

HOUSE BILL REPORT

HB 1918

As Reported by House Committee On: Agriculture & Natural Resources

Title: An act relating to addressing treatment of groundwater under state water codes to support rural development while protecting instream flows.

Brief Description: Addressing treatment of groundwater under state water codes to support rural development while protecting instream flows.

Sponsors: Representatives Stanford, Lytton, Blake, Fitzgibbon, Pettigrew, Robinson and Doglio.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/7/17, 2/16/17 [DP].

Brief Summary of Bill

- Allows county legislative authorities to implement programs for mitigating new permit-exempt groundwater withdrawal impacts.
- Requires the Department of Ecology (Ecology), upon request by a county, to assist counties in adopting mitigation programs and provide data and mapping of ground and surface water resources in the county, and directs certain new Ecology responsibilities related to permit-exempt groundwater well withdrawals and water banking.
- Creates the Water Mitigation Assistance Account.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass. Signed by 8 members: Representatives Blake, Chair; Chapman, Vice Chair; Fitzgibbon, Lytton, Pettigrew, Robinson, Springer and Stanford.

Minority Report: Do not pass. Signed by 7 members: Representatives Buys, Ranking Minority Member; Dent, Assistant Ranking Minority Member; Chandler, Kretz, Orcutt, Schmick and J. Walsh.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Rebecca Lewis (786-7339).

Background:

State Building Code, Subdivisions, and Potable Water.

Building Permits.

The State Building Code requires all building permit applicants to provide evidence that an adequate supply of potable water will be available for the building being proposed. Adequate evidence of a potable water supply may include possession of a water right or a letter from a water purveyor stating the ability to provide water to the building. All public water systems must provide an adequate quantity and quality of water in a reliable manner at all times. An application for a water right is not considered sufficient proof of an adequate water supply.

In most cases, adequate and reliable potable water is supplied either from a source located off of the property by an approved water purveyor or a permit-exempt well located on the property. Certain counties allow building permits to be issued when the potable water supply is to be provided from a source other than a traditional, piped water purveyor or a permit-exempt well. These alternative sources include rainwater collection and on-site cisterns filled with water delivered by a truck. The counties that allow some form of alternative water supply to satisfy the potable water condition of a building permit include Kittitas, San Juan, King, and Jefferson.

Subdivisions.

A "subdivision" is the division or re-division of land into five or more lots for the purpose of sale, lease, or transfer of ownership. In order to approve a subdivision, the city, town, or county legislative body for the jurisdiction in which the proposed subdivision is located must find that appropriate provisions are made for a variety of factors including for potable water supplies.

Department of Ecology Authority and Responsibility Related to Water.

Instream Flows.

The Department of Ecology (Ecology) has the authority to adopt rules establishing a minimum water flow for streams, lakes, or other public water bodies for the purposes of protecting fish, game, birds, and the recreational and aesthetic values of the waterways. These levels, commonly called "instream flows," essentially function as water rights with a priority date set at the adoption date of the corresponding rule. There is an instream flow rule in place for almost half of the state's identified watersheds.

The instream flow may not affect an existing water right with a senior time priority date. Ecology may not allow any subsequent water withdrawals with a junior time priority date to the instream flow that conflicts with the established flow level unless the withdrawals clearly serve to satisfy an overriding consideration of the public interest (OCPI). Recent state Supreme Court decisions have found that Ecology improperly applied the OCPI exception in certain instances.

Water Resource Inventory Areas.

A Water Resource Inventory Area (WRIA) is, generally, an area determined to be a distinct watershed within which are sub-basins. Each WRIA is identified by a number and may contain a local watershed planning group with an identified lead entity.

Permit-exempt Wells.

Most groundwater withdrawals require an application and permit from Ecology. However, there is a class of lawful, unpermitted wells, often referred to as "permit-exempt wells," which may be constructed and used without first obtaining a permit from Ecology. The types of permit-exempt uses include any withdrawal of public groundwater for stock-watering purposes, or for watering a lawn or a noncommercial garden less than one-half acre. Single or group domestic uses or industrial purposes in an amount not exceeding 5,000 gallons per day are also included in the class of permit-exempt wells. Recent state Supreme Court decisions have held that permit-exempt groundwater withdrawals may not impair senior water rights holders.

Ecology has exercised authority in certain regions of the state to limit the availability of new permit-exempt wells. This includes agency rules applicable to portions of Skagit, Kittitas, Clallam, and Jefferson counties.

Growth Management Act.

The Growth Management Act (GMA) is the comprehensive land use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, the GMA establishes land use designation and environmental protection requirements for all Washington counties and cities, and a significantly wider array of planning duties for the 29 counties and the cities within that are obligated by mandate or choice to satisfy all planning requirements of the GMA. Of the 29 counties and the cities within that fully plan under the GMA, 18 were required by population criteria to become planning jurisdictions. The remaining 11 counties elected through a resolution of their county legislative authority to have all planning requirements of the GMA apply to them and to the cities within.

The GMA directs jurisdictions that fully plan under the GMA to adopt internally consistent comprehensive land-use plans that are generalized, coordinated land-use policy statements of the governing body. Comprehensive plans are implemented through locally adopted development regulations subject to review and revision requirements prescribed in the GMA.

Each comprehensive plan adopted by a county or city must include seven mandatory elements consisting of a plan, scheme, or design. Two of the seven mandatory elements contain provisions addressing the protection of water resources: the land use element and the rural element. Specifically, the land-use element must provide for the protection of the quality and quantity of groundwater use for public water supplies, and the rural element must include measures that protect the rural character of an area by protecting surface and groundwater resources. A recent state Supreme Court decision held that a county must make an independent determination regarding the legal availability of water instead of relying on Ecology rules.

Counties that fully plan under the GMA must designate urban growth areas: areas within which urban growth must be encouraged and outside of which growth can occur only if it is not urban in nature. These fully planning counties and each city within must include in their

urban growth areas, areas and densities that are sufficient to permit the urban growth projected to occur in the county or city for the succeeding 20-year period.

All counties and cities must also designate and protect environmentally sensitive critical areas under the GMA. These requirements obligate local governments, using the best available science, to adopt development regulations to protect critical areas (also known as critical areas ordinances) that comply with specified criteria. Critical areas include: wetlands; aquifer recharge areas; fish and wildlife habitat conservation areas; frequently flooded areas; and geologically hazardous areas. The Department of Commerce provides technical and financial assistance to jurisdictions that must implement requirements of the GMA.

Summary of Bill:

County Mitigation Certificates.

County legislative authorities may implement programs to mitigate impacts to surface waters of new permit-exempt groundwater withdrawals. The county must consult with Ecology to scale the program to encompass either a single WRIA, or a sub-basin within a WRIA as necessary to avoid impairment of senior water rights. If a county legislative authority chooses to implement a mitigation program for a WRIA that crosses county lines, the county legislative authority must coordinate with the legislative authorities of any other affected counties. Upon request by a county, Ecology must provide data and mapping of ground and surface water resources for each area requested by the county. Ecology must give priority to processing of applications to transfer water rights to a trust water rights program for water banking for rights that will be used to mitigate small groundwater withdrawals under the county mitigation plan.

A county may accept the following as mitigation:

- monetary payments, so long as the county applies all mitigation payments towards acquiring water rights and other measures that fully mitigate for groundwater impacts associated with the landowner's well;
- mitigation obtained through the state's trust water rights program or from an Ecology-recognized water bank established by the county, Ecology, or a third party; or
- a permanent dedication to instream flows under the state's trust water rights program, or other change or transfer of a water right approved by Ecology for dedication to instream flows.

Subject to appropriation, Ecology must provide assistance to counties adopting a mitigation program including:

- the best available information on surface and groundwaters, including surface water impact risk relative to well location, in the areas to be covered by the program;
- information on potential water rights that may serve as mitigation, how to design mitigation projects, alternative water programs that use cisterns or other methods to avoid or mitigate for new wells, and information regarding existing and potential water banks;

- design of potential mitigation projects in sub-basins where the county and Ecology determine that a water bank is not feasible;
- assistance in creating a county-sponsored water bank;
- entering into a memorandum of agreement, upon request by a county, to administer all or portions of a county mitigation program; and
- financial assistance for creating and implementing the county mitigation program.

The county must issue a mitigation certificate to a participant meeting the mitigation program standards, and the certificate must be recorded with the title to the real property.

State Building Code, Subdivisions, and Potable Water.

A county or city governing body in a jurisdiction where new, unmitigated use of surface or groundwater is not legally available on a year-round basis must develop and adopt ordinances related to the use of alternative water sources. The ordinances must specify when and how alternative water sources may be used to provide adequate water supply in order to obtain a building permit, or meet other state or local potable water supply requirements for new construction. Local ordinances must, where allowed, include the following as allowable alternative water sources:

- a well under a county's mitigation program;
- a rainwater collection and treatment system; or
- a nontraditional system that allows potable water to be treated and stored, such as trucking.

A mitigation certificate issued by a county may be considered evidence of an adequate water supply for the purposes of obtaining a building permit.

Building Permits.

A city or county may issue building permits for projects that were "substantively active" on or before October 26, 2016. Building permits issued in this scenario do not grant the application water rights, and do not authorize construction that has not commenced by July 1, 2019.

Substantively active means an applicant must have submitted a building permit application prior to October 26, 2016, or have made an investment of \$500 or more on certain activities prior to October 26, 2016, in anticipation of obtaining a building permit. Activities that qualify an applicant as "substantially active" include:

- delineating wetland buffers, performing a natural resources assessment, or performing an archaeological assessment;
- establishing a state-approved private water system to serve the property; or
- installing a designed, approved, septic system on the property.

An applicant must provide records documenting substantive project activity or completion. Costs associated with purchasing the property, taxes paid on the property, any costs for permitting or assessments paid prior to January 1, 2012, may not be counted towards the \$500 minimum.

Subdivisions.

For the purposes of issuing a building permit for a subdivision, a permitting authority may determine that water is available for a proposed permit-exempt withdrawal where water is physically available and:

- the subdivision will be built in an area of a county that does not fully plan under the GMA;
- the water will be withdrawn from a source in hydraulic continuity with surface waters that Ecology has determined have flows in excess of both instream flows and senior water rights that are available for new noninterruptible withdrawals; or
- the applicant demonstrates that provisions have been made to adequately mitigate for the proposed withdrawal. A county mitigation certificate is considered evidence of adequate mitigation.

Responsibility of the Department of Ecology Related to Water.

Ecology may establish by rule acreage limits for new noncommercial garden and domestic uses that are less than one-half acre or 5,000 gallons per day, as provided by statute. The rules must be specific to watersheds or aquifers that Ecology believes are at or close to being fully appropriated. The rules must include mechanisms to verify that the limits are not being violated. In instances when mitigation is necessary to avoid impairment to a senior water right, the amount of mitigation must be based on the lesser of either:

1. one-half acre for noncommercial garden use or 5,000 gallons per day;
 2. the amounts established by rule for noncommercial garden use or domestic water use;
- or
3. the consumptive use associated with the new permit-exempt well if the well is metered and consumptive use data is provided to a county consistent with the terms of a county mitigation certificate.

Ecology must evaluate legal water availability in each WRIA and publish maps indicating where water is available by WRIA. Ecology must prioritize this mapping of water supplies in watersheds or aquifers where the greatest amount of developments relying on permit-exempt withdrawals are anticipated to occur over the 20-year planning periods under the GMA.

Water Banking.

Ecology must prioritize the processing of applications to transfer a water right to the trust water rights program for water banking purposes to mitigate for small groundwater withdrawals under a county mitigation program.

Water Mitigation Assistance Account.

A Water Mitigation Assistance Account is created. Monies from the account may only be used for expenditures related to:

- county mitigation plans;
- mitigation measures for individual or subdivision building permits; and
- transfers of water rights for water banking under the trust water rights program.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) Counties and rural builders need clarity and consistency in the law regarding water availability, but it's also important to protect water users. This bill contains similar tools already used in the Dungeness basin and Kittitas County. It provides clarity for builders and water users, and it is a market-based solution intended to be sustainable. Future new water uses should be mitigated. Taking away water from water users is not a viable solution. There is agreement that a regional solution is needed rather than a house-by-house solution. The bill contains a five-year transition program to issue temporary certificates that will turn into permanent water rights. Counties do not have the same technical and financial capacity to make water availability determinations that the state does. The provision providing for "grandfathering" building projects in process is necessary to provide certainty for those who had already made significant investments towards obtaining a building permit at the time of the *Hirst* decision.

(Opposed) The recognition that the court's decision on *Hirst* invites a legislative fix is appreciated. The bill contains an overreliance on water banks. There are challenges to setting up water banks in eastern Washington that do not exist in western Washington. The provision to allow certain building in process before the *Hirst* decision is appreciated. Some counties have halted development in response to *Hirst* and more will follow. Cost and uncertainty has created a de facto moratorium on building in certain places. Counties do not have capacity to make water availability determinations. The Kittitas model has worked because there is not an instream flow rule for the Yakima River and there are hundreds of adjudicated senior water rights in the area to make water banking possible. These features do not exist in most places in western Washington. There are elements of the bill that can work, but the Kittitas model should not be applied statewide. It is unclear what happens at the end of five years if a mitigation scheme is not put in place. Remedies are too constrained and won't work. There needs to be more flexibility to work basin-by-basin so local governments may work within their boundaries. There is concern with mitigation certificates offered by the counties. Ecology should not give a county right to process mitigation certificates. Washington is an outlier. Not all states have the same restrictions on groundwater use that other states do. Mapping of water availability in most places has already been done, and in most cases there is very little water available. Homes still need to be built and this bill makes it too hard. A Senate bill addressing this issue is preferred.

(Other) This is one of the better bills addressing this issue, but there are still concerns. It is important to continue the discussion to address water availability. A regional approach, instead of a house-by-house solution, and the five-year implementation period are necessary. Counties do not have the same technical and financial capacity to make water availability determinations that the state does, so it is important that the Department of Ecology is responsible for mapping water availability. The in-time in-place mitigation standard is too narrow. Other mitigation options should be available. The inclusion of cisterns, rainwater collection, and trucking in the bill is appreciated. It is important to focus efforts on areas where there are water availability problems. There is concern that the grandfathering

provisions would allow the building of thousands of homes that would ordinarily fall under the *Hirst* restrictions. There should be stronger language to protect instream flows. Senior water rights should not be impaired. Mitigation must be in-time in-place and based on a 1 percent ratio. Costs associated with this bill are not accounted for in the Governor's budget. The bill contains some elements that will create challenges. It is unlikely to generate relief for many property owners since mitigation must be water for water. Finding balance for property owners that also protects instream flows is important, and *Hirst* has made that balance more difficult. There is support for authorizing mitigation certificates. Ecology appreciates the ability to reduce the amount of water use that qualifies for permit exemption.

Persons Testifying: (In support) Representative Stanford, prime sponsor; and Jan Himebaugh, Building Industry Association of Washington.

(Opposed) Jeff Dickinson, Squaxin Island Tribe; Michael Ennis; Bill Clarke, Washington Realtors; Kathleen Collins, Washington Water Policy Alliance; Kathleen Gano, Suncadia; and Evan Sheffels, Washington Cattleman's Association.

(Other) Laura Berg, Washington State Association of Counties; Emily Haley, Swinomish Tribe; Carla Carlson, Muckleshoot Tribe; Carl Schroeder, Association of Cities; Bruce Wishart, Sierra Club; Trish Rolfe, Center for Environmental Law and Policy; Dawn Vyvyan, Yakama Nation and Puyallup Tribe; Daryl Williams and Anne Savery, Tulalip Tribe; and David Christensen, Department of Ecology.

Persons Signed In To Testify But Not Testifying: None.