



# ESSB 6091

## 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.

### Updates:

- This document was revised on March 2, 2018.
- We recently solicited and collected questions and comments about our initial policy interpretations. We will update this document to address that input once our review and analysis is complete.
- What's new in this version:
  - Page 4: Added a topic on "water use" to the "Basin planning" section
  - Page 5: Added a topic on SEPA requirements to the "Basin planning" section
  - Page 2: Revised the topic on "obligations for recording" under the "Requirements affecting local land use decisions" section

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## Requirements affecting local land use decisions

**The new law impacts only new domestic uses.** Existing homeowners and water users are not affected by the new law, which went into effect on January 19, 2018.

**Existing wells are exempt from the provisions of the new law.** The Legislature wrote the new law so that wells constructed in the Hirst-affected basins<sup>1</sup> before the effective date of the act would serve as proof of an adequate water supply for a building permit. Wells constructed in these basins in compliance with chapter 18.104 RCW are not subject to the new restrictions, limitations, and fees. This is regardless of whether the well was put to beneficial use prior to January 19, 2018.

**Subdivisions.** The new law does not place additional requirements per se at the subdivision stage of permitting. Counties must continue to follow 90.44.050 for water supply for subdivisions, and relevant case law which provides limitations on the use of permit exempt wells. Because the new law imposes

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<sup>1</sup> The basins that were directly affected by the State Supreme Court's decision in *Hirst* are those with pre-2000 instream flow rules. This includes the following WRIAs: 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.

limitations on building permits, counties may choose to update regulations to specify these requirements on plats.

**Which new uses are affected by ESSB 6091?** The new law provides specific regulation for new permit-exempt domestic uses requiring a building permit. 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 chapters 90.22 or 90.54 RCW.

**What is domestic use?** The Legislature did not define “domestic use” in the new law. The Legislature chose to specify that during a drought, only 350 gallons per day (GPD) may be used 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).

**How much water is legally allowed for domestic use in Hirst-affected basins?** Under the new law, applicants relying on a permit-exempt well for a new home may use a maximum annual average of 950 GPD or 3,000 GPD for their indoor and outdoor use, depending on which water resource inventory area (WRIA) they are located in (see our [map](#) for details). All new permit-exempt uses, including group domestic, are still restricted by the 5,000 GPD limit under RCW 90.44.050. For 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.

**New fees.** The law imposes a \$500 fee, which is paid to the local government at the time of applying for a 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 chapter 18.104 RCW.

**Does the new law expand areas covered under a rule?** No. The new law identifies which 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.

**Obligations for recording.** Under Sections 202(5)(a) and 203(4)(a)(i), counties (or some cities) must record relevant water use restrictions, which would be either limits to 950 GPD or 3,000 GPD, depending on the specific watershed. We recommend 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), counties (or some cities) would need to record the potential for curtailment to 350 GPD during a declared drought, where applicable. We recommend 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 counties or cities that do not have local low-impact development standards, [guidance is available on our website](#).

## Impacts on Ecology water right permitting

**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, and 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.

## 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 will work 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.

## Basin planning

**Streamflow enhancement projects.** The Legislature authorized \$300 million for 15 years to be used for restoring and enhancing streamflows statewide. Although funding is to be prioritized within the basins in which planning is being conducted, the language does not limit projects to those basins. We have not yet developed criteria for approving funding.

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

**Watershed Restoration and Enhancement Committees.** Under Section 203, we convene a group of local governments, tribes, and stakeholders to develop a Watershed Restoration and Enhancement Plan. If all members of the committee agree to approval of a plan, then we will proceed to adopt a plan.<sup>2</sup> Then, if necessary, we will amend instream flow rules to incorporate provisions of the plan. We have

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<sup>2</sup> 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 then we amend the draft plan and adopt it into rule.

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 to offset the impact of permit-exempt domestic water use. In-time, in-place mitigation is not required to offset this impact. We and local planning partners must prioritize projects that replace the consumptive impact in the same basin or tributary and during critical times to fish; if this is not feasible, however, we may invest in projects that are in other basins/tributaries and during other times of the year. However, the consumptive impacts from domestic permit-exempt wells must be offset within the WRIA with “water-for-water.” While we can invest in out-of-kind projects, those projects are “extra” and cannot be counted towards offsetting the consumptive impact of domestic permit-exempt withdrawals. In addition, prior to adoption of an updated plan, Ecology must determine that the actions in the plan will result in a net ecological benefit to instream resources in the WRIA.

We are continuing to evaluate Sections 202 and 203 in more detail and will provide additional guidance as developed. In addition, Ecology will take the lead in developing criteria for determining net ecological benefit to instream resources. We anticipate that the process to develop this criteria will involve tribes and other agencies.

**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.

In WRIsAs identified in Section 202:

- (a) If the updated plan recommends a change to the fee or water use limit 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 limit 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 Ecology amends and adopts the plan. We must then adopt the plan into rule.

**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 [watershed 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, Ecology interprets all six subsections to refer to the consumptive water use of 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 impacts 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](#).

**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 Ecology will not do an additional statewide programmatic EIS for the new requirements under ESSB 6091, as was done in 2003 for watershed planning under chapter 90.82 RCW. 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, Ecology expects 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.

## Contacts

**Our regional managers (see [map](#) to find your local office) can answer implementation and basin-specific questions:**

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