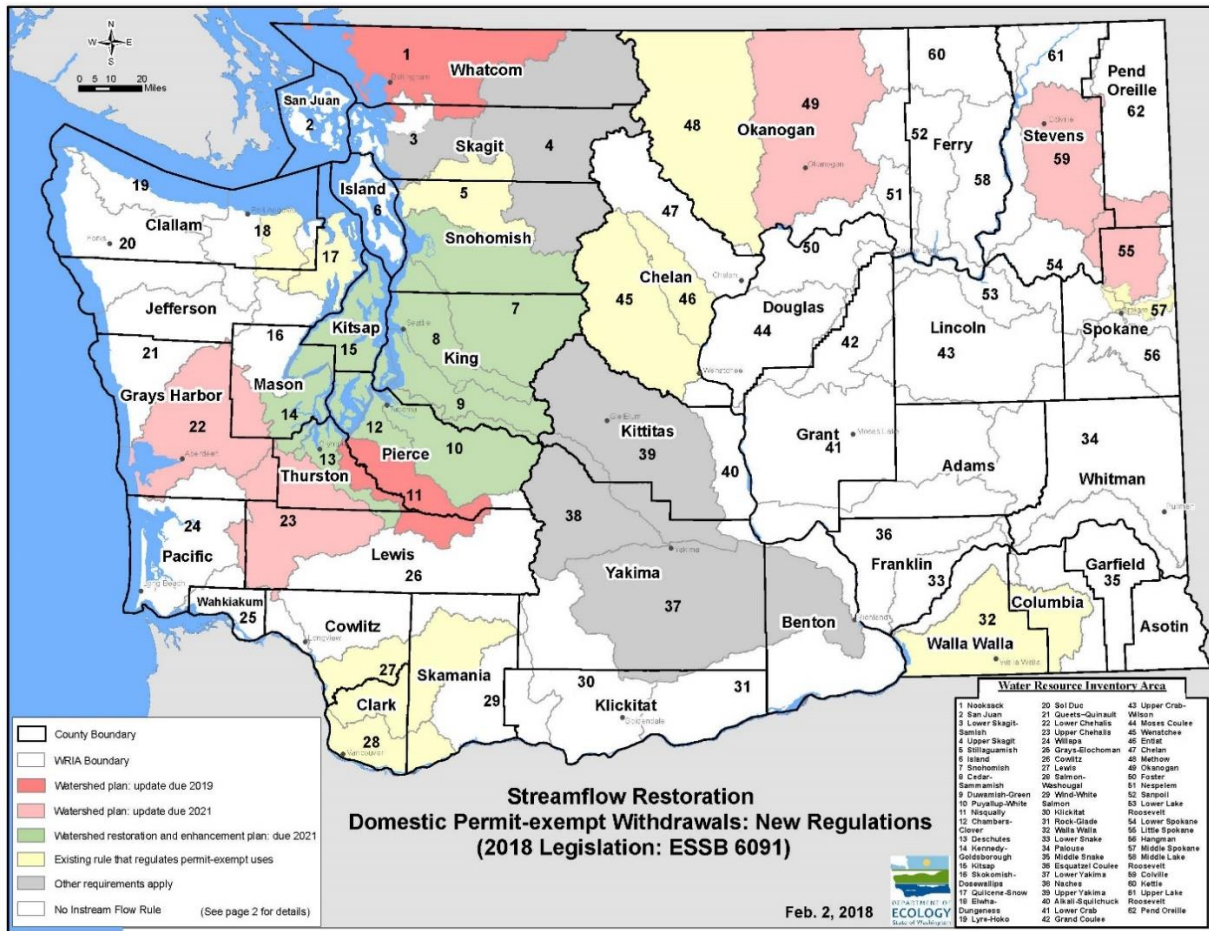


Figure 1. Statewide Map of Streamflow Restoration Planning

## Next Steps

Ecology staff are continuing to implement existing instream flow rules throughout the state:

- In all basins where instream flows are adopted, we condition new water right permits to protect the instream flow levels.

<sup>10</sup> WAC 173-557 Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer.

- In some basins we help local governments track allocations from water reserved for new uses.
- In others, we take an active role in finding or providing reliable water supplies for rural development and mitigation of impacts of new uses on instream flows.

In the upcoming year, Ecology will prioritize efforts around implementation chapter 90.94 RCW, working collaboratively with communities to identify their water management interests and priorities. Where plans are not approved because consensus cannot be achieved, Ecology will implement statutory requirements to amend instream flow rules.

## Publication information

This report is available on the Department of Ecology's website at <https://fortress.wa.gov/ecy/publications/SummaryPages/2011094.html>

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