

POL-2094

DEPARTMENT OF ECOLOGY WATER RESOURCES PROGRAM  
POLICY AND INTERPRETIVE STATEMENT

**STREAMFLOW RESTORATION POLICY AND INTERPRETIVE STATEMENT**

Effective Date: **xx/xx/2022**

Contact: Program Development and Operations Support

References: *Statute*: Chapters 18.104, 34.05, 90.03, 90.82, and 90.94 RCW; RCW 19.27.097, 43.83B.405, 89.08.460, and 90.44.050  
*Administrative Rule*: Chapters 173-500, 173-531A, 173-563, and 173-566 WAC.

Purpose: To ensure consistency, conformity with state law, and transparency in the implementation of chapters 19.27 and 90.94 RCW.

Application: This policy applies to the evaluation of building permit applications under RCW 19.27.097 and the implementation of activities authorized under chapter 90.94 RCW.

**This policy supersedes any previous policy statement with which it conflicts.**

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## 1. Background

In January 2018, the Washington State Legislature passed Engrossed Substitute Senate Bill (ESSB) 6091 (session law 2018 c 1). This law was enacted in response to the State Supreme Court's 2016 decision in *Whatcom County vs. Hirst, Futurewise, et al.* (commonly referred to as the "Hirst decision")<sup>1</sup>. The law, now primarily codified in chapter 90.94 RCW, clarifies how local governments can issue building permits for homes intending to use a permit-exempt well for their domestic water supply. The law also requires that local watershed planning efforts take place in 15 WRAs. Plans must be developed that identify projects to offset the potential consumptive impacts of new permit-exempt domestic groundwater withdrawals on instream flows over the next 20 years (2018-2038), and provide a net ecological benefit to the WRA. Additionally, the law provides opportunities for Ecology to issue water right permits to authorize pilot projects related to the State Supreme Court's 2015 decision in *Foster vs. Ecology, City of Yelm, et al.* (commonly referred to as the "Foster decision")<sup>2</sup>. Such permits may be issued if impacts on streamflows can be mitigated based on criteria provided in the new law. This document provides policy statements as it relates to Ecology's interpretation and implementation of the law. This policy applies to the interpretation and implementation of RCW 19.27.097 and chapter 90.94 RCW.

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

<sup>2</sup> *Foster v. Dep't of Ecology*, 142 Wn.2d 465, 362 P.3d 959 (2015).

## 2. Acronyms

GPD – Gallons Per Day

LID – Low Impact Development

NEB – Net Ecological Benefit

RCW – Revised Code of Washington

SEPA – State Environmental Policy Act

WAC – Washington Administrative Code

WRIA – Water Resource Inventory Area<sup>3</sup>

## 3. Definitions

The following definitions apply in the context of this policy and the interpretation of chapter 90.94 RCW. Unless otherwise noted, Ecology does not apply these definitions to the interpretation of other statutes.

**Home:** A general term referring to any house, household, or other Equivalent Residential Unit.

**Instream resources:** Fish and related aquatic resources.

**Net ecological benefit (NEB):** The outcome that is anticipated to occur through implementation of projects and actions in a plan to yield offsets that exceed impacts within: a) the planning horizon; and, b) the relevant WRIA boundary.

**Planning group:** A general term that refers to either initiating governments, in consultation with the planning unit, preparing a watershed plan update required by RCW 90.94.020, or a watershed restoration and enhancement committee preparing a plan required by RCW 90.94.030<sup>4</sup>.

**Planning horizon:** The 20-year period beginning on January 19, 2018 and ending on January 18, 2038, over which new consumptive water use by permit-exempt domestic withdrawals within a WRIA must be addressed.

**Watershed plan:** A general term that refers to either: a watershed plan update prepared by a WRIA's initiating governments, in collaboration with the WRIA's planning unit, per RCW 90.94.020; or a watershed restoration and enhancement plan prepared by a watershed restoration and enhancement committee, per RCW 90.94.030. This term does not refer to RCW 90.82.020(6).

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<sup>3</sup> For the purposes of this policy, "water resource inventory area" refers to those areas described in chapter 173-500 WAC as of January 19, 2018.

<sup>4</sup> Planning group roles are described in RCW 90.94.020(4)(a) and RCW 90.94.030(3)(c).

#### 4. Applicability

RCW 19.27.097 establishes requirements as to what constitutes evidence of an adequate water supply for an applicant to receive a building permit from a local government for a building necessitating potable water.

Per RCW 19.27.097(5), water wells constructed *before* the effective date of the law (January 19, 2018) can serve as proof of adequate water supply for a building permit ~~in WRIs planning pursuant to RCW 90.94.020 or 90.94.030~~ except for the Skagit Basin and the Yakima Basin, as specified below.<sup>5</sup> These building permits are, therefore, not subject to requirements of chapter 90.94 RCW, regardless of whether water was put to beneficial use by operation of the well prior to January 19, 2018.

Geographic applicability is as follows:

- **In basins with instream flow rules that *do not* regulate permit-exempt groundwater withdrawals** (permit-exempt withdrawals), evidence must be consistent with the statutory requirements established in RCW 90.94.020 and 90.94.030, including requirements about a fee and water use restriction (RCW 19.27.097(1)(c)-(d)).
- **In basins with instream flow rules that *explicitly* regulate permit-exempt withdrawals**, evidence must be consistent with requirements set forth in the rule (RCW 19.27.097(1)(b)).
- **In the Yakima basin**, additional requirements may be required to satisfy adjudicated water rights (RCW 19.27.097(1)(e)).
- **In the Skagit basin**, additional requirements apply due to the *Swinomish* Supreme Court decision<sup>6</sup> (RCW 19.27.097(1)(f)).
- **In the rest of the state**, a well report showing physical availability, proof of potability, and demonstration of meeting other requirements imposed by local governments of water is sufficient proof of an adequate water supply (RCW 19.27.097(1)(g)).
  - **In WRIs tributary to the Columbia River**, a building permit application is subject to the requirements in the law relating to the respective WRIA in which the proposed well is located. If the proposed well is in an area governed by the Columbia River Rules (chapters 173-531A and/or 173-563 WAC), then RCW 19.27.097(1)(g) is applicable.

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<sup>5</sup> Local governments may impose additional requirements. Requirements, such as those to purchase mitigation, limit quantities, meter, and report water use may still exist if those provisions are included in an instream flow rule or if required by the local permitting jurisdiction.

<sup>6</sup> *Swinomish Indian Tribal Community v. Dept of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

- **In WRIAs where existing instream flow rules only cover portions of the WRIA**, requirements under chapter 90.94 RCW only apply to the geographical areas directly covered by the existing rule.
- Local governments may impose additional requirements (RCW 19.27.097(2)).

The requirements in RCW 90.94.020 and 90.94.030 only pertain to permit-exempt domestic withdrawals associated with a new building permit, and do not affect other uses exempt from permitting under RCW 90.44.050<sup>7</sup>.

If an applicant for a building permit or subdivision provides technical evidence that demonstrates a new permit-exempt domestic withdrawal will not cause impairment to an adopted instream flow or closure, then the applicant is relieved of having to comply with the requirements in chapter 90.94 RCW.

## 5. Local Government Obligations

Under RCW 90.94.020 & 90.94.030, Ecology interprets local governments in the 15 affected WRIAs<sup>8</sup> to have the following obligations as of January 19, 2018<sup>9</sup>:

- Collect a \$500 fee for each development permit authorizing a new permit-exempt domestic withdrawal regulated by chapter 90.94 RCW. The law does not specify whether local governments must collect the fee at the time of a subdivision or building permit application. Local governments are expected to annually remit \$350 from each fee collected to Ecology. The \$500 fee is in addition to existing well drilling fees required under chapter 18.104 RCW.
- Record withdrawal restrictions on the title of affected properties. Ecology recommends local governments use 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 *or* other amount specified by rule<sup>10</sup>] gallons per day, per connection, subject to the five thousand gallons per day limit in RCW 90.44.050.”

For WRIAs listed in RCW 90.94.030:

- Where applicable, record withdrawal curtailment during drought emergencies on affected properties. Ecology recommends local governments use 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

<sup>7</sup> See Section 6 for further details.

<sup>8</sup> WRIAs 1, 7-15, 22-23, 49, 55, and 59.

<sup>9</sup> These are the initial directions provided in RCW 90.94.20 and 90.94.030. RCW 90.94.20 and 90.94.030 further direct that these obligations may be changed thru rulemaking. Where rulemaking modifies these obligations, they should be appropriately interpreted with the respective modifications.

<sup>10</sup> Local governments should include the relevant volume, *i.e.* one of the amounts in the brackets.

connection [or other amount specified by rule], for indoor use only. Notwithstanding the drought restriction to indoor use, a fire control buffer may be maintained.”

- Require applicants to manage stormwater runoff on-site to the extent practicable by maximizing infiltration, including using LID techniques, or pursuant to stormwater management requirements adopted by the local permitting authority, if locally adopted requirements are more stringent.

## 6. Withdrawal Limits under RCW 90.94.020 and 90.94.030

RCW 90.44.050 establishes the following permit-exempt withdrawal limits:

- **Domestic** - 5,000 GPD limit
- **Non-commercial lawn or garden** – ½ acre limit (no GPD limit)
- Stockwater - no GPD limit
- Industrial - 5,000 GPD limit

The withdrawal limits under chapter 90.94 RCW further restrict the limits identified in RCW 90.44.050 for:

- **Domestic**
- **Non-commercial lawn or garden**

Collectively, the amounts for both of these are a maximum annual average of 950 or 3,000 GPD per connection<sup>11</sup>

Chapter 90.94 RCW includes restrictions for new permit-exempt domestic withdrawals for “domestic use” to a maximum annual average of up to 950 GPD per connection in basins planning under RCW 90.94.030, and a maximum annual average of up to 3,000 GPD per connection in basins planning under RCW 90.94.020<sup>11</sup>.

- In the context of chapter 90.94 RCW, “domestic use” and the GPD withdrawal limits include both indoor and outdoor home uses, and watering of a lawn and noncommercial garden up to ½ acre in size.
- Water restrictions are based on a maximum annual average withdrawal. Ecology interprets this to mean that a home’s withdrawals cannot exceed 950 or 3,000 GPD as the daily average over the entire year.
- Homes are still limited to a 5,000 GPD maximum limit for domestic use and ½ acre non-commercial lawn or garden, as set forth in RCW 90.44.050. As an example, under RCW 90.94.020 and RCW 90.94.030, a home could withdraw 4,000 gallons on a summer day, so long as the home did not do so often enough that their annual average exceeds the 950 or 3,000 GPD limit.

<sup>11</sup> These are the initial volumetric limits provided in RCW 90.94.20 and 90.94.030. RCW 90.94.20 and 90.94.030 further direct that these limits may be changed thru rulemaking. Where rulemaking modifies these limits, they should be appropriately interpreted with the respective modifications.

In RCW 90.94.030 during drought emergencies issued pursuant to RCW 43.83B.405, domestic withdrawals may be curtailed to no more than 350 GPD per connection, for indoor use only. Notwithstanding the drought restriction to indoor use, a fire control buffer may be maintained. A rule adopted pursuant to chapter 90.94 RCW for a specific WRIA may change the withdrawal limit(s) in that WRIA, but those limits cannot exceed limits in RCW 90.44.050.

*Ecology v. Campbell & Gwinn, LLC, et al* (2002)<sup>12</sup> specifies that a development project, such as a residential subdivision, is considered to be supplied with water by a single withdrawal of groundwater. Well(s) supplying water for all the homes in the project are subject to the withdrawal limits under RCW 90.44.050 in aggregate. Though the withdrawal restrictions in chapter 90.94 RCW are specified as “per connection,” the limits under *Campbell & Gwinn* also apply. Thus, while an individual home within a subdivision may withdraw a maximum annual average of 950 GPD or 3,000 GPD under chapter 90.94 RCW, the entire project is still restricted to no more than 5,000 GPD for all domestic use for all the homes in the project, and irrigation of no more than ½ acre of lawn or non-commercial garden, collectively, in the subdivision.

## **7. Planning under RCW 90.94.020 and 90.94.030**

### *WRIAs planning under RCW 90.94.020*

For WRIAs planning under RCW 90.94.020, Ecology will work with existing planning units and initiating governments formed under chapter 90.82 RCW, where those groups are still active. In a WRIA where a planning unit created under chapter 90.82 RCW is no longer active, Ecology will work with the respective WRIA’s initiating governments to reestablish a planning unit that includes the range of representation identified under chapter 90.82 RCW, to the extent practicable. RCW 90.94.020 does not specify that Ecology is required to follow the process in RCW 90.82.060(6) to reestablish a planning unit for the purpose of implementing RCW 90.94.020. Per RCW 90.94.020(3), the lead agency shall invite a representative from each federally recognized Indian tribe that has a usual and accustomed harvest area within the WRIA to participate as a part of the planning unit.

### *Minimum watershed plan requirements*

RCW 90.94.020 and 90.94.030 establish requirements for updating a watershed management plan or completing a watershed restoration and enhancement plan (“watershed plans”). Watershed plans must identify projects and actions necessary that *at a minimum*, offset the consumptive use of new groundwater permit-exempt domestic withdrawals over the planning

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<sup>12</sup> *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002).

horizon<sup>13</sup> and achieve NEB. Ecology has developed guidance for determining whether a watershed plan meets the NEB requirement<sup>14</sup>.

A complete update of all the elements of the original watershed management plan is not required for WRIAs planning under RCW 90.94.020. The requirement to update an existing watershed management plan applies specifically to the objectives of the Streamflow Restoration legislation.

Projects and actions identified in watershed plans are not limited to those that can provide strict in-time, in-place offsets, though projects in the same sub-basin or tributary (within the same WRIA), and during the same time that the use occurs are prioritized. Projects and actions in other sub-basins or tributaries, or projects that replace water only during critical times for fish, may also be recommended.

- Though the statute requires the offset of “consumptive impacts to instream flows associated with permit-exempt domestic water use” (RCW 90.94.020(4)(b)) and 90.94.030(3)(b)), watershed plans should address the *consumptive use* of new permit-exempt domestic withdrawals. Ecology recommends *consumptive use* as a surrogate for *consumptive impact* to eliminate the need for detailed hydrogeologic modeling, which is costly and unlikely feasible to complete within the limited planning timeframes provided in chapter 90.94 RCW.
- RCW 90.94.020 and 90.94.030 have various references to how watershed plans are to project, offset, or account for “water use.” Ecology interprets these subsections of the law (RCW 90.94.020(4)(b), 90.94.020(4)(c), 90.94.030(3)(b), 90.94.030(3)(c), 90.94.030(3)(d), and 90.94.030(3)(e)) to relate to the consumptive water use of new permit-exempt domestic withdrawals that come online during the planning horizon.

SEPA review, in the form of a non-project SEPA analysis, is necessary prior to Ecology adopting a watershed plan. SEPA may be completed by Ecology or by a local government. In general, this allows for projects identified in adopted watershed plans to be implemented without further SEPA analysis. However, some individual projects or actions implemented under chapter 90.94 RCW may also need SEPA review, depending on how the project or action conforms under the criteria provided in RCW 89.08.460.

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<sup>13</sup> New consumptive water use in this document addresses new homes connected to permit-exempt domestic wells associated with building permits issued during the planning horizon. Generally, new homes will be associated with wells drilled during the planning horizon. However, new uses could occur where new homes are added to existing wells on group systems or shared wells operating under RCW 90.44.050. In this document the well use discussed refers to both these types of new well use. This does not affect withdrawals authorized under RCW 19.27.097(5).

<sup>14</sup> *Interim Guidance for Determining Net Ecological Benefit* (Draft Publication 18-11-009; June 2018) applies to planning groups with 2019 deadlines, or planning groups which planned in accordance with the Interim NEB Guidance due to the group's accelerated schedules with Ecology's prior agreement; *Final Guidance for Determining Net Ecological Benefit* (GUID 2094; Publication 19-11-079; July 2019) pertains to all other WRIAs identified in chapter 90.94 RCW. Where there is any apparent conflict between this Policy and the *Final Guidance for Determining Net Ecology Benefit*, this Policy shall be considered the controlling document.

*Acceptable projects and actions*

Projects and actions identified in watershed plans should meet the intent of chapter 90.94 RCW for development of *new* projects and actions that benefit instream resources, offset the consumptive use of new permit-exempt domestic withdrawals projected during the planning horizon, and achieve NEB in the WRIA. In Ecology's evaluation of watershed plans, the agency considers:

- Projects or phases of a project with a signed funding contract or agreement *after* January 19, 2018 may count towards the required consumptive use offset and/or providing NEB.
- New regulations or amendments to existing regulations adopted *after* January 19, 2018, enacted to contribute to the restoration or enhancement of streamflows may count towards the required consumptive use offset and/or providing NEB.
- Projects and actions funded by Streamflow Restoration (chapter 90.94 RCW) funding may count towards the required consumptive use offset and/or providing NEB.
- Projects and actions funded by means other than Streamflow Restoration (chapter 90.94 RCW) funding may count towards the required consumptive use offset and/or providing NEB.
- Projects or actions completed *before* January 19, 2018 will *not* count towards the required consumptive use offset and/or providing NEB.
- Ecology will *not* consider mitigation required by existing environmental regulations such as critical area buffers, shoreline setbacks, stormwater/LID, floodplain management, forest practices, NPDES requirements, etc., as contributing towards the required consumptive use offset and/or NEB. Ecology understands that regulations required by other laws or programs would apply regardless of the passage of chapter 90.94 RCW. This is irrespective of whether or not a building or project had yet been constructed under the regulation.

All funding decisions for projects and actions applied for using Streamflow Restoration (chapter 90.94 RCW) funding will be made pursuant to chapter 173-566 WAC – Streamflow Restoration Funding Program.

*Watershed plan approval, review, and adoption*

For the purposes of chapter 90.94 RCW, Ecology defines watershed plan *approval* as an action taken on the local level (*i.e.* by the planning group) to document support for the WRIA's respective watershed plan. Watershed plan *review* is an action taken by Ecology to examine and evaluate an approved watershed plan. Watershed plan *adoption* is a formal action taken by Ecology after review, if the agency determines the watershed plan meets the requirements of RCW 90.94.020 or 90.94.030. These steps must occur sequentially, meaning that Ecology will not begin its review until the watershed plan is formally approved by the local planning group.



For watershed plan *approval*:

- In WRIAs planning under RCW 90.94.020, the planning group (the planning unit and initiating governments) must determine the watershed plan approval procedure. The approval procedure identified under RCW 90.82.130 is not specifically required under RCW 90.94.020, so planning groups can elect to follow different approval procedures, if preferred.

RCW 90.94.020(4)(a) states, “In collaboration with the planning unit, the initiating governments must update the watershed plan....” This means that both the planning unit and initiating governments support the approval procedures for a watershed plan.

- In WRIAs planning under RCW 90.94.030, the planning group must follow the specific approval procedures outlined in that section of the law.

For watershed plan *review*:

- Ecology will not edit or provide feedback on draft watershed plans in advance of approval by the planning group and submittal to Ecology. Ecology will base its review on what has been approved and submitted to Ecology.
- Ecology will not consider a draft watershed plan, or portions thereof, which were not approved by the planning group.
- For the WRIAs identified in RCW 90.94.020, Ecology will not review a watershed plan that has not been approved by the planning group.

For watershed plan *adoption*:

- Ecology will not adopt a watershed plan contingent upon specific revisions to the watershed plan.
- Planning groups may include components which they believe help ensure that projects/actions will be completed successfully (*e.g.* conditions to allow for adjustment of the watershed plan in the future) as an “adaptive management” element. However, Ecology cannot adaptively change statutory-defined requirements, such as water quantities or the connection fee, at some future date if certain projects or actions are not completed. Such a change requires rulemaking. Ecology could not include such a “potential conditional rulemaking” for adaptive management as part of a watershed plan adoption.
- Ecology will review approved watershed plans submitted by planning groups that provide reasonable time for Ecology review prior to the relevant statutory deadline.<sup>15</sup>
- RCW 90.94.020 and 90.94.030 require that, prior to the adoption of a watershed plan, Ecology must determine that the projects and actions identified in the plan will result in a NEB within the WRIA.
- The NEB Guidance<sup>16</sup> notifies planning groups of the standards Ecology applies when reviewing an approved watershed plan.
- Watershed plans must, at a minimum, identify projects and actions intended to offset impacts. Planning groups may, at their discretion, opt to identify projects and actions in

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<sup>15</sup> Ecology's lead planner assigned to each planning group will coordinate with their respective planning group to establish this “reasonable time.”

<sup>16</sup> *Interim Guidance for Determining Net Ecological Benefit* (Draft Publication 18-11-009; June 2018) applies to planning groups with 2019 deadlines, or planning groups which planned in accordance with the Interim NEB Guidance due to the group's accelerated schedules with Ecology's prior agreement; *Final Guidance for Determining Net Ecological Benefit* (GUID 2094; Publication 19-11-079; July 2019) pertains to all other WRIAs identified in chapter 90.94 RCW. Where there is any apparent conflict between this Policy and the *Final Guidance for Determining Net Ecology Benefit*, this Policy shall be considered the controlling document.

their plans that offset water use and anticipated effects beyond those associated with new consumptive permit-exempt domestic withdrawals initiated over the planning horizon. However, watershed plans are not required to include such projects and actions. Any work undertaken beyond the specific planning minimums increases the likelihood that time and funds are spent on matters that will not necessarily yield a locally approvable or adoptable plan within the very tight timeframes of the law.

If Ecology does not adopt a watershed plan on or before the statutory deadline set forth in RCW 90.94.020 or 90.94.030, the agency must initiate rulemaking consistent with the provisions in the law (see Section 8).

As articulated in the *Final Guidance for Determining Net Ecological Benefit*<sup>17</sup>, watershed plans are to be prepared with implementation in mind. However, RCW 90.94.020 and 90.94.030 do not create an obligation on any party to ensure that plans, or projects and actions in those plans or associated with rulemaking, are implemented. Further, the law does not predicate the issuance of building permits on the implementation of watershed plans or any projects and actions in those plans.

#### **8. Rulemaking under RCW 90.94.020 and 90.94.030**

RCW 90.94.020 and 90.94.030 establish that Ecology *must* adopt rules to incorporate watershed plan provisions under the following circumstances:

- (a) If the adopted watershed plan recommends a change to the fee or the water use restriction prescribed in the law; or
- (b) If the watershed plan is not adopted by Ecology by the statutory timeline.

Ecology *may* amend or adopt rules if it believes it necessary for another reason.

If Ecology adopts a watershed plan by the prescribed deadline, Ecology may commence a rulemaking process, depending on the contents of the adopted watershed plan.

- Ecology will generally avoid rulemaking if an adopted watershed plan does not include recommendations that require it.
- Ecology will begin rulemaking if an adopted watershed plan recommends changing the statutory withdrawal limits or fees. The rulemaking may be limited to the scope of what is recommended in the watershed plan. In general, Ecology will rely on adopted watershed plan recommendations supported by legal and scientific information when proposing the rule amendments. If additional information or analysis is developed during the public rulemaking process, Ecology will use that information, and may modify rule amendments, as appropriate.

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<sup>17</sup> *Final Guidance for Determining Net Ecology Benefit* (GUID 2094; Publication 19-11-079; July 2019).

- If planning groups include measures in the adopted plan that are outside the scope of chapter 90.94 RCW. Ecology will evaluate these recommendations during rulemaking. Ecology is not obligated to include such changes in a rule.

If a watershed plan has not been adopted by the prescribed deadline, Ecology is required to commence a rulemaking process under RCW 90.94.020 or 90.94.030.

- Ecology will not write a watershed plan update for WRIAs identified in RCW 90.94.020. As required under the law, Ecology will initiate rulemaking and develop rule supporting documents that meet the intent and requirements of RCW 90.94.020. At a minimum, the rule supporting documents will include: a WRIA-wide estimate of consumptive use from new permit-exempt domestic withdrawals over the planning horizon; a list of projects and actions that Ecology is reasonably assured could be completed to offset the consumptive use; and a NEB determination.
- For the WRIAs identified in RCW 90.94.030, Ecology will follow the procedures specified in RCW 90.94.030(3)(h). Ecology will submit the final draft plan to the Salmon Recovery Funding Board for a technical review, and provide recommendations to amend the final draft plan, if necessary. Ecology shall consider the recommendations and may amend the final draft plan without committee approval prior to adoption.

## **9. Foster Pilot Projects**

RCW 90.94.090(8) authorizes Ecology to issue permit decisions for up to five water resource mitigation pilot projects. Ecology expects the pilot projects to consist of applications for new water right permits and/or applications to change existing water rights. Ecology retains the authority and obligation to review each pilot project water right decision and approve or deny the application based on sufficiency of technical information and compliance with the law. Decisions on applications for Foster pilot project permits are appealable following the same procedure as for other water right permit decisions under the Administrative Procedures Act, chapter 34.05 RCW.

Under RCW 90.94.090, Ecology is not authorized to issue permits that will impair senior consumptive rights. Additionally, under chapter 90.03 RCW, Ecology is only authorized to issue permits for water rights that will be put to beneficial use.

Pursuant to RCW 90.94.090(8), Ecology must determine whether proposed withdrawals and diversions of water from pilot projects would impair adopted instream flows, or would otherwise impact closed surface waters. To do this, Ecology will assess whether the applicants have addressed impacts through the established mitigation sequence as described in RCW 90.94.090(8)(a)-(c) in assessing permit applications for the pilot projects. This process will be followed instead of applying the traditional test for impairment and availability of water subject to adopted instream flow water rights and closures.

The mitigation sequencing of RCW 90.94.090(8) should be followed in order. Applicants may only proceed along the sequence when the previous step was not “reasonably attainable.”

Avoiding impacts, under RCW 90.94.090(8)(a), refers only to compliance with minimum flows adopted by rule or making the water use interruptible in favor of the rule. To show that avoidance is not “reasonably attainable,” an applicant must explain why the water use cannot be subject to otherwise-applicable minimum flows.

Minimizing impacts, under RCW 90.94.090(8)(b), refers to mitigating the impacts to instream flows or closures by replacing the water supply.

- This can include acquiring existing trust water rights that are not already committed to mitigation, placing water rights into trust; or other types of replacement water supply.
- Mitigation rights that are not placed into trust should be secured with adequate legal provisions, such as permit conditions, to ensure that the water use is fully contingent on the supply of mitigation water.
- These measures must ensure both (1) no net annual increase in quantity of water diverted or withdrawn and (2) no net detrimental impacts to fish and related aquatic resources.

To show that minimizing impacts is not reasonably attainable, applicants should:

- Explain what efforts have been taken to identify replacement water rights; and
- Whether it would be technically feasible to mitigate with those rights.

If applicants attest that “water for water” mitigation is not reasonable because of cost, they should explain how the cost of potentially obtainable water was determined.

Compensation, under RCW 90.94.090(8)(c), should provide a NEB through replacement of water, habitat improvements, and/or other measures that improve instream functions and values. Under RCW 90.94.090(8)(c), Ecology will evaluate projects consistent with the published Final NEB Guidance (Final Guidance for Determining Net Ecological Benefit (GUID 2094; Publication 19-11-079; July 2019).

Ecology has sole discretion, and will use its best professional judgement, in assessing the technical merits of projected impacts of the proposed project and whether the mitigation sequence was properly followed. Ecology will document its findings in the draft Report of Examination, which must be posted for public review and comment, under RCW 90.03.290.

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Mary Verner  
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Water Resources Program

**Note:** These policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rule-making process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.

To request ADA accommodation, call Ecology at 360-407-6831 or visit <https://ecology.wa.gov/accessibility>. People with impaired hearing may call Washington Relay Service at 711. People with speech disability may call TTY at 800-833-6384.