

# SENATE BILL REPORT

## SB 5024

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As of February 1, 2017

**Title:** An act relating to groundwater supply availability in areas with ground and surface water interaction.

**Brief Description:** Concerning groundwater supply availability in areas with ground and surface water interaction.

**Sponsors:** Senators McCoy, Hasegawa, Chase, Lias, Rolfes, Cleveland, Wellman, Frockt, Pedersen, Keiser and Kuderer.

**Brief History:**

**Committee Activity:** Agriculture, Water, Trade & Economic Development: 1/24/17.

**Brief Summary of Bill**

- Allows counties to establish a mitigation program for the mitigation of impacts upon surface waters of new permit-exempt groundwater withdrawals.
- Allows an applicant that plans to use a permit-exempt groundwater withdrawal for a building permit, subdivision, or dedication to show water availability where water will be withdrawn from a source that meets certain conditions or where there will be mitigation.
- Creates the Permit-Exempt Well Withdrawal Mitigation Committee.

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**SENATE COMMITTEE ON AGRICULTURE, WATER, TRADE & ECONOMIC DEVELOPMENT**

**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 the Department of Ecology (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

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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.

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 an 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. Instream flows have been set in 29 watersheds plus the mainstem of the Columbia River. The instream flow cannot affect an existing water right with a senior priority date.

Trust Water Rights Program. The Trust Water Rights Program enables the voluntary transfer of water and water rights to the state, either temporarily or permanently. While a water right is held in trust, it is considered an exercised water right and is protected from relinquishment. Additionally, water held in trust retains its original priority date. Generally, the process to establish a water bank begins with a consultation between Ecology's Water Resources Program and a would-be banker. If Ecology agrees that the banker's proposal is within the public's interest, a water banking agreement may be negotiated. This agreement describes how the Department will take ownership of a water right and hold it in the Trust Water Rights Program in exchange for processing applications for mitigated new uses.

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 Growth Management Act (GMA) to protect water availability. (*Whatcom County v. Western Washington Growth Management Hearings Board*, Wash. Supreme Ct. Case No. 91475-3; 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).

**Summary of Bill:** Building Permits and Subdivision Approvals. When applying for a building permit, evidence of an adequate water supply for potable water may be in the form

of a mitigation certificate issued by the county. For building permit, subdivision, or dedication approvals, if the applicant proposes to use a permit-exempt groundwater withdrawal, the permitting authority may determine that water is available for the proposed withdrawal where water is physically available and the water will be withdrawn from a source that is in hydraulic continuity with surface waters that Ecology has determined to have excess minimum instream flows and new water rights would be available for new noninterruptible withdrawals; or the applicant demonstrates that mitigation has been done to mitigate for the proposed withdrawal.

County Mitigation Program (Program). Each county may choose to implement a Program for the mitigation of impacts upon surface waters of new permit-exempt groundwater withdrawals. If requested by a county, Ecology must provide the best available existing data and mapping of ground and surface water resources in the county. In a county that adopts a Program, every applicant for a building permit and for subdivision approval must be allowed to participate if they are within the area covered by the Program and the county has or reasonably anticipates having water resources available to mitigate the applicant's impact.

A county may accept a monetary payment as an acceptable mitigation measure, provided that the county commits to fully mitigate for impacts associated with the landowner's well. The county may also accept mitigation obtained through the Trust Water Rights Program or from a water bank. The county may also accept a permanent dedication to instream flows under the Trust Water Rights Program or other change or transfer of a water right for dedication to instream flows. Ecology must expedite the processing of all applications to transfer a water right to the Trust Water Rights Program for water banking purposes, where the bank will serve to provide mitigation for small groundwater withdrawals under a Program.

The county must issue a mitigation certificate to a participant meeting the Program standards. The certificate must be recorded with the title to the real property. The certificate recipient has no further responsibility for implementing the mitigation but may be required to pay reasonable fees to pay for Program operation and monitoring. These fees may not be based on the amount of water used and must be the same for all participants.

The county planning department must provide assistance to counties choosing to adopt a program, including:

- the best available information regarding ground and surface waters in the areas to be covered by a Program, including surface water impact risk relative to well locations;
- information regarding potential water rights that may serve as mitigation;
- information on how to design potential mitigation projects, such as offstream storage or flow augmentation, or alternative water supply programs, such as cisterns;
- information regarding water banks, including assistance in creating a county-sponsored water bank; and
- financial assistance for creating and implementing the Program, which should cover at least one-half of the costs of the Program.

Permit-Exempt Well Withdrawal Mitigation Committee (Committee). The Committee is created, comprised of seven members appointed by the Governor. Members of the Committee include a chair of the Committee; a representative of counties; a representative of tribal governments; a representative of rural property owners; a representative of rural

property development interests; a representative of environmental and conservation interests; and a representative of the Department of Commerce, who must coordinate with other appropriate agencies including the Departments of Health, Ecology, and Fish and Wildlife.

By January 1, 2018, the Committee must provide a report to the Governor and the Legislature that includes:

- a summary of actions by counties to incorporate considerations of water supply availability and ground and surface water interactions into comprehensive land use plans, development regulations, and building permit and land division reviews;
- a review of county mitigation programs;
- a summary of the hydrological data and mapping resources available to assist counties in assessing water supply availability for permit-exempt wells;
- an estimate of additional hydrological assessments needed and recommendations for state financial and technical assistance to obtain such assessments;
- recommendations for policy and budgetary measures to provide for alternative water supplies and mitigation projects when water banks are not available; and
- recommendations for guidance to counties for integrating water supply availability considerations into comprehensive land use plans and development regulations.

By January 1, 2019, the Committee must submit a report to the Governor and to the Legislature that includes recommendations for:

- improving local and state coordination and funding of integrating water supply availability into land use planning;
- state funding to cover the costs of mitigation that exceed monetary compensation received in the issuance of mitigation certificates; and
- the protection and restoration of stream flows necessary to support fisheries and all other instream resources, including the adoption of regulatory minimum flows in the remaining watersheds of the state.

The water withdrawal mitigation assistance account is created in the State Treasury and expenditures from the account may be used only for implementing mitigation programs to address water supply availability.

**Appropriation:** \$10 million for the 2017-19 biennium from the water withdrawal mitigation assistance account.

**Fiscal Note:** Requested on January 19, 2017.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony:** PRO: There is a need to work together to come to common ground that will benefit all stakeholders and the environment. The problem is fourfold: water is a finite resource; there is more water on paper than there is real water; the fishing industry is reliant on instream flows; and new wells collectively have significant impact in some basins. Washington relies on the recreational fisheries and that bring in \$1.2 billion a year, and the commercial fisheries bring in approximately \$3.3 billion a year. These

both rely on instream flows, and are vital not only for the economy but for tribal culture. While wells represent 1 percent of the water used statewide, in some localized basins they are 100 percent of the water. Studies show that the cumulative impact of thousands of homes over decades is significant. It is important to fully mitigate, where necessary, impacts from new wells on senior water rights, whether they be instream or out of stream.

SB 5024 allows local governments to permit new homes for up to five years before the mitigation is in place, provided the county adopts and commits to carry out the mitigation plan. This bill allows counties to develop creative new approaches to fully mitigate permit exempt well use. The permit-exempt well withdrawal mitigation committee might also include climate scientists to address evolving climate issues for people and agriculture. This bill both acknowledges the legal status of instream flows and tries to address the cumulative impact of permit exempt wells on the watershed, particularly on basins already under stress.

CON: The Hirst decision overwhelmed counties, and many are now requiring hydrogeological studies or 500 foot buffers. SB 5024 leaves impairment determinations to the counties rather than to Ecology and counties are not equipped to make impairment decisions. This bill asks counties to set up water banks, conduct hydrological review, and determine impairment, which is too much for counties to handle. This bill will not solve the Hirst decision's impact on individual rights. Families who bought property in reliance on Ecology's rules and the county's land use plans will still be stuck. This bill requires water be both physically and legally available, which is tough to show. It is inappropriate for the Legislature to take property based on a nebulous assumption of impact, which may require just compensation for the harmed party.

This bill has a fundamental flaw in that it assumes that the issuance of a building permit in a controlled basin necessarily has an adverse impact on surface water. The appropriate method of asserting impairment of a water right is that the person asserting the impairment carries the burden of proof. This bill in part relies on water banks, which do not work in most Western Washington counties because there are not agricultural water rights to bank. There needs to be a different fix to make the bill actually work and actually solve the problems. The bill proposes to amend the building permitting section to recognize a mitigation certificate issued by the county, which would limit the availability for people to rely on certificates issued by other water banks. This bill also amends the Trust Water Rights Program giving counties a priority over Ecology's processing of water rights in the program, which means that other water bank applications would fall behind all of a county's water bank applications, rather than be treated the same.

OTHER: The state population is set to grow by 1 million people in the next ten years, and this issue needs to be handled correctly or there will be bigger challenges ahead. The ability for mitigation needs to be addressed, not only for permit exempt wells but also for municipal use. Finally, lack of metering on permit exempt wells is an issue. SB 5024 introduces a key provision, an in lieu fee payment structure, which is essential when one looks at the 5000 new wells across the state. The attempt to focus on mitigation is appreciated but there could be risks to senior water right holders.

**Persons Testifying:** PRO: Senator John McCoy, Prime Sponsor; Carla Carlson, Muckleshoot Tribe; Denise Smith, League of Women Voters; Michael Garrity, WA Dept. of

Fish and Wildlife; Bruce Wishart, Sierra Club; Trish Rolfe, CELP; Bryce Yaddon, Futurewise; Marie Sullivan, Confederated Tribes of the Umatilla Indian Reservation.

CON: Nancy Belsby, WA Cattlemen's Assoc; Laura Berg, WA State Assoc of Counties; Jan Himebaugh, Building Industry Assoc of WA; Bud Blake, Thurston County Commissioner; Teri Jeffries, Mason County Commissioner; Glen Smith, WA State Ground Water Assoc.; Bill Clarke, WA Realtors; Steve Gano, Suncadia Resort; Kathleen Collins, WA Water Policy Alliance; Evan Sheffels, WA Farm Bureau and WA Cattlemen's Assoc.

OTHER: David Christensen, Ecology; Tim Ballew II, Chairman, Lummi Nation; Dawn Vyvyan, Puyallup Tribe and Yakama Nation; Carl Schroeder, Assoc of WA Cities; Lisa Pelly, Trout Unlimited.

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