

# 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

Ecology last updated an instream flow rule in January of 2015 when the Spokane River and Spokane Valley Rathdrum Prairie rule was finalized.<sup>2</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.

No new instream rules are planned for WRIAs not covered by Chapter 90.94 RCW. Recent court decisions, such as *Postema*<sup>3</sup>, *Kittitas*<sup>4</sup>, *Swinomish*<sup>5</sup>, and *Foster*<sup>6</sup>, will continue to make it challenging for Ecology to adopt new instream flow rules. While these cases do not directly restrict Ecology’s authority to adopt instream flow protection in rule, they limit the available tools to balance water needs of diverse users.

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

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

<sup>4</sup> *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011)

<sup>5</sup> *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013)

<sup>6</sup> *Foster v. Dep’t of Ecology*, 142 Wn.2d 465, 362 P.3d 959 (2015)

## 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>7</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 for these fifteen WRIsAs did establish instream flows, these 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.

The planning processes required under Chapter 90.94 RCW do not require setting new instream flow levels or modifying existing instream flow levels. Changes to current instream flows may be requested as part of the planning efforts. However, 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. The scope of the WRIA 1 rule amendment includes adding restrictions on water use from new permit-exempt domestic wells, and adding flexibility for projects that retune high flows for instream resource benefits. **The scope of the rule amendment does 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. 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>8</sup> is available online and will be described in a separate report to the Legislature due in 2020.

## Litigation

Two instream flow rules have recently been challenged in court.

Litigation was resolved in the *Bassett v. Ecology*<sup>9</sup> case challenging the Dungeness instream flow rule<sup>10</sup>. The plaintiffs challenged the rule based on procedural and substantive requirements. The

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<sup>7</sup> *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016)

<sup>8</sup> <https://ecology.wa.gov/Water-Shorelines/Water-supply/Streamflow-restoration>

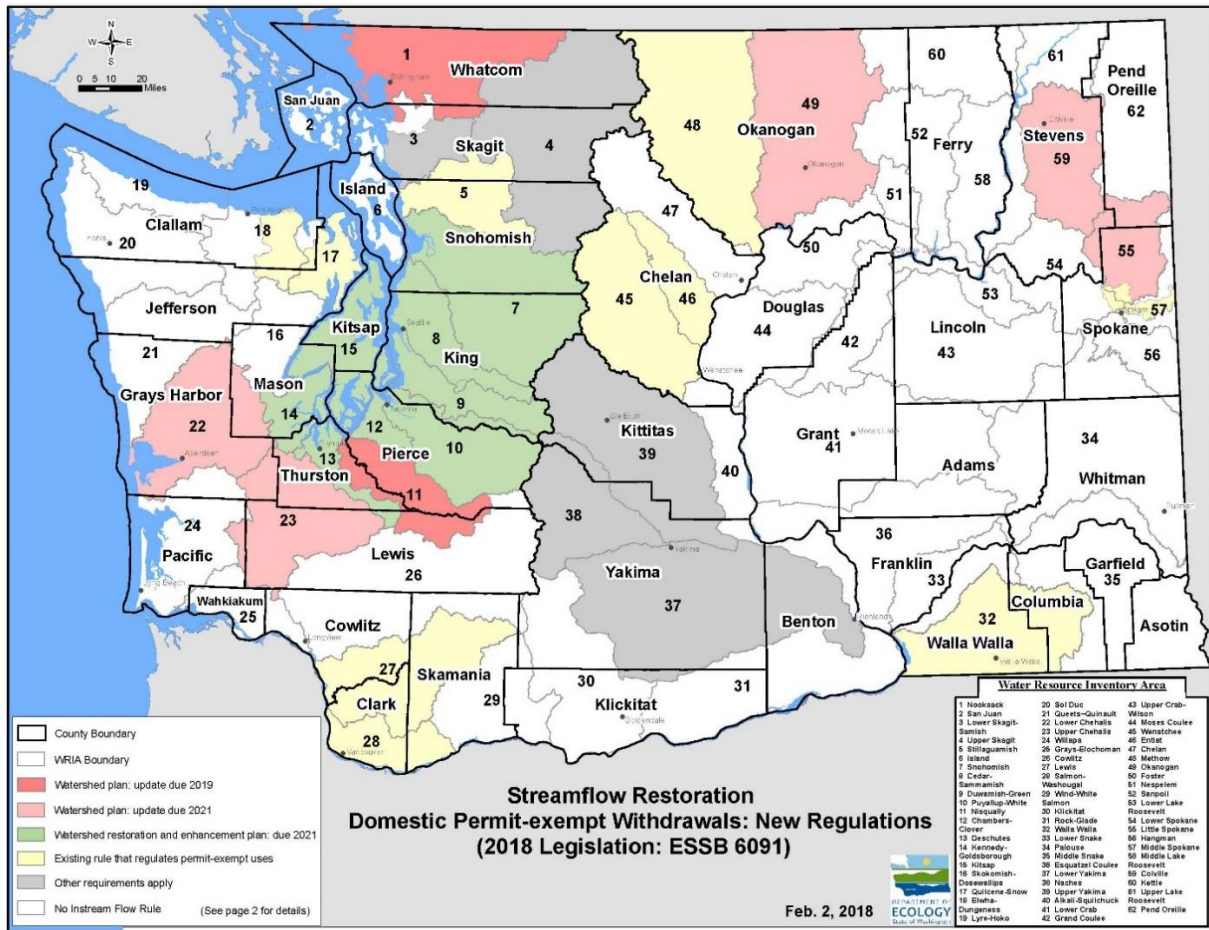
<sup>9</sup> *Bassett v. Dep't of Ecology*, 8 Wn.2d 284, 438 P.3d 563 (2019)

<sup>10</sup> WAC 173-518 Water resources management program for the Dungeness portion of the Elwha-Dungeness water resource inventory area (WRIA) 18.

Washington State Court of Appeals affirmed the Dungeness rule in its decision issued on April 2, 2019. The Washington Supreme Court rejected a request by the plaintiffs for a discretionary review of the decision.

Litigation is ongoing in a challenge to the 2015 Spokane instream flow rule.<sup>11</sup> In 2016, environmental and recreation groups appealed the rule challenging the summer instream flow levels. The Thurston County Superior Court denied the challenge to the rule, and plaintiffs appealed the Superior Court decision to the Court of Appeals.

On June 26, 2019 the Court of Appeals published a decision invalidating the Spokane instream flow rule. The Court of Appeals later clarified that its decision applies only to the 850 cubic feet per second summer flow in the rule. The court found that Ecology had too narrowly focused on flows to support fish habitat and did not give enough consideration to other instream values, specifically recreation. Ecology has requested discretionary review by the Washington Supreme Court and expects to hear in early 2020 if the case will be accepted.



**Figure 1. Statewide Map of Streamflow Restoration Planning**

<sup>11</sup> WAC 173-557 Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer.

## 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.
- 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.

## Publication information

This report is available on the Department of Ecology's website at <https://fortress.wa.gov/ecy/publications/SummaryPages/1911086.html>

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