

# REPORT TO THE LEGISLATURE



## Statewide Progress on Setting Instream Flows

### Introduction

In the Water Resources Act of 1971, the Washington Legislature identified the preservation and protection of instream resources for future generations as a fundamental value of the state's water resources policy. The Legislature further authorized Ecology to establish minimum instream flows for streams, lakes, and other public waters through the adoption of administrative rules under chapter 90.22 and 90.54 RCW. Since then, Ecology has adopted 29 instream flow rules in watersheds around the state.

The Department of Ecology (Ecology) has prepared this report to the Legislature on the progress of setting instream flows 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 2024, Ecology began no new instream flow rulemaking. Ecology last updated an instream flow rule in May 2020 when the Nooksack Water Resource Inventory Area (WRIA) 1 instream flow rule update was adopted.<sup>1</sup> In 2025, Ecology anticipates updating several existing instream flow rules as a part of Streamflow Restoration, chapter 90.94 RCW (see below).

No new instream rules are planned. Recent court decisions, such as *Postema*<sup>2</sup>, *Kittitas*<sup>3</sup>, *Swinomish*<sup>4</sup>, and *Foster*<sup>5</sup> continue to make it challenging for Ecology to adopt new instream flow rules. While these cases do not 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> WAC 173-501 Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA) 1.

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

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

<sup>4</sup> *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013)

<sup>5</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>6</sup> decision addressing streamflow protection and rural water availability. Chapter 90.94 RCW, Streamflow Restoration, provides tools to Ecology and local governments to protect and enhance streamflows while ensuring that water is available for new homes in rural Washington.

The 2018 law required planning efforts in fifteen specific WRIs that have existing instream flow rules adopted under chapters 90.22 and 90.54 RCW. The existing rules in these fifteen WRIs established instream flows but 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.

Chapter 90.94 RCW does not require setting new or modifying existing instream flow levels to address the impacts of groundwater withdrawals for new rural homes. The law requires rulemaking in certain circumstances (e.g., updating fees or water use restrictions), but does not require updates to instream flow levels already established.

## Status of chapter 90.94 RCW planning and rulemaking

Local planning is now complete for all fifteen WRIs required under chapter 90.94 RCW. Planning in five of these WRIs (7 – Snohomish, 8 – Cedar-Sammamish, 13 – Deschutes, 14 – Kennedy-Goldsborough, and 15 – Kitsap) did not result in adopted plans by the statutory deadline. Plans that were not adopted are required to go through rulemaking, as outlined in RCW 90.94.030(3)(h).

Ecology anticipates that rulemaking updates for the five WRIs that did not meet the plan adoption deadline will begin in 2025. These rulemakings will be completed within the 2-year statutory deadline. More information on the status of the work under chapter 90.94 RCW is available on our [Streamflow Restoration webpage](#)<sup>7</sup>.

## 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.
- In some basins we help local governments track allocations from water reserved for new uses. We plan to continue requiring tracking and reporting by local governments.
- 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.

Ecology anticipates that rulemaking updates for the five WRIs that did not meet the plan adoption deadline will begin in 2025. These rulemakings will be completed within the 2-year statutory deadline.

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<sup>6</sup> *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016)

<sup>7</sup> <https://ecology.wa.gov/Water-Shorelines/Water-supply/Streamflow-restoration>

## Publication Information

This report is available on the Department of Ecology's website at <https://apps.ecology.wa.gov/ecy/publications/SummaryPages/2411025.html>

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<sup>8</sup> [www.ecology.wa.gov/contact](https://www.ecology.wa.gov/contact)