

# 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 2021 no new instream flow rules were commenced by Ecology. Ecology last updated an instream flow rule in May 2020 when the WRIA 1 (Nooksack) instream flow rule update was adopted.<sup>2</sup>

Ecology is not proposing to commence additional rulemaking to adopt new instream flows this year, but anticipates potential future rulemaking in the next few years as a part of Streamflow Restoration, chapter 90.94 RCW (see below). No new instream rules are planned for WRIsAs 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> 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.

### 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.

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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> *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)

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

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 established instream flows, the existing rules did not regulate permit-exempt uses. The combined effect of the rules and recent court cases made it challenging for rural landowners to find water supply solutions for new homes.

Changes to current instream flows could potentially have been requested as part of the local planning processes required under chapter 90.94 RCW. However, the 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. Local planning is now complete and no changes to instream flows were requested in the nine WRIsAs with adopted plans.

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

Chapter 90.94 RCW set planning deadlines in early 2019 for two WRIsAs. 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. Ecology completed rulemaking for WRIA 1 in 2020. The scope of the rule amendment did not include changing the instream flow levels in WRIA 1.

Chapter 90.94 RCW set deadlines in 2021 for the remaining thirteen WRIsAs to complete their planning work, and local planning is now complete for all fifteen WRIsAs. Of the thirteen, WRIsAs 9 (Duwamish-Green), 10 (Puyallup-White), 12 (Chambers-Clover), 22 (Lower Chehalis), 23 (Upper Chehalis), 49 (Okanogan), 55 (Little Spokane), and 59 (Colville) completed the planning requirements and no rulemaking was necessary. Planning in WRIsAs 7 (Snohomish), 8 (Cedar-Sammamish), 13 (Deschutes), 14 (Kennedy-Goldsborough), and 15 (Kitsap) did not result in adopted plans by the statutory deadline and are moving to the next phase outlined in RCW 90.94.030(3)(h), with anticipated potential future rulemaking in the next few years. More information on the status of the work under chapter 90.94 RCW is available on our [Streamflow Restoration webpage](#)<sup>8</sup>.

### **Litigation**

Litigation was resolved in 2020 to a challenge to the Spokane instream flow rule.<sup>9</sup> There is no other active litigation on instream flow rules.

### **Next Steps**

Ecology staff continue 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.

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

<sup>9</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.

Over the past year, Ecology focused its staff resources on the successful implementation of chapter 90.94 RCW. To date, Ecology completed one new update to an instream flow rule, consistent with the requirements in that law. In the upcoming year, Ecology plans to prioritize efforts around completing Streamflow Restoration plans for the five remaining WRIAs and moving to the next phase, which likely requires rulemaking in future years.

## Publication information

This report is available on the Department of Ecology’s website at <https://apps.ecology.wa.gov/publications/SummaryPages/2111024.html>.

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