



ESSB 6091 – Streamflow Restoration

Initial Policy Interpretations

This document reflects the Department of Ecology’s current interpretations of key provisions of Engrossed Substitute Senate Bill (ESSB) 6091. It is not a comprehensive analysis of the new law, but rather an explanation of certain provisions. **We are still reviewing and analyzing the law – answers provided here are subject to future revision.** We may choose to incorporate these ideas into a formal policy or guidance document; however, we have yet to determine a timeframe for that to happen.

Updated March 20, 2018. Revisions include:

- Page 1: Adding a new section on applicability
- Page 2: Revising the topic on building permit applications
- Page 3: Revising the topic on subdivision applications
- Page 3: Revising the topic on water use restrictions
- Page 3: Revising the topic on fees
- Page 4: Revising the topic on streamflow enhancement projects
- Page 4: Revising the topic on Watershed Restoration and Enhancement Committees
- Page 5: Revising the topic on plan requirements
- Page 6: Adding a topic on scope of rulemaking

Applicability

The new law establishes clear standards for what constitutes proof of an adequate water supply when applying for a building permit or subdivision for a home relying on a new permit-exempt well. See our [online map](#) for a guide.

- **In basins with instream flow rules that do not regulate permit-exempt uses** (labeled in red, pink, and green on our map), evidence must be consistent with the new programs established in Sections 202 and 203 of the law, including requirements about a fee and water use restriction. Alternatively, building permit applicants may show other evidence of an adequate water supply that complies with RCW 90.03 and 90.44.
- **In basins with instream flow rules that explicitly regulate permit-exempt uses** (labeled in yellow on our map), evidence must be consistent with requirements set forth in the rule.
- **In the Yakima basin** (labeled in gray), we may impose additional requirements to satisfy adjudicated water rights.
- **In the Skagit basin** (also labeled in gray), additional requirements apply due to the *Swinomish* Supreme Court decision.
- **In the rest of the state** (labeled in white), a well report showing physical availability of water is sufficient proof of an adequate water supply.

In all parts of the state, a county may impose additional requirements.

How does ESSB 6091 affect Ecology’s water right permitting? Our approach to water right permit decisions will not change. The bill did not modify sections of statute affecting our permitting decisions, authority, or approach except as it relates to processing permits under the “Foster Pilot” in Sections 301 and 302. We are evaluating how best to provide procedural guidance for the five identified projects.

Does the new law expand areas covered under a rule? No. The new law identifies which Water Resource Inventory Areas (WRIAs) have new regulations. In some watersheds, however, instream flow rules only cover portions of the WRIA. When that is the case, the new regulations apply to the geographical areas directly covered by a rule. The remainder of the WRIA is only subject to limits under Section 101(1)(g) and RCW 90.44.050.

The remainder of this document, with the exception of the metering pilot program, is only applicable in the 15 basins with instream flow rules that do not regulate permit-exempt uses. These basins were directly affected by the state Supreme Court’s decision in Hirst: 1-Nooksack, 7-Snohomish, 8-Cedar-Sammamish, 9-Duwamish-Green, 10-Puyallup-White, 11-Nisqually, 12-Chambers-Clover, 13-Deschutes, 14-Kennedy-Goldsborough, 15-Kitsap, 22-Lower Chehalis, 23-Upper Chehalis, 49-Okanogan, 55-Little Spokane, and 59-Colville.

Requirements affecting local land use decisions

Building permit applications

The new law places additional requirements on building permit applicants for new homes relying on a permit-exempt groundwater withdrawal in Hirst-affected basins. The new requirements include a fee and water use restriction. The following permit-exempt water uses are not subject to these new requirements:

- **Existing wells and water users:** The Legislature wrote the new law so that wells constructed in a Hirst-affected basin before the effective date of the act (January 19, 2018) would serve as proof of an adequate water supply for a building permit. Development proposals relying on wells constructed in these basins in compliance with RCW 18.104 before the effective date of the act are not subject to the new fees and restrictions. This is regardless of whether the well was put to beneficial use prior to January 19, 2018.
- **Domestic uses not requiring a building permit:** Only domestic uses for projects requiring new building permits are subject to the new requirements. There are no new requirements for a landowner who already has a building permit for their project.
- **Industrial and stockwatering uses:** Per our interpretation of the term “domestic use” (below), we interpret the new law to limit water use under the exemptions in RCW 90.44.050 for domestic water use and watering of a non-commercial lawn or garden. The other uses exempt from permitting (industrial use including irrigation and stockwatering) are not restricted beyond

existing legal limitations under RCW 90.44.050, and, in some cases, restrictions identified in instream flow rules adopted under RCW 90.22 or 90.54. Commercial uses, like a restaurant, typically fall under the industrial exemption, and thus are not affected by the new law.

Subdivision applications

Subdivisions. The new law requires that subdivisions comply with the water use restrictions and fees set forth in Sections 202 and 203. Specifically, local governments must ensure that the \$500 fee is collected for each new building permit for a home relying on a permit-exempt withdrawal within the subdivision and that the water use restrictions are recorded on each property title. We interpret that local governments may carry out these requirements either at the subdivision stage of permitting or when issuing the building permit. Local governments must continue to follow RCW 90.44.050 and relevant case law that provide limitations on the use of permit-exempt wells. Because the new law imposes limitations on building permits, local governments may choose to update regulations to specify these requirements on plats.

New requirements

Water use restrictions. Under the new law, applicants relying on a permit-exempt well for a new home in an affected basin may use a maximum annual average of 950 or 3,000 gallons per day (GPD) per connection for domestic use, depending on which WRIA they are located in (see our [map](#) for details). The water use restrictions remain in place until and unless we amend the applicable instream flow rule to change them.

- **Domestic use:** The Legislature did not define “domestic use” in the new law. However, they chose to specify that during a drought, we may curtail use to only 350 GPD per connection for “indoor domestic use” in selected basins. This distinction leads us to interpret that the larger quantities authorized in non-drought years (950 or 3,000 GPD, depending on which basin) include indoor and outdoor uses for a household (including watering of a lawn and noncommercial garden).
- **Maximum annual average:** The water use restrictions are based on a maximum annual average withdrawal. We interpret this to mean that a home’s water use cannot exceed 950 or 3,000 GPD as the average over the entire year. However, all new permit-exempt uses, including group domestic, are still restricted by the 5,000 GPD limit under RCW 90.44.050. As an example, a new homeowner in an affected basin could withdraw 4,000 gallons on a summer day, so long as they did not do so often enough that their annual average exceeded the 950 or 3,000 gallon limit.
- **Per connection:** The Legislature specified that the water use restrictions are “per connection.” Thus, we interpret that each home within a subdivision is limited to the maximum annual average of 950 or 3,000 GPD for domestic use. However, as mentioned above, all new permit-exempt uses, including group domestic, are limited to 5,000 GPD under RCW 90.44.050. Therefore, while a home within a subdivision may withdrawal 3,000 GPD under the new law, the entire project is still restricted to the 5,000 GPD limit for domestic use plus the irrigation of no more than one-half acre of lawn and noncommercial garden throughout the subdivision.

Fees. The law imposes a \$500 fee on all new building permits for homes relying on a permit-exempt well in an affected basin. The fee is paid to the local government at the time of applying for a subdivision

or building permit. The new fee is not required to be paid at the time a well is drilled. The new \$500 fee is separate and in addition to existing well drilling fees required under RCW 18.104. The fee remains in place until and unless we amend the applicable instream flow rule to change it.

Obligations for recording. Under Sections 202(5)(a) and 203(4)(a)(i), local governments must ensure relevant water use restrictions are recorded on the title to affected properties, which would be either limits to 950 GPD or 3,000 GPD, depending on the specific watershed. We recommend local governments use the following language: “Domestic water use at this property is subject to a water use limitation of a maximum annual average withdrawal of [three thousand or nine hundred and fifty] gallons per day, per connection, subject to the five thousand gallon per day limit in RCW 90.44.050.”

In addition, under Section 203(4)(b), local governments would need to ensure the potential for curtailment to 350 GPD during a declared drought, where applicable, is also recorded. We recommend local governments use the following language: “If a Drought Emergency Order is issued pursuant to RCW 43.83B.405, domestic water use at this property may be curtailed to no more than three hundred and fifty gallons per day per connection, for indoor use only. Notwithstanding the drought restriction to indoor use, a fire control buffer may be maintained.”

Low-impact development. In basins identified in Section 203, building permit recipients are required to employ low-impact development techniques. For local governments that do not have local low-impact development standards, [guidance is available on our website](#).

Basin planning

Streamflow enhancement projects. The Legislature authorized \$300 million over 15 years to be used for restoring and enhancing streamflows statewide. Although we are to prioritize spending funds in the 15 Hirst-affected basins, the law does not limit projects to those watersheds. Work is underway to develop a transparent system for the prioritization and evaluation of proposed projects. This spring, we plan to provide detailed information about accessing funding for projects under the current legislative appropriation. In the summer, we plan to begin accepting funding proposals. Decisions on project proposals are anticipated in the fall. We have yet to determine the process for subsequent funding rounds.

Watershed planning units. For information about Section 202 watersheds, please see “Section 202 watersheds” below.

Watershed Restoration and Enhancement Committees. Under Section 203, we prepare and adopt Watershed Restoration and Enhancement Plans in collaboration with committees made up of local governments, tribes, and stakeholders. For plan development, we are committed to ensuring that the committee has access to sufficient technical support, like hydrogeologists, GIS analysts, and relevant data; we will not be expecting other committee members to provide those resources (unless they wish to provide them). Once a plan is developed, the committee may adopt the plan only with the approval

of all committee members.¹ Then, if necessary, we will amend instream flow rules to incorporate provisions of the plan. We have not yet established procedures or guidelines for finalization of plans or for subsequent evaluation and adoption.

Plan requirements. Sections 202 and 203 establish the requirements for an adopted plan. Specifically, under subsections 202(4)(b) and 203(3)(b), plans must identify projects necessary that at a minimum, offset the consumptive impact of new permit-exempt domestic water use. While projects must replace the consumptive use from permit-exempt wells with water (in-kind mitigation), they are not limited to strictly in-time, in-place mitigation. Planning groups must prioritize projects that replace the consumptive use from new domestic permit-exempt withdrawals in the same basin or tributary and during the same time that the use occurs. If this is not feasible, however, planning groups may recommend projects that are in other basins/tributaries and/or that replace water only during critical times for fish.

Prior to adoption of an updated plan, we must determine that the actions in the plan will result in a “net ecological benefit” to instream resources in the WRIA. The planning group may recommend out-of-kind projects to help achieve this standard (these projects will not count towards offsetting the consumptive use from new domestic permit-exempt withdrawals).

We will be developing criteria for determining net ecological benefit to instream resources over the next two to three months. We intend to develop an interim standard to use to evaluate early-planning basins. Once the interim standard is developed, we will engage in a more thorough public process to develop a final standard.

Definitions of *water use*. Sections 202 and 203 have multiple references to how plans are to offset or account for water use in the basin (Sections 202(4)(b), 202(4)(c), 203 (3)(b), 203(3)(c), 203(3)(d), 203(3)(e)). Sections 202(4)(b) and 203(3)(b) state: “At a minimum, the [plan] must include those actions that the planning units determine to be necessary to offset potential impacts to instream flows associated with permit-exempt domestic water use.” Subsequent subsections (Sections 202(4)(c), 203(3)(c), 203(3)(d), 203(3)(e)) use slightly different verbiage. Consistent with the intent of the entire law, we interpret all six subsections to refer to the consumptive water use of new permit-exempt domestic withdrawals. This interpretation is based on principles that statutes should be read as a whole and should be interpreted to be internally consistent. Planning units may choose, and are encouraged, to identify projects in their plans that offset consumptive uses beyond domestic permit-exempt uses; however, plans are not required to include additional projects. Guidance on how planning units are to perform consumptive use analyses is provided in a [supplemental document](#).

When is Ecology required to amend instream flow rules? There are two circumstances under which we must adopt rules to incorporate plan provisions. In addition, we may adopt rules if we believe it to be necessary for another reason.

¹ If a committee fails to adopt a plan by their prescribed timeline, they are to send the draft plan to the Salmon Recovery Funding Board (SRFB) for its review. The SFRB makes recommendations and sends them to us. We will then amend the draft plan and adopt it into rule.

In WRIsAs identified in Section 202:

- (a) If the updated plan recommends a change to the fee or water use restriction prescribed in the law; or
- (b) If the planning unit fails to adopt an updated watershed plan by their prescribed timeline.

In WRIsAs identified in Section 203:

- (a) If the adopted plan recommends a change to the fee or water use restriction prescribed in the law; or
- (b) If the basin committee fails to adopt a plan by their prescribed timeline. In this case, the draft plan goes to the Salmon Recovery Funding Board; they make recommendations, then we amend and adopt the plan. We must then adopt the plan into rule.

Scope of rulemaking. The new law requires that we update instream flow rules to incorporate plan recommendations, either when the planning unit fails to adopt the plan by their prescribed timeline, or when the plan recommends changes to the water use restriction or fee. We interpret that when amending a rule, we may take a targeted approach and only update specific provisions addressed in the adopted plan (like water use restriction and fee). As there are no requirements in the new law that we broadly review existing instream flow rules, we do not interpret that we must reevaluate parts of the rule that are not addressed in the plan, such as instream flow levels or stream closures, though we retain the authority to do so if needed. If planning units recommend changes to instream flow levels or other recommendations outside the scope of the fee and water use restriction, we will evaluate this recommendation during the plan development process and, if necessary, during rulemaking.

Requirements under the State Environmental Policy Act (SEPA). SEPA review will be necessary for the adoption of updated watershed plans and watershed restoration and enhancement plans under ESSB 6091. Counties and planning units should conduct a non-project SEPA analysis for each adopted plan prior to plan adoption. At the beginning of the SEPA process, counties may assess whether an Environmental Impact Statement (EIS) is necessary using the environmental checklist. Note that we will not do an additional statewide programmatic EIS for the new requirements under ESSB 6091, as was done in 2003 for watershed planning under RCW 90.82. When doing the SEPA review, counties and planning units may draw upon existing SEPA documents, such as the 2003 programmatic EIS and other supporting resources, including the technical studies completed in the watershed planning process. Once a SEPA analysis is completed, counties and the planning units may or may not also need to complete SEPA on individual projects, depending how projects conform under the criteria provided in RCW 89.08.460.

Section 202 watersheds

Watershed planning terminology. Section 201(2) clarifies that the term “lead agency” has the same meaning as defined in RCW 90.82.060. Under RCW 90.82, a lead agency is the entity that coordinates staff support and receives grants.

ESSB 6091 also uses the terms “initiating government” and “planning unit,” however, these terms are not clarified or defined in ESSB 6091. We interpret these terms to also have the same meaning as described in RCW 90.82.060.

Under RCW 98.82.060, initiating governments include:

- All counties within the WRIA(s);
- The largest city or town within the WRIA (or each WRIA in the case of multi-WRIA watershed planning) unless the WRIA does not contain a city or town;
- The water supply utility obtaining the largest quantity of water from the WRIA (or each WRIA); and
- Tribes, if they accepted the invitation to participate in watershed planning.

The composition of the planning units under RCW 90.82 were determined by the initiating governments and were to provide for a wide range of water resource interests (RCW 90.82.060 (5) and (6)).

Watershed planning units. In WRIAs where planning units created under RCW 90.82 are still active, we will work with those existing groups. In WRIAs where planning units created under RCW 90.82 are no longer active, we will work with initiating governments to reestablish planning units that include the range of representation in the original planning unit to the extent practicable. We do not intend to follow the process in RCW 90.82.060(6) to reestablish a planning unit for the purpose of implementing ESSB 6091.

Tribal participation. Under Section 202(3), the lead agency is required to extend an invitation to each federally recognized tribe with a usual and accustomed fishing area within the WRIA to participate as part of the planning unit. It is the tribes' choice whether to participate and the extent of their participation; however, we expect the planning process to move forward regardless of tribal participation. We will communicate directly with lead agencies regarding inviting tribal participation under the new law. We also commit to government-to-government communication with tribes throughout implementation of the new law.

Review of existing watershed plans. Under Section 202(2), Ecology shall work with the initiating governments and the planning units described in RCW 90.82 to review existing watershed plans.

We interpret the review of existing watershed plans as a procedural step to help inform the participants in the planning process in their endeavor to update the watershed plan as directed under Section 202(4)(a). We do not interpret the new law to necessitate a comprehensive review of the entire watershed plan. As stated in Section 202(4)(a) the purpose of the review is to identify:

- The potential impacts of exempt well use;
- Evidence-based conservation measures; and
- Projects to improve watershed health.

Updating watershed plans. Section 202(4)(a) of the new law calls for initiating governments, in collaboration with the planning unit, to update the watershed plan to include recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids. Additional language in sections 202(4)(c), (5), and (7) refers to adoption or approval of the updated watershed plan.

We interpret the requirement to update the watershed plan to be limited to the objectives of the new legislation; a complete update of all the elements of the original watershed plan is not required.

We do not interpret the language in ESSB 6091 calling for the adoption or approval of the updated watershed plan as a requirement to follow the watershed management plan approval procedures in RCW 90.82.130. The initiating governments and planning unit may decide how to approve the update plan. They may choose to follow the procedures in RCW 90.82.130.

Metering

Metering pilot program. The new law directs us to initiate a metering pilot program in the Dungeness Basin and in Kittitas County (Section 204). We are working with the entities that are implementing existing programs (the Washington Water Trust in the Dungeness Basin and with Kittitas County) to implement this section. We are developing a process to purchase and provide meters. We anticipate paying for new meters once we have this process in place; we do not intend to reimburse homeowners who bought meters before we launch the new process. Landowners wanting to build immediately using a permit-exempt well in these basins may purchase their own meter through the existing program, or wait until we have our new process in place to obtain a meter free of charge.

Contacts

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