

ESSB 6091: Resolving instream flow impacts of rural residential development

A new statewide law (ESSB 6091) requires that the Chehalis Watershed Plan be updated by February 2021. Purpose of the update is to accommodate future rural residential wells while protecting instream resources. The Chehalis Basin Board and OCB will need to work with the Chehalis Basin Partnership in the coming months and years, to ensure compatibility and mutual support between our emerging plans and project proposals.

The following is a brief outline of the key features of ESSB 6091 as they apply to the Chehalis basin. An excerpt from the statute defining the planning process is included below.

1. What are the problems addressed by ESSB 6091 adopted by the 2017 Legislature?

- **Resolving “evidence of adequate water supply” for rural residential development:** The 1990 Growth Management Act includes a requirement that “adequate water supply” be demonstrated before issuing a building permit. Where development is hooking up to a water utility or has a water right, this is easily demonstrated. But for rural residential development, determining “adequate water supply” has been a major issue in some basins, and led to several legal actions. This culminated in the 2016 “Hirst” decision, which created sharp uncertainties and roadblocks to rural development across the state.
- **Protecting stream flow and senior water users:** Protecting instream flows for fish and other species directly links to the “adequate water supply” question. In principle, even though small wells do not require an Ecology water right, they should meet State requirements for protecting instream flows and senior water users. Conceptually, the ground and surface water impacts of 100 rural homes on individual wells may be similar to a 100-lot subdivision on a single well. But there has been no clear mechanism for small wells to meet these legal requirements – especially given the limited technical expertise of local government staff.
- **Challenge of mitigating very small impacts:** The impacts of individual wells are individually small, but cumulatively can be significant within a basin or sub-basin. Ecology’s permitting system is oriented to larger-scale developments, where the costs of analyzing impacts and providing mitigation can be included in the cost of development. But the project-specific process for analysis and mitigation is too expensive and cumbersome for small-scale development. For this reason, implementing mitigation for small scale impacts has been very challenging.

2. What does ESSB 6091 do? (Note: This summary does not include all provisions.)

- **Establishes a framework for WRIA-specific water use and conservation requirements for rural development,** along with identifying projects that mitigate impacts of rural wells and improve watershed health. Includes interim requirements for approving building permits and subdivision applications that apply prior to adopting the new frameworks.
- **Creates a watershed-wide approach to mitigation** (in contrast to the usual project-specific path to mitigation.) The process: Assess the cumulative impact of anticipated small wells on instream flows; adopt a 20-year action plan that prioritizes projects that offset these cumulative impacts; and address these impacts in the larger context of enhancing instream resources and improving watershed health.

- **Invests \$300 million across Washington State over the next 15 years** in projects that help fish and streamflows.
3. Implications/questions regarding implementing ESSB 6091 in the Chehalis Basin:
- The new required planning builds on previous Watershed Planning work completed in the Chehalis Basin. The Chehalis watershed Planning Unit will need to be revitalized and expanded to include all tribes with U & A to meet the requirements of the new legislation. The current Chehalis Basin Partnership will be the starting point for this.
 - Deadline for adoption of the updated plan is February 1, 2021. Ecology must approve the plan.
 - Opportunities for protecting and enhancing instream flow should be considered by all organizations that are conducting studies and developing habitat and floodplain project proposals in the Chehalis basin. We will need a collaborative approach among all organizations with overlapping missions in the Chehalis basin.
 - Specific roles of local organizations in supporting Watershed Plan development and implementation will evolve and be clarified over the coming months and years. The involved organizations may include the Chehalis Board, Aquatic Species Restoration Plan Steering Committee, the three county Voluntary Stewardship Programs, and others.

Excerpt from statute

The planning process to be followed in the Chehalis Basin is described in Section 202 (4) (a) of the legislation. This process also applies to the Nisqually and four other watersheds. These areas all have a combination of (1) Adopted Instream Flow rules that do not explicitly regulate permit-exempt wells (meaning that additional water supply planning is needed), and (2) Adopted Watershed Plans (which can serve as the framework for additional water supply work by local entities and Ecology.) Bullet points are added for clarity.

ESSB 6091 Section 202(4) (excerpt)

(a) In collaboration with the planning unit, the initiating governments must **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. Watershed plan recommendations may include, but are not limited to,

- acquiring senior water rights,
- water conservation,
- water reuse,
- stream gaging (and) groundwater monitoring, and
- developing natural and constructed infrastructure, which includes, but is not limited to, such projects as
 - o floodplain restoration,
 - o off-channel storage, and
 - o aquifer recharge.

Qualifying projects must be specifically designed to enhance streamflows and not result in negative impacts to ecological functions or critical habitat.

(b) **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.

- The highest priority recommendations must include replacing the quantity of consumptive water use during the same time as the impact and in the same basin or tributary.
- Lower priority projects include projects not in the same basin or tributary, and projects that replace consumptive water supply impacts only during critical flow periods.
- The watershed plan may include projects that protect or improve instream resources without replacing the consumptive quantity of water where such projects are in addition to those actions that the planning unit determines to be necessary to offset potential consumptive impacts to instream flows associated with permit-exempt domestic water use.

(c) Prior to adoption of the updated watershed plan, the department must determine that actions identified in the watershed plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area.