

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.”

Progress on Setting Instream Flows

Ecology last updated instream flow rules in January of 2015.²

Significant rulings of the Washington State Supreme Court have impeded Ecology’s progress on adopting new rules. The court decisions in *Postema*³, *Kittitas*⁴, *Swinomish*⁵, *Foster*⁶, and *Hirst*⁷ have reaffirmed and reinforced that instream flows adopted in rule must be protected from any and all impairment. Consequently, it has been difficult for Ecology to adopt instream flow protections in rule in a way that does not preclude all other new uses. While these cases do not directly restrict Ecology’s authority to adopt instream flow protection in rule, they limit our available tools to balance the water needs of diverse users.

Streamflow Restoration

In January 2018, the Washington State Legislature passed a new law addressing streamflow protection and rural water availability. Engrossed Substitute Senate Bill 6091, now codified as Chapter 90.94 RCW, provides Ecology and local governments with tools to protect and enhance

¹ 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.

² WAC 173-557 Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer.

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

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

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

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

⁷ *Foster v. Dep’t of Ecology*, 142 Wn.2d 465, 362 P.3d 959 (2015)

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

stream flows while ensuring that water is available for homes in rural Washington. The law requires planning efforts be conducted in 15 water resource inventory areas (WRIAs) with existing instream flow rules adopted under chapters 90.22 and 90.54 RCW that did not regulate permit-exempt uses (See Figure 1). In these WRIAs, the combined effect of the recent court cases and instream flow rules had made it challenging for landowners to find water supply solutions for new homes. Under the new law:

- A landowner may build a home on a new permit-exempt domestic well in the WRIAs, subject to payment of a fee and restriction on water use.
- State, local and tribal governments working with stakeholder groups develop plans that identify projects to offset 20 years of domestic permit-exempt consumptive use projected for that area. Seven of the 15 WRIAs will update existing watershed plans originally developed under Chapter 90.82 RCW. The remaining WRIAs will create new watershed restoration and enhancement plans. Among other elements, planning groups may recommend that Ecology amend existing instream flow rules.
- If planning groups are not able to meet the deadlines established in the law for plan adoption, then Ecology is directed to begin rulemaking. Updated plans for WRIAs 1 (Nooksack) and 11 (Nisqually) are supposed to be adopted by February 1, 2019. Updated plans for WRIAs 22 (Lower Chehalis), 23 (Upper Chehalis), 49 (Okanogan), 55 (Little Spokane), and 59 (Colville) are supposed to be adopted by February 2, 2021. New plans are supposed to be adopted by June 30, 2021 for WRIAs 7 (Snohomish), 8 (Cedar-Sammamish), 9 (Duwamish-Green), 10 (Puyallup-White), 12 (Chambers-Clover), 13 (Deschutes), 14 (Kennedy-Goldsborough), and 15 (Kitsap).

Litigation

Ongoing litigation continues related to challenges to the Dungeness⁸ and Spokane instream flow rules. In 2014, groups petitioned Ecology to amend the Dungeness rule; upon the decision not to amend it, the petitioners appealed. The case is currently pending at the Court of Appeals.

In 2016, environmental and recreation groups petitioned Ecology to amend the Spokane rule; upon the decision not to amend it, petitioners appealed. The state Supreme Court denied the request for direct review. The appeal is also pending in the Washington State Court of Appeals.

At issue in both cases is whether Ecology established flows at the correct levels.

⁸ WAC 173-518 Water resources management program for the Dungeness portion of the Elwha-Dungeness water resource inventory area (WRIA) 18.

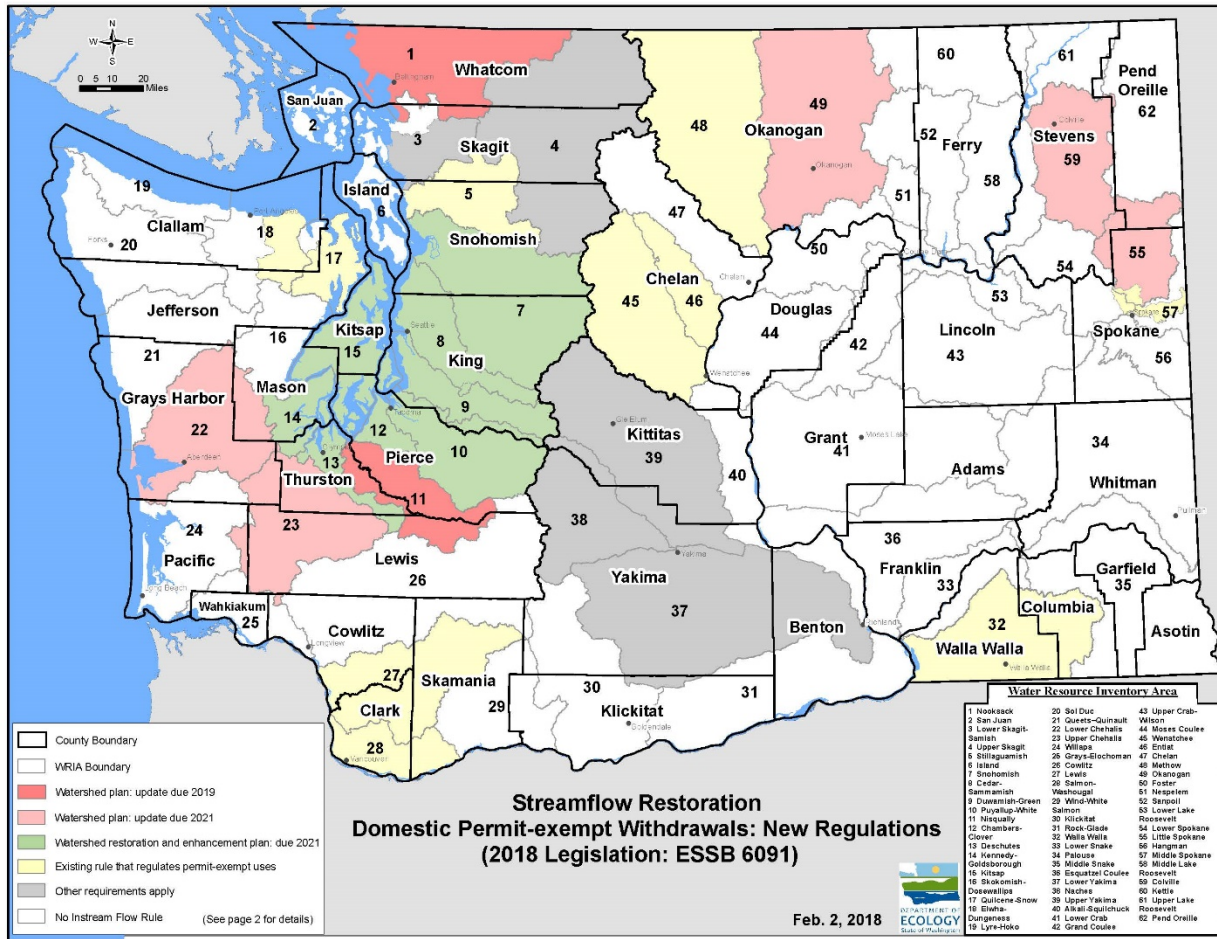


Figure 1. Statewide Map of Streamflow Restoration Planning

Next Steps

Ecology staff are implementing current 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.
- In some basins we are helping track allocations from water reserved for new uses.
- In others, we are taking an active role in finding or providing mitigation and reliable water supplies for rural development.

Ecology is not proposing to commence new rule making to adopt instream flows at this time, as we focus on supporting the planning groups under the new law. As planning groups finish their process under the new law, Ecology will amend existing instream flow rules consistent with the intent of chapter 90.94 RCW as needed.

Publication information

This report is available on the Department of Ecology's website at <https://fortress.wa.gov/ecy/publications/SummaryPages/1811015.html>

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