

IMPLEMENTING CHAPTER 90.94 RCW (ESSB 6091)

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Today's presentation



- What was the Hirst decision about?
- Legislative response and passage of ESSB 6091 (chapter 90.94 RCW)
- Ecology's implementation efforts
- What's next?

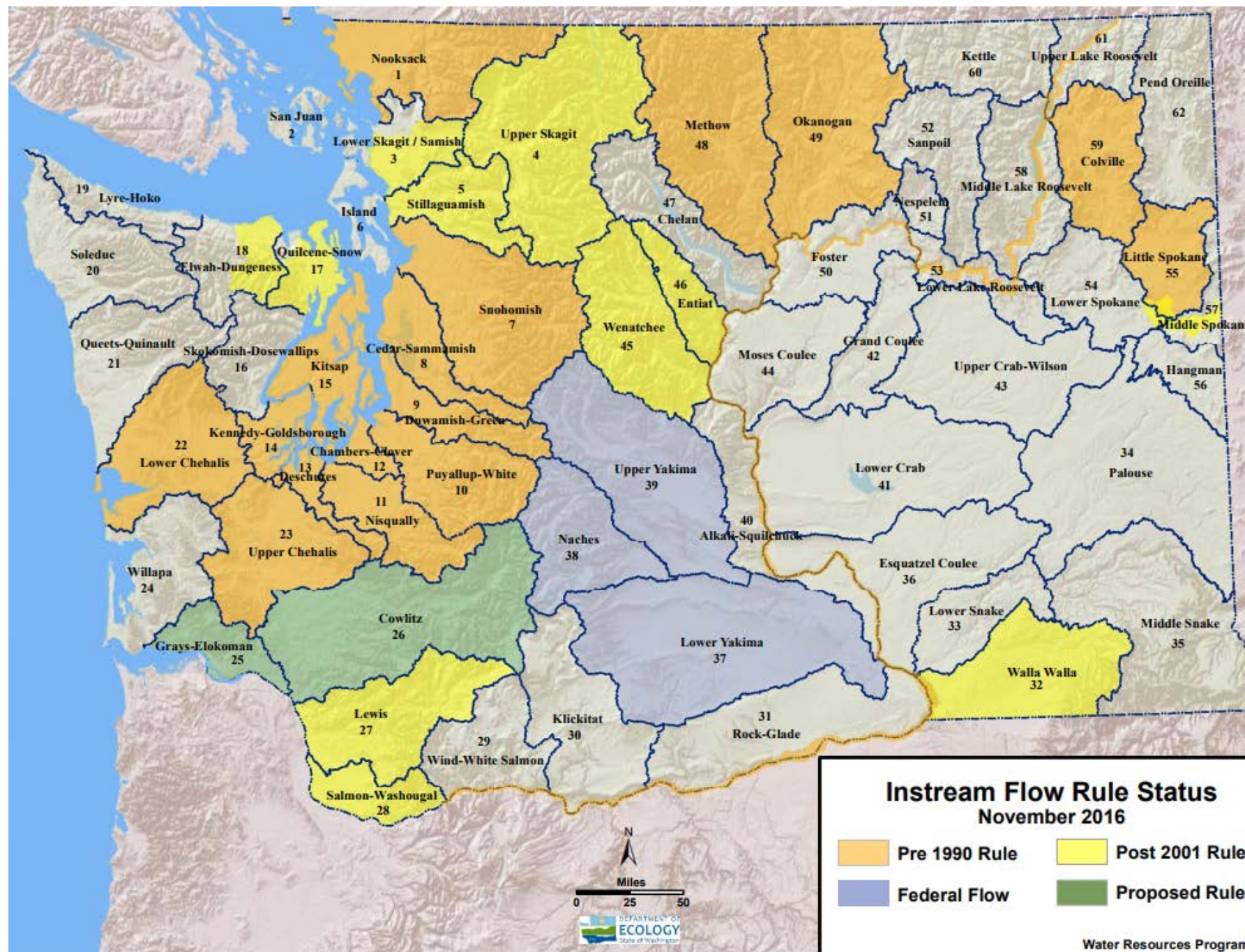
We manage water resources to meet the needs of people and the natural environment, in partnership with Washington communities.



WATER for PEOPLE, FARMS & FISH

Water Resources Act (1971)

- “Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, **fish and wildlife... are declared to be beneficial**” (RCW 90.54.020(1)).
- “The quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) Perennial rivers and **streams of the state shall be retained with base flows** necessary to provide for preservation of wildlife, fish...” (RCW 90.54.020(3)).



Postema decision (2001)

Appeal of permit denials for groundwater in hydraulic continuity with “closed” surface water sources.

- Instream flow rights are rights get the same protection as any other water right.
- No impairment to existing rights allowed, even *de minimis* impairment.
 - “Any effect on the flow or level of the surface water” in closed streams would mean impairment.



Growth Management Act (1991)



Two relevant provisions

- “The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies.”
- “Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building.”

Whatcom County v. Hirst, et al. (2016)

The WA Supreme Court ruled that the plan failed to sufficiently protect water resources under the Growth Management Act.

- Counties have an independent responsibility to ensure there is no impairment to instream flows
- Cannot allow even *de minimus* impairment
- Must “go beyond” state rule if needed to meet GMA obligations
- Moratorium issued in Whatcom Co. (as well as others)

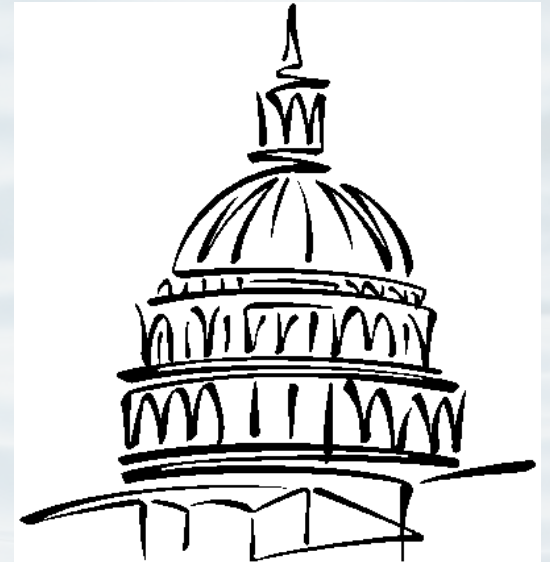


Major themes of 2017 Legislature

Hirst important priority

- No agreement on what needed to be done (if anything)
- About 20 different “Hirst bills” introduced
- Fundamental split on many issues
- Longest session in history ended without agreement

\$4 billion capital budget held up for the first time in State’s history – tied to Hirst resolution



ESSB 6091 / chapter 90.94 RCW



* Also included Legislative Mitigation Task Force pilot projects, metering pilot projects

In Hirst Basins:

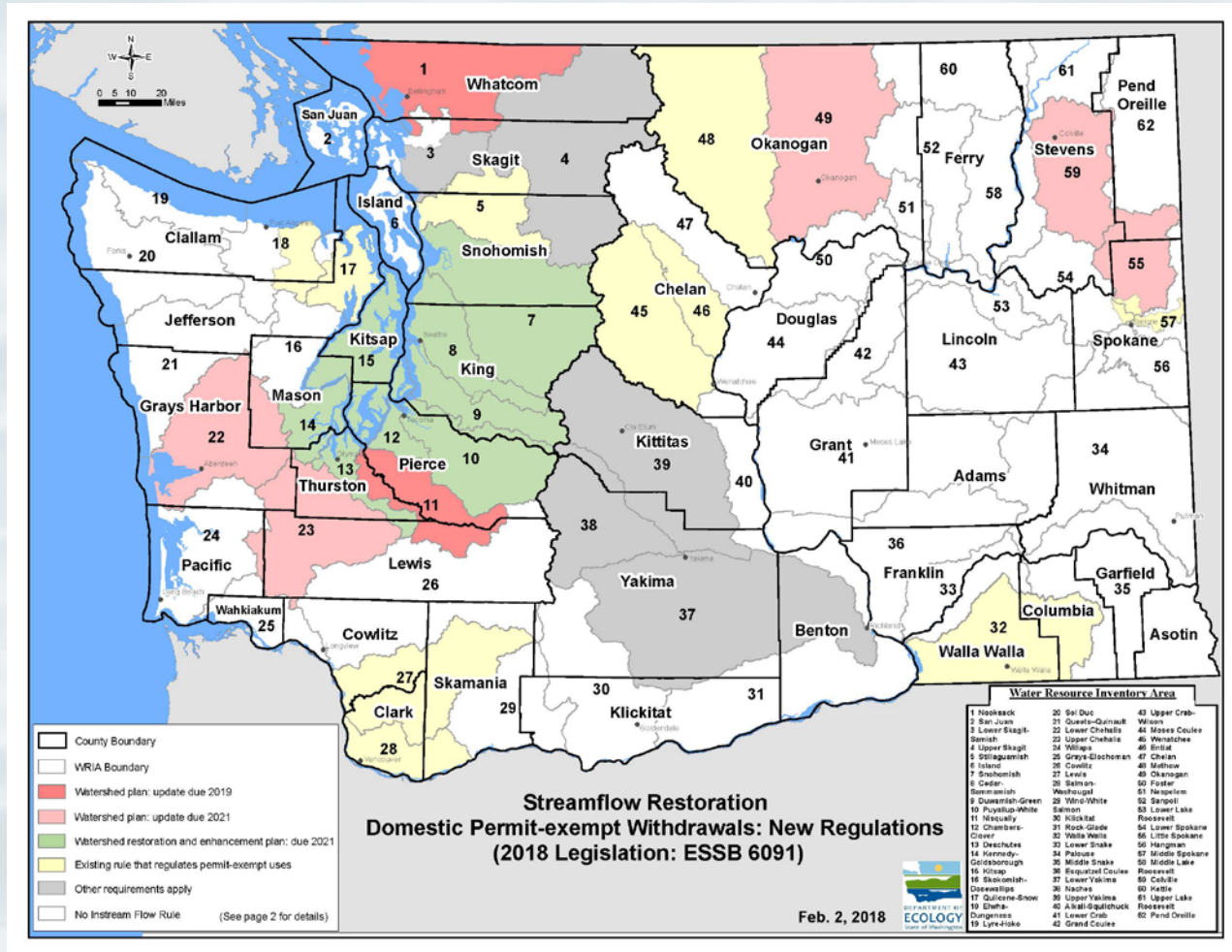
- People can build homes using a permit-exempt well; potential impacts authorized
- \$500 fee for each new home
- Water use restrictions
- Planning process in each “Hirst” basin

Statewide:

- Counties can rely on Ecology rules for GMA compliance
- Impacts offset through streamflow restoration projects (\$300M for 15 years)

ESSB 6091 / chapter 90.94 RCW

- Plans due in one year in WRIAs 1 and 11
- Some basins rely on chapter 90.82 RCW planning units
- Ecology invites entities in other basins for planning committees
- Basins with instream flow rules that regulate permit-exempt uses
- “Other” requirements



Implementation

Ecology's role:

- Leading and participating in planning
- Evaluating and approving plans
- Financial support and selection of projects

Key products/actions completed:

- Planning guidance and support
- Net ecological benefit
- Project funding criteria and decisions



Initial guidance



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.

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

- Initial policy interpretations issued within weeks of new law passing – focus on immediate needs/questions
- Updated twice so far (last update in March 2018)
- New draft policy under public review
- Addresses ambiguous language and questions we have received

Net Ecological Benefit

Interim Guidance issued in June 2018

What plans should include:

- Describe all the impacts
- Describe any ecological impacts that are not offset in-place and in-kind
- Detailed hydrological analysis, conceptual or numerical model
- Monitoring and evaluation plans
- Scientific sources and methods



Interim Guidance for Determining Net Ecological Benefit

*for streamflow restoration planning
and water permit mitigation pilots
under the 2018 Streamflow
Restoration Act*

June 2018
Publication 18-11-009

Basins planning under RCW 90.94.020

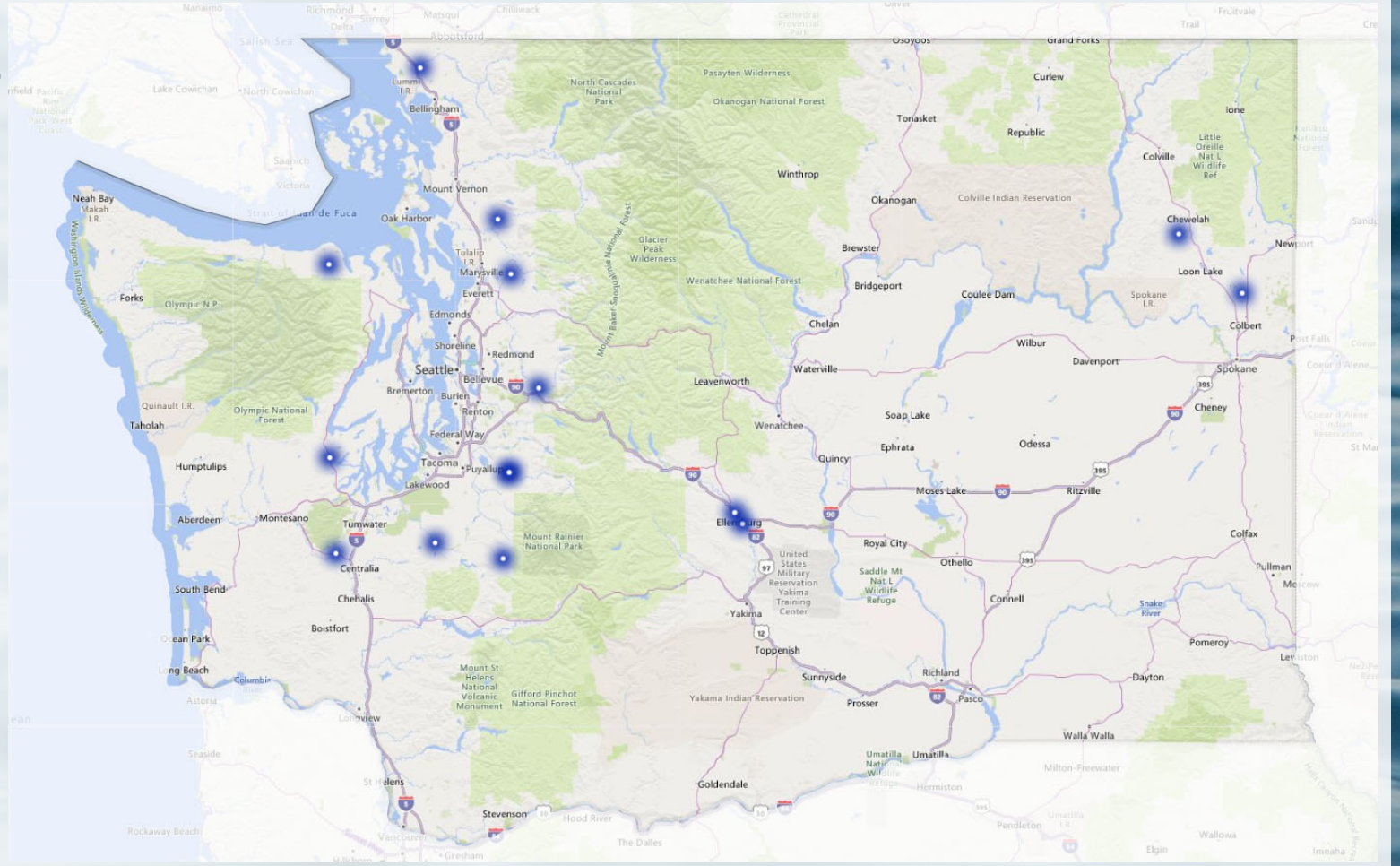
Watershed	Status	Current Focus
Nooksack (WRIA 1)	Did not approve plan	Rulemaking per RCW 90.94.020
Nisqually (WRIA 11)	Approved plan	Pursuing project development
Chehalis (WRIAs 22 & 23)	Actively meeting	Work groups & data collection
Okanagan (WRIA 49)	Actively meeting	Work groups & data collection
Little Spokane (WRIA 55)	Actively meeting	Data collection & project identification
Colville (WRIA 59)	Actively meeting	Data collection & project identification

Basins planning under RCW 90.94.030

Watershed	Status	Current focus
Snohomish (WRIA 7)	Actively meeting	Charters, work groups, & data collection
Cedar-Sammamish (WRIA 8)	Actively meeting	Charters, work groups, & data collection
Duwamish-Green (WRIA 9)	Actively meeting	Charters, work groups, & data collection
Puyallup-White (WRIA 10)	Actively meeting	Charters, work groups, & data collection
Chambers-Clover (WRIA 12)	Actively meeting	Charters, work groups, & data collection
Deschutes (WRIA 13)	Actively meeting	Charters, work groups, & data collection
Kennedy-Goldsborough (WRIA 14)	Actively meeting	Charters, work groups, & data collection
Kitsap (WRIA 15)	Actively meeting	Charters, work groups, & data collection

Projects approved for funding in 2019

- Initial \$20 M legislative appropriation in 2018
- Guidance issued mid- 2018
- Project solicitation through fall 2018
- Reviewed in Nov/Dec
- Successful applicants notified in Jan 2019



More on 2019 Streamflow projects

- 46 applications received totaling \$74M requested
- 16 projects approved
- Types of projects funded:
 - Shallow aquifer recharge
 - Off-channel water storage
 - Water right acquisition
 - Flow supplementation
 - Floodplain function protection and restoration
 - Reclaimed water expansion to improve streamflow



Looking forward

- **WRIA 1 (Nooksack) and WRIA 11 (Nisqually)**
 - No adopted plan in WRIA 1
 - Adopted plan in WRIA 11
- **Rulemaking – WRIA 1**
- **Ongoing planning, plans due in February or June, 2021**
 - Rulemaking required if plans are not adopted
- **Funding for projects**



Amendment to Chapter 173-501 WAC,
Instream Resources Protection Program-
Nooksack Water Resource Inventory Area
(WRIA) 1

Preliminary Draft Rule Language for Public Comment

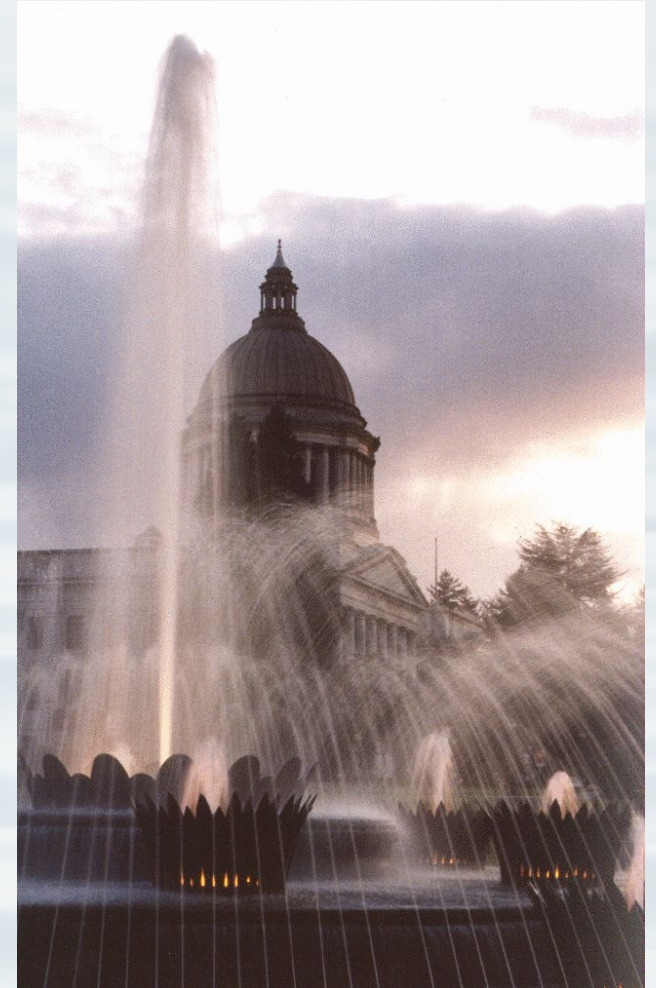
April 8 – May 10, 2019

WRIA 1 Rule amendment

- Informal review draft for WRIA 1 Nooksack Basin instream flow rule
- Public meetings in April
- Included limits on indoor and outdoor use of water
- Heard strong concern expressed at public meetings
- Adoption required by Aug. 1, 2020 under RCW 90.94.020(7)(a)

Updating policy guidance

- **Scope of instream flow rulemaking**
- **How to distribute funding to ensure legislative priorities maintained**
 - Must ensure adequate funding is available to implement plan recommendations
- **How is “success” defined?**
 - Fundamental disagreement on how Ecology has characterized what should be achieved
- **Taking comments on updated policy document, with final to be completed by July 31, 2019**



Final Net Ecological Benefits Guidance

- Preliminary guidance being used by planning units that will be adopting plans in 2019
- Final guidance will be issued by July 31, 2019 and be informed by additional research
 - These questions are challenging- not apples to apples
 - Received input from a team that included expertise from state, federal and academic researchers
 - Obtaining input from the public and planning groups
 - Looked to other models (e.g. HEA, ecosystem services)



Project funding rule: chapter 173-566 WAC



Permanent rule for FY 2020 and beyond

- Public hearing on March 5, 2019
- Legislature appropriated \$40 M for FY19-21
- Anticipate adoption of final rule in July

Legislative geographic priorities

- Basins planning under RCW 90.94.020 and .030
- Areas where metering pilots are occurring

Project priorities

- Creating water supply to offset rural domestic use
- Improving streamflow and instream resources

Final considerations

- **Success will be defined by the desire to succeed in each planning group**
 - Not based on technical definitions or more specific standards
- **What can be achieved is constrained by reality**
 - Resources, while significant, are limited
 - “Doing more” in one watershed will be at the detriment of others
- **Real improvements can be attained for instream resources**
 - Our goal should include doing the best we can with what we have
 - Measure success; build on success; show that collaboration works

Web page resources

The screenshot shows the Washington Department of Ecology website. The header includes the logo and navigation links: Regulations & Permits, Research & Data, Site Map, and Contact Us. A search bar is located below the header. The main navigation bar includes Home, Air & Climate, Water & Shorelines (selected), Waste & Toxics, and Spills & Cleanup. The breadcrumb trail reads: Water & Shorelines > Water supply > Streamflow restoration. A left sidebar menu lists various water supply topics, with 'Streamflow restoration' selected. The main content area features a title 'Streamflow restoration' and a paragraph explaining the new law in response to the 'Hirst decision'. A highlighted box titled 'I want to...' contains three links: 'Go to the watershed plan archive', 'See an interactive map of where the new law applies', and 'Read a handout: "Focus On: New streamflow restoration law"'. Below this, a section titled 'What does the law do?' contains a bullet point about the law's focus on 15 watersheds and standards for rural residential permit-exempt wells.

- Overview of the law
- Guidance documents
- Historical watershed planning documents
- Comment on NEB guidance and streamflow policy
- Regional contact information

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

Thank you!

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ECOLOGY
State of Washington