



# ESSB 6091

## Ecology's 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.

If you have additional questions about how we are interpreting ESSB 6091, please submit them by Feb. 15 through the following web link: <http://ws.ecology.commentinput.com/?id=mkpSi>. Once the comment period has ended, we will compile questions and provide a response.

### 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 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. 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.

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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.

**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.

**County obligations for recording.** Under Sections 202(5)(a) and 203(4)(a)(i), counties must record relevant water use restrictions, which would be either limits to 950 GPD or 3,000 GPD, depending on the specific watershed. In addition, under Section 203(4)(b), counties would need to record the potential for curtailment to 350 GPD during a declared drought, where applicable.

**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.** Section 202 provides some procedural guidance for how we and initiating governments are to update existing Watershed Plans in selected WRIsAs. In these basins, plans were developed under the Watershed Planning Act (RCW 90.82). Where the law does not provide specific direction as to the process for plan development and approval, we and local governments should look to the Watershed Planning Act for direction. We are evaluating Section 202 in more detail and will provide additional guidance in the near future.

**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 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 an “extra” and cannot be counted toward offsetting the consumptive impact of domestic permit-exempt withdrawals. In addition, we must determine that the actions in the plan will result in a net ecological benefit to the

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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.

stream. We are evaluating Sections 202 and 203 in more detail and will provide additional guidance in the near future.

**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.

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