

# HOUSE BILL REPORT

## ESSB 6091

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**As Passed House:**  
January 18, 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:** Senate Committee on Agriculture, Water, Natural Resources & Parks (originally sponsored by Senators Van De Wege, Rolfes and Frockt).

**Brief History:**

**Committee Activity:**

None.

**Floor Activity:**

Passed House: 1/18/18, 66-30.

### Brief Summary of Engrossed Substitute Bill

- Establishes that evidence of potable water for a building permit must meet certain requirements based on the Water Resource Inventory Area (WRIA) in which the building permit is sought.
- Provides that an applicant's compliance with the permit-exempt groundwater statute and with applicable instream flow rules is sufficient in determining whether appropriate provisions for water supply for a subdivision have been made.
- Establishes that a county or city may rely on or refer to applicable minimum instream flow rules adopted by the Department of Ecology (Ecology) for purposes of complying with Growth Management Act and Planning Enabling Act requirements relating to water resources.
- Authorizes potential impacts to closed water bodies and potential impairment to instream flows in a specified set of WRIsAs, contingent upon compliance with the updated watershed plan process established for that set of WRIsAs.
- Authorizes potential impacts to closed water bodies and potential impairment to instream flows for a second specified set of WRIsAs, contingent upon compliance with the watershed restoration and enhancement plan process established for that second set of WRIsAs.

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*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.*

- Establishes a fee of \$500 for each new permit-exempt withdrawal for a domestic purpose in the WRIAs for which an updated watershed plan process or a watershed restoration and enhancement plan process has been established.
- Establishes maximum daily withdrawals, as calculated on an average annual basis, for new permit-exempt withdrawals for a domestic purpose in the WRIAs for which an updated watershed plan process or a watershed restoration and enhancement plan process has been established.
- Authorizes the issuance of \$300 million in bonds to fund watershed restoration and enhancement projects.
- Requires metering of all new domestic permit-exempt groundwater withdrawals in portions of two specified WRIAs.
- Authorizes up to five water resource mitigation pilot projects in specified WRIAs.

**Staff:** Robert Hatfield (786-7117).

**Background:**

Growth Management Act – Introduction.

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. The GMA also establishes a significantly wider array of planning duties for 29 counties, and the cities within those counties, that are obligated to satisfy all planning requirements of the GMA.

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, both of which are subject to review and revision requirements as prescribed in the GMA.

Growth Management Act – Planning Goals.

For the purpose of guiding the development of comprehensive plans and development regulations, counties and cities must consider various planning goals set forth in statute. These planning goals include protecting the environment, enhancing the state's high quality of life—including air and water quality—and the availability of water.

Growth Management Act – Rural Character.

The rural element of a comprehensive plan must allow for rural development, forestry, and agriculture in rural areas, and such rural development must be consistent with rural character. Rural character refers to the patterns of land-use and development established by a county in

the rural element of its comprehensive plan that, among other things, are consistent with the protection of natural surface water flows, and groundwater and surface water recharge, and discharge areas. Development regulations for rural areas must protect the rural character of the area by, among other things, protecting surface water and groundwater resources.

#### Planning Enabling Act.

Enacted in 1959, the Planning Enabling Act (PEA) is a precursor to the GMA that authorizes counties and regions in the state to engage in comprehensive land-use and development planning. Under the PEA, counties are authorized to, among other things, adopt comprehensive land-use plans to guide development. Comprehensive plans adopted under the PEA must provide for the protection of the quality and quantity of groundwater used for public water supplies.

#### Building Permits.

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 the Department of Ecology (Ecology), a letter from an approved water purveyor stating the purveyor's ability to provide water, or other verification of the existence of an adequate water supply.

#### Subdivision Approvals

The process by which land divisions, including 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. In reviewing a proposed subdivision, the local government must determine whether appropriate provisions have been made for, among other things, potable water supplies.

#### Wells.

The Washington Well Construction Act (WWCA) governs the design, construction, alteration, and decommissioning of wells in this state. Ecology regulates well design, construction, and maintenance. Wells are defined in the WWCA, and include water wells, resource protection wells, dewatering wells, and geotechnical soil borings.

#### 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. There is an exemption to the water right permit requirement, codified at RCW 90.44.050, for withdrawals of public groundwater for stock watering purposes, for watering a lawn, for a noncommercial garden less than one-half of an acre, and for single or group domestic uses or industrial purposes, not exceeding 5,000 gallons per day.

#### Water Resource Inventory Areas.

A Water Resource Inventory Area (WRIA) is, generally speaking, an area determined to be a distinct watershed. Ecology has divided the watersheds of the state into 63 WRIs. Each WRIA is identified by a number.

#### 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. Ecology must set minimum water flows to protect fish, game, or wildlife resources, when requested by the Department of Fish and Wildlife or if Ecology finds it necessary to protect water quality.

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. Instream flows have been set in 27 WRIAs. The instream flow cannot affect an existing water right with a senior priority date.

#### Watershed Planning.

State watershed planning laws provide a process for conducting watershed planning through a locally initiated process. If planning is conducted under this process, it must include a component on current and future water availability and use. It may include components regarding instream flows, water quality, and habitat.

Watershed planning may be conducted for WRIA or it may be conducted for multiple WRIAs. For this purpose, the local governments that initiate the process select or create a planning unit and designate a lead agency to provide staff support for the planning unit. Grants were made available from Ecology for organizing a planning unit and establishing work schedules, for conducting assessments, studying storage opportunities, and setting instream flows, and for developing a watershed plan and making recommendations for actions to be taken. Once a plan is approved by the planning unit, it is submitted to each of the counties with territory in the watershed or watersheds for which planning was conducted. After publishing notice and conducting at least one public hearing per county, the legislative authorities of these counties are to approve or disapprove of the plan in a joint session. If approved by the counties, the plan is an approved watershed plan.

#### Water Code – Minimum Flows.

Whenever an application for a permit to make beneficial use of public waters is approved relating to a waterbody for which a minimum instream flow has been adopted, Ecology must condition the permit to protect the minimum instream flows.

#### Water Code – Department of Ecology Duty to Investigate and Make Findings.

When Ecology considers an application for a water right permit, Ecology is required to investigate certain matters, including whether water is available for appropriation and whether the water would be applied to a beneficial use. In addition, Ecology is required to make certain findings before granting a water right permit, including that there is water available for appropriation for a beneficial use, and that the appropriation will not impair existing rights or be detrimental to the public welfare.

#### **Summary of Bill:**

##### Building Permits.

In water resource inventory areas (WRIAs) where the Department of Ecology (Ecology) has adopted rules pursuant to the updated watershed plans or the watershed restoration and enhancement plans mandated by the act, and in the following WRIAs with instream flow

rules that explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply for a building permit must be consistent with the specific applicable rule requirements: 5 (Stillaguamish); 17 (Quilcene-Snow); 18 (Elwha-Dungeness); 27 (Lewis); 28 (Salmon-Washougal); 32 (Walla Walla); 45 (Wenatchee); 46 (Entiat); 48 (Methow); and 57 (Middle Spokane).

In the following WRIAs where instream flow rules do not explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply for a building permit must be consistent with the updated watershed plan process mandated by the act for those WRIAs, unless the applicant provides certain other evidence of an adequate water supply: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville).

In the following WRIAs where instream flow rules do not explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply for a building permit must be consistent with the watershed restoration and enhancement plan process mandated by the act for those WRIAs, unless the applicant provides certain other evidence of an adequate water supply: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap).

In WRIAs 37 through 39 (Lower Yakima, Naches, and Upper Yakima), Ecology may impose additional requirements related to evidence of an adequate water supply for a building permit.

Additional requirements related to evidence of an adequate water supply for a building permit apply in WRIAs 3 and 4 (Lower Skagit-Samish and Upper Skagit).

In other areas of the state, physical and legal evidence of an adequate water supply for purposes of obtaining a building permit may be demonstrated by submittal of a water well report consistent with the requirements of the Washington Well Construction Act.

Any permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed in accordance with the Washington Well Construction Act before the effective date of this act is deemed to be evidence of an adequate water supply for a building permit.

#### Growth Management Act.

A county or city may rely on applicable minimum instream flow rules adopted by Ecology in order to comply with the requirements of the Growth Management Act related to surface and groundwater resources.

#### Planning Enabling Act.

County development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable minimum instream flow rules when considering subdivision and building permit applications.

#### Subdivision Approvals.

If a subdivision applicant intends to rely on a permit-exempt well as a source of potable water, the applicant's compliance with applicable instream flow rules and with RCW 90.44.050 is sufficient for determining whether appropriate provisions for water have been made for the subdivision.

Impacts to Instream Flows – Compliance with Updated Watershed Plans – Specified Water Resource Inventory Areas.

Unless requirements are otherwise specified in applicable rules, impacts and impairments to instream flows are authorized for new permit-exempt domestic groundwater withdrawals in the WRIAs listed below by complying with the updated watershed plan process created by the act.

The seven WRIAs in which the updated watershed plan process applies are: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville).

In the WRIAs listed above, the lead agency must invite a representative from each federally recognized Indian tribe that has a usual and accustomed harvest area within the water resource inventory to participate as part of the planning unit. In collaboration with the planning unit, the initiating governments must update the watershed plan for the WRIA. At a minimum, the updated 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.

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

The updated watershed plan may include, among other things, recommendations for modification to fees established under the act and standards for water use quantities that are less than authorized under RCW 90.44.050, or that are more or less than the maximum withdrawals authorized under the act.

Any modification to fees collected under the act or to standards for water use quantities that are less than authorized under RCW 90.44.050, or that are more or less than the maximum withdrawals authorized under the act may not be applied unless adopted as rules by Ecology.

Until an updated watershed plan is adopted and new rules have been adopted accordingly, a building permit applicant must pay to the permitting authority a fee of \$500, of which \$350 must be transmitted to Ecology, and may obtain approval for a permit-exempt withdrawal for domestic use only, with a maximum annual average withdrawal of 3,000 gallons per day.

If an updated watershed plan is not adopted in WRIA 1 (Nooksack) by February 1, 2019, Ecology must adopt rules in that WRIA that meet the requirements of the act by August 1, 2020.

If an updated watershed plan is not adopted in WRIA 11 (Nisqually) by February 1, 2019, Ecology must adopt rules in that WRIA that meet the requirements of the act by August 1, 2020.

If an updated watershed plan is not adopted in WRIs 22 (Lower Chehalis), 23 (Upper Chehalis), 49 (Okanogan), 55 (Little Spokane), or 59 (Colville), by February 1, 2021, Ecology must adopt rules that meet the requirements of the act for any WRIA without an updated watershed plan.

The authorization for impacts in the WRIs that are required to produce updated watershed plans, and the requirements that apply in these WRIs, applies only to new domestic permit-exempt groundwater withdrawals in the following WRIs: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville). These requirements do not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050.

Impacts to Instream Flows – Compliance with Watershed Restoration and Enhancement Plans – Specified Water Resource Inventory Areas.

Unless requirements are otherwise specified in applicable rules, impacts and impairments to instream flows are authorized for new permit-exempt domestic groundwater withdrawals in the WRIs listed below by complying with the watershed restoration and enhancement plan process created by the act.

The eight WRIs in which the watershed restoration and enhancement plan process applies are: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap).

In each of the WRIs listed above, Ecology must chair a watershed restoration and enhancement committee, and must invite the following entities to participate: a representative from each federally recognized Indian tribe that has either a usual and accustomed harvest area or reservation land within the WRIA; a representative of the Department of Fish and Wildlife; a representative of each county within the WRIA; a representative of each city within the WRIA; a representative designated by the largest irrigation district within the WRIA; a representative designated by the largest publicly owned provided or municipal water within the WRIA that is not a municipality; a representative designated by a local organization representing the residential construction industry in the WRIA; a representative designated by a local organization representing environmental interests within the WRIA; and a representative designated by a local organization representing agricultural interests within the WRIA.

By June 30, 2021, and in collaboration with the watershed restoration and enhancement committee, Ecology must adopt a watershed restoration and enhancement plan for each of the WRIs listed above. 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.

Prior to the adoption of the watershed restoration and enhancement plan, Ecology must determine that the actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream water resources within the inventory area.

The watershed restoration and enhancement plan may include, among other things, recommendations for modification to fees established under the act and standards for water use quantities that are less than authorized under RCW 90.44.050, or that are more or less than the maximum withdrawals authorized under the act.

Any modification to fees collected under the act or to standards for water use quantities that are less than authorized under RCW 90.44.050, or that are more or less than the maximum withdrawals authorized under the act may not be applied unless adopted as rules by Ecology.

If a watershed restoration and enhancement committee fails to approve a plan by June 30, 2021, the Director of Ecology must submit the final draft plan to the Salmon Recovery Funding Board and request that the board provide a technical review of the plan and provide recommendations to the Director of Ecology. The Director must consider the recommendations and may amend the plan without committee approval. In such an instance, Ecology must initiate rule-making within six months to incorporate recommendations into rules. The rules must be adopted within two years of initiation.

Until an updated watershed plan is adopted and new rules have been adopted accordingly, a building permit applicant must pay to the permitting authority a fee of \$500, of which \$350 must be transmitted to Ecology, and may obtain approval for a permit-exempt withdrawal for domestic use only, with a maximum annual average withdrawal of 950 gallons per day. Upon the issuance of a drought emergency order, Ecology may curtail groundwater withdrawals authorized by the act to no more than 350 gallons per day in the WRIAs in which watershed restoration and enhancement plans must be produced, except that an applicant may use a permit-exempt groundwater withdrawal to maintain a fire control buffer during a drought emergency order.

The authorization for impacts in the WRIAs in which watershed restoration and enhancement plans must be produced, and the requirements that apply in these WRIAs, applies only to new domestic permit-exempt groundwater withdrawals in the following WRIAs: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap). These requirements do not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050.

#### Pilot Groundwater Withdrawal Metering Project.

Ecology must initiate a pilot project to measure water use from all new groundwater withdrawals in the area under the Dungeness water rule, chapter 173-518 WAC (WRIA 18), and the area in which the Kittitas County Water Bank program operates (WRIA 39). Ecology must purchase and provide the meters to be used in the pilot projects. The project must be conducted to determine the overall feasibility of measuring water use for all new groundwater withdrawals.

### Report to Legislature.

Ecology must submit reports to the Legislature by December 31, 2020, and December 31, 2027. The reports must include the following elements, among others: progress in completing and adopting updated watershed plans and watershed restoration and enhancement plans; a description of program projects and expenditures; and an assessment of the streamflow restoration and enhancement benefits from program projects.

### Creation of New Accounts.

The watershed restoration and enhancement account, the watershed restoration and enhancement taxable bond account, and the watershed restoration and enhancement bond account are created.

It is the intent of the Legislature to appropriate \$300 million for projects to achieve the goals of the act until June 30, 2033.

### Joint Legislative Task Force – Pilot Projects.

A joint legislative task force on water supply is established to review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat, to develop and recommend a mitigation sequencing process and scoring system to address such appropriations, and to review the Washington Supreme Court decision in *Foster v. Department of Ecology*. Recommendations of the task force must be made by a 60 percent majority. The task force must make its recommendations to the Legislature by November 15, 2019.

Ecology must issue water-right permit decisions for up to five water resource mitigation pilot projects. Out-of-kind mitigation is authorized for projects where avoidance and minimization of impacts is not reasonably attainable. The purpose of the projects is to inform the legislative task force process while also enabling the processing of water right applications that address water supply needs.

The following entities are eligible to participate in the pilot projects:

- a city operating a Group A water system in Kitsap County and WRIA 15, with a population between 13,000 and 14,000;
- a city operating a Group A water system in Pierce County and WRIA 10, with a population between 9,500 and 10,500;
- a city operating a Group A water system in Thurston County and WRIA 11, with a population between 8,500 and 9,500;
- a nonprofit mutual water system operating a Group A water system in Pierce County and WRIA 12, with between 10,500 and 11,500 service connections; and
- an irrigation district located in Whatcom County and WRIA 1, solely for the purpose of processing changes of water rights from surface water to groundwater, and implementing flow augmentation to benefit instream flows.

### Water Code – Minimum Flows.

Whenever an application for a permit to make beneficial use of public waters is approved relating to a waterbody for which a minimum instream flow has been adopted, Ecology must condition the permit to protect the minimum instream flows, or must require water resource

mitigation of impacts to instream flows and closed surface water bodies for water resource mitigation pilot projects authorized under the act.

Water Code – Department of Ecology Duty to Investigate and Make Findings.

The requirement that Ecology undertake certain investigations and make certain findings when considering a water right permit application does not apply to a water resource mitigation pilot project for which water right permits are issued in reliance on water resource mitigation of impacts to instream flows and closed surface water bodies under the act.

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**Appropriation:** None.

**Fiscal Note:** Requested on January 18, 2018.

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