

# SENATE BILL REPORT

## SB 6091

As of January 11, 2018

**Title:** An act relating to ensuring that water is available to support development.

**Brief Description:** Ensuring that water is available to support development.

**Sponsors:** Senators Van De Wege, Rolfes and Frockt.

**Brief History:**

**Committee Activity:** Agriculture, Water, Natural Resources & Parks: 1/08/18.

### Brief Summary of Bill

- Establishes that evidence of potable water for a building permit must meet certain requirements based on the area that the permit is located.
- Provides that appropriate provisions for water supply for a subdivision, dedication, or short subdivision must be consistent and may rely on certain statutes and applicable rules.
- Establishes that a county or city must be consistent with and may rely on certain statutes and rules when protecting groundwater in the comprehensive plan under the Growth Management Act (GMA).
- Requires that the Department of Ecology (Ecology) establish Watershed Restoration and Enhancement (WRE) committees and adopt WRE plans in certain watersheds.

## SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

**Staff:** Karen Epps (786-7424)

**Background:** Building Permits and Subdivision Approvals. Under the State Building Code, an applicant for a building permit for a building that requires potable water must provide evidence of an adequate water supply for the intended use of the building. The evidence may be in the form of a water right permit from Ecology, a letter from an approved water purveyor stating the purveyor's ability to provide water, or another form verifying the existence of an adequate water supply. The process by which land divisions, including

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subdivisions, dedications, and short subdivisions may occur is governed by state and local requirements. Local governments, the entities charged with receiving and determining land division proposals, must adopt associated ordinances and procedures in conforming with state requirements.

GMA. The GMA is the comprehensive land use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, GMA establishes land use designation and environmental protection requirements for all Washington counties and cities, and additional planning duties for the 28 counties and the cities within them that fully plan under GMA. The GMA directs counties and cities that fully plan under GMA to adopt internally consistent comprehensive plans that are generalized, coordinated land use policy statements of the governing body. Comprehensive plans must address specified planning elements, including a land use element and a rural element, each of which is a subset of a comprehensive plan.

Water Rights. Washington operates under a water right permit system. With certain exceptions, new rights to use surface or ground water must be established according to the permit system. Exemptions include any withdrawal of public groundwater for stock watering purposes, for watering a lawn, or for a noncommercial garden less than one-half acre. Single or group domestic uses or industrial purposes not exceeding 5000 gallons a day are also exempt.

Ecology must consider a four-part test when deciding whether to issue a new water right, specifically whether: (1) water is available, (2) a beneficial use of water would be made, (3) granting the right would impair existing rights, and (4) the proposed use would detrimentally affect the public welfare. If an application passes this test, Ecology issues a permit which establishes a time table for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Instream Flow Rules. 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 minimum water flow levels, commonly called instream flows, function as water rights with a priority date set at the adoption date of the corresponding rule. The instream flow cannot affect an existing water right with a senior priority date.

Watershed Planning. The Watershed Planning Act establishes a process through which local groups can develop and implement plans for managing and protecting local water resources and rights. The local groups authorized to develop watershed plans are organized by water resource inventory areas (WRIAs).

Supreme Court Decision. In 2016, the state Supreme Court held that Whatcom County cannot reasonably rely on Ecology's regulation, specifically the Nooksack instream flow rule, to satisfy its responsibility under the GMA to protect water availability (*Whatcom County v. Western Washington Growth Management Hearings Board*, 381 P.3d 1 [2016]; considering a local citizens' challenge to Whatcom County's comprehensive land use plan,

contending that it failed to adequately protect surface and groundwater resources under the GMA).

General Obligation Bonds. The State Finance Committee, composed of the Governor, the Lieutenant Governor, and the State Treasurer, is responsible for supervising and controlling the issuance of all state bonds. The Committee periodically issues general obligation bonds to finance projects authorized in the capital budget. No bonds may be authorized for sale without prior legislative appropriation of the net proceeds. Legislation authorizing the issuance of bonds requires a 60 percent majority vote in both the House of Representatives and the Senate.

**Summary of Bill:** Building Permits and Subdivisions. In areas where instream flow rules explicitly regulate permit-exempt withdrawals have been adopted, evidence of potable water must be consistent with and may rely on the rule requirements. In areas where instream flow rules have been adopted that do not explicitly regulate permit-exempt withdrawals, evidence of potable water must meet certain requirements described below or meet the requirements adopted as part of a WRE Plan. An applicant may provide other evidence of an adequate water supply that complies with the water code and the groundwater act. In certain areas, additional requirements apply requiring the demonstration of the physical and legal existence of an adequate water supply. In other areas, evidence of potable water may consist of a water well report.

Appropriate provisions for water supply for a subdivision, dedication, or short subdivision must be consistent with and may rely on the water code, the minimum water flow statutes, the groundwater act, and the water resources act and applicable rules adopted under those statutes.

GMA. A county or city must be consistent with and may rely on the water code, the minimum water flow statutes, the groundwater act, and the water resources act and applicable rules adopted under those statutes when providing for the protection of the quantity of groundwater used for public water supplies in the comprehensive plan. A comprehensive plan must incorporate projected uses of water over the subsequent 20 years as developed in the WRE Plan.

A county or city must be consistent with and may rely on applicable rules adopted under the water code, the minimum water flow statutes, the groundwater act, and the water resources act when protecting surface and groundwater resources under the rural element in the comprehensive plan.

Amendments to the Intent of the Water Resources Act. It is the intent of the Legislature to protect and restore healthy stream flows for instream resources, which will aid in recovery of depleted salmonid populations, support properly functioning ecosystems, and provide for the general welfare of the citizens of the state. The Legislature also intends to ensure that a legal and reliable domestic water supply is available for its citizens.

WRE Committees and WRE Plans. Ecology must establish a WRE committee in each watershed with an instream flow rule adopted or amended before 2000. Ecology chairs the WRE committee and invites representatives from:

- each federally recognized tribe with reservation land in the WRIA;
- each federally recognized tribe with usual and accustomed harvest areas in the WRIA;
- Department of Fish and Wildlife; and
- each county and city in the WRIA.

Ecology must adopt a WRE plan no later than June 30, 2023, in collaboration with the WRE committee, in each watershed with an instream flow rule adopted or amended before 2000. All members of the WRE committee must approve the plan.

The WRE plan should 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. Plan recommendations may include, but are not limited to, acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure. The WRE Plan must include:

- those actions that the WRE committee determines to be necessary in order to offset potential impacts to instream flows associated with permit-exempt domestic and commercial water use;
- an evaluation or estimation of the actual cost of offsetting new domestic and commercial uses over the subsequent 20 years; and
- estimates of the cumulative consumptive water use impacts over the subsequent 20 years.

Prior to adoption of the WRE plan, Ecology must determine that actions identified in the WRE plan, after accounting for new projected uses of water over the subsequent 20 years, will result in a net ecological benefit to instream resources within the WRIA. Potential impacts on a closed water body and potential impairment to an instream flow for domestic or commercial groundwater withdrawals exempt from permitting may be allowed under a WRE plan. After adoption of a WRE plan, Ecology must evaluate the plan recommendations and initiate rule making if necessary.

If the WRE committee fails to approve the WRE plan by June 30, 2023, Ecology must submit the final draft plan to the Salmon Recovery Funding Board and request that the board provide a technical review and make recommendations. Ecology must consider the recommendations and may amend the WRE plan without WRE committee approval prior to adoption.

Permit-Exempt Wells in WRIAs with Instream Flow Rules Adopted Before 2000. A city, town, or county issuing a building permit in WRIAs with instream flow rules adopted or amended before 2000 must:

- record relevant restrictions or limitations with the property title;
- collect fees of \$1,500;
- record the number of building permits or subdivisions issued under these restrictions;
- annually remit an accounting of building permits and subdivision approvals; and
- until rules have been adopted that specify otherwise, require the following measures:
  - (1) a limitation for single domestic or commercial use indoor only, with a maximum

withdrawal of 400 gallons per day; and (2) that the applicant manage stormwater runoff on-site to the extent practicable.

Ecology and the city or county issuing a building permit may allow an applicant to obtain approval for a withdrawal of permit-exempt groundwater for a single domestic or commercial outdoor use for a specified period of time, after Ecology has reviewed and determined that water is available in the watershed for these purposes.

Duties. Ecology must initiate rulemaking in at least one WRIA every four years in basins where instream flow rules do not exist. Ecology must initiate a pilot project in a priority WRIA to measure water use from all new groundwater withdrawals and to determine the overall feasibility of measuring water use for all new groundwater withdrawals. Ecology must submit a report to the Legislature by December 31, 2022, and December 31, 2027, that includes:

- progress in completing and adopting WRE Plans;
- a description of program projects and expenditures and potential or planned projects;
- an assessment of the streamflow restoration and enhancement benefits from program projects;
- a listing of other efforts taken associated with streamflow restoration and enhancement, projects to benefit instream resources, and other watershed improvements; and
- the total number of new withdrawals exempt from permitting authorized in each WRIA, and estimates of consumptive water use impacts associated with the new withdrawals.

Cause of Action. The ability of any person to pursue a cause of action for the protection of the person's water right is not affected by this bill.

Joint Legislative Task Force. A Joint Legislative Task Force is established to make recommendations to the Legislature on the necessary authority in statute for Ecology to authorize mitigation for impacts to instream flows, fish, or aquatic habitat from appropriations of water in areas where instream flows have been adopted by rule. The Task Force must make recommendations to the Legislature by November 15, 2019. Recommendations must be made by a three-fourths majority of the Task Force and the representatives from Ecology, Fish & Wildlife, and Agriculture are not eligible to vote.

Creation of New Accounts and Appropriation. The watershed restoration and enhancement account, the watershed restoration and enhancement taxable bond account and the watershed restoration and enhancement bond account are created. Expenditures from the bond accounts may be used to assess, plan, and develop WRE projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure. The State Finance Committee is authorized to issue up to \$200 million to finance WRE projects. The proceeds of the new bonds will be appropriated in phases over five biennia.

**Appropriation:** None.

**Fiscal Note:** Requested on January 5, 2018.

**Creates Committee/Commission/Task Force that includes Legislative members:** Yes.

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

**Staff Summary of Public Testimony:** CON: The Hirst decision has had a negative impact and affected property values. The gallon limitation would be onerous. Restrictions on water will not allow organic farming. The limitation on outside watering will have adverse effects on low-income families that want to have a garden. The cost of the permit to use water will be hard on families. Landowners are asking the local government to rezone their property because the landowner cannot get water. The Legislature needs to maintain oversight over agency rules. The Hirst decision destroyed retirement plans. The WRE committee should have a property owner on the committee. This bill will not solve the problems around the Hirst decision. There needs to be a long-term solution that can be enforced. All water users should share in the costs of hydrologic studies. There is a need for more reservoirs. Domestic groundwater use may not be consumptive and could, in some situations, improve instream flows. The loss of property use will impact the economy. Consideration needs to be given to the full hydrologic cycle and the benefits of onsite water recharge. There needs to be options for indoor and outdoor water use. Development needs to be matched with legally available water so that senior water rights are protected and there is not undue harm. Mitigation for water must be considered in the comprehensive plan. Rivers are over-allocated. The bill should not be selective on what rivers should be protected. Withdrawals should not impair senior water rights and fishery resources. Mitigation should be fully implemented to offset impairment. The use of out of kind mitigation would undermine stream flow restoration. Water for water mitigation is key. The bill does not adequately protect stream flows. This bill does not have a compliance mechanism and the timeline for adopting new instream flow rules is too long.

OTHER: This bill provides a framework to address the specific challenges from the Hirst decision, but also looking at ensuring healthy streams into the future. This bill focuses on the Hirst decision challenges and streamflow challenges facing the state. Population growth and agricultural production, coupled with significant changes in climate and precipitation, have exacerbated demands on water, impacted stream flows, and degraded habitat. This bill attempts to provide a structure for addressing the long-term sustainability of the state's shared water resources. This bill sets up a program aimed at protecting stream flows into the future. The bill is trying to establish a pathway for comprehensive basin-wide programs that can make improvements to stream flows and habitat, by investing in projects. The bill provides for resource managers in each basin to make improvements that are unique in each basin. The bill is looking to provide a structure to provide a legal supply of water for rural landowners. This bill provides that domestic uses for new permit-exempt uses may use up to 400 gallons per day for indoor use. This bill clarifies that Ecology's instream flow rules regulate water availability and reduces uncertainty for local governments and landowners. This bill is a one size fits all proposal and that will not work in the state.

**Persons Testifying:** CON: Stella Neumann, citizen; Scott Shock, citizen; Gerald Hulbert, citizen; Theresa Sygitowicz, citizen; Kathleen Sabel, citizen; Glen Morgan, Citizens' Alliance for Property Rights; Cindy Alia, Citizens' Alliance for Property Rights and Cattle Producers of Washington; William Palmer, Kitsap Alliance of Property Owners; Michael Gustavson, Kitsap Alliance of Property Owners; Glen Smith, Washington State Ground Water

Association; Bryce Yadon, Futurewise; Dan Von Serrgen, Center for Environmental Law & Policy; Bruce Wishart, Sierra Club; Daryl Williams, Tulalip Tribes; Rodney Cawston, Confederated Tribes of the Colville Reservation; Jeanne Cushman, Squaxin Island; Davor Gjurasic, Nisqually; Mike Ennis, Association of Washington Business; Jan Himebaugh, Building Industry Association of Washington.

OTHER: Brin Noren, citizen; Edwina Johnston, Citizens Alliance for Property Rights; Councilmember Norma Sanchez, Confederated Tribes of the Colville Reservation; Rob Duff, Governor's Policy Office; Maia Bellon, Department of Ecology; Bill Clarke, Realtors, PUDs, Kittitas County, Pierce Water; Laura Berg, Washington State Association of Counties; Carl Schroeder, Association of Washington Cities; Chris Stearns, Thurston PUD Commissioner; Kathleen Collins, Washington Water Policy Alliance; Evan Sheffels, Washington Farm Bureau & Washington Cattlemen's Association.

**Persons Signed In To Testify But Not Testifying:** No one.