

SENATE BILL REPORT

SB 5239

As of February 1, 2017

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 Warnick, Takko, Ericksen, Becker, Walsh, Angel, Wilson, Schoesler, Honeyford, Pearson, Brown and Padden.

Brief History:

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

Brief Summary of Bill

- Allows a local jurisdiction to rely on Department of Ecology's (Ecology) water resources rules when approving a building permit, subdivision, dedication, or short subdivision to determine if there is available potable water.
- Allows a county or city to rely on Ecology's water resources rules in its comprehensive plan under the Growth Management Act (GMA).
- Provides that a permit-exempt groundwater withdrawal may not be deemed or considered to be causing impairment or injury to a minimum flow or other similar policy established by Ecology, regardless of the policy's priority date.

SENATE COMMITTEE ON AGRICULTURE, WATER, TRADE & ECONOMIC DEVELOPMENT

Staff: Karen Epps (786-7424)

Background: Growth Management Act. 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 Originally enacted in 1990 and 1991, GMA establishes land use designation and environmental protection requirements for all Washington counties and cities, and a significantly wider array of planning duties for the 28 counties and the cities within them that fully plan under GMA. All counties and cities must designate and protect critical areas and agricultural lands, forest lands, and mineral resources

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lands that have long-term significance for commercial production. These protection requirements obligate local governments, using the best available science, to adopt development regulations, also known as critical areas ordinances, that comply with specified criteria.

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.

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 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.

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*, 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: An applicant for a building permit may rely on information pertaining to applicable water resources management rules adopted by Ecology as evidence to verify the existence of an adequate water supply. If an applicant for a building permit proposes to use a permit-exempt groundwater withdrawal to supply potable water for a building, the local building permitting authority may determine that it is sufficient for the applicant to provide evidence that water is physically available for use. In approving a subdivision, dedication, or short subdivision, a city, town, or county may rely on or refer to applicable water resources management rules adopted by Ecology to determine if appropriate provisions have been made for potable water supplies.

As part of the land use element in a county's comprehensive plan, a county or city may rely on or refer to applicable water resources management rules adopted by Ecology when providing for the protection of the quantity of groundwater used for public water supplies. Under the rural element of a county's comprehensive plan, a county or city may include measures that rely on, or refer to, applicable water resources management rules adopted by Ecology to protect critical areas and surface and groundwater resources.

A permit-exempt groundwater withdrawal may not be deemed or considered to be causing impairment or injury to a base flow, minimum flow, minimum level, or other similar standard or policy established by Ecology, regardless of the priority date. This provision does not affect the ability of any person to pursue a cause of action for the protection of any water right that is not a base flow, minimum flow, minimum level, or other similar standard or policy established by Ecology.

Appropriation: None.

Fiscal Note: Not requested.

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: This bill works to accomplish two objectives: reestablish the coordination between local governments and the Department of Ecology that existed prior to the Hirst decision, and reinforce the Legislature's long-standing expectation that household wells are exempt from state permitting due to their insignificant impact. After the Hirst decision, one basin in Spokane County with a minimum instream flow has been closed until the development of a water mitigation program. The county is coordinating with neighboring counties to develop a water bank, but this will take significant time and resources. Four other basins in Spokane County do not have instream flow rules, but the county felt compelled to limit development due to the Hirst Decision. Mason County has had to put efforts to update its comprehensive plan on hold for fear of an appeal due to the Hirst Decision. This bill has county support because it allows local government to rely on Ecology's water resource rules as a determination of potable water availability and as part of their planning under the Growth Management Act. Counties need to be able to rely on

information developed by Ecology, because rural counties, and everyday citizens, cannot afford to do the level of hydrological study needed to meet the demands of the court. Hydrological studies cannot guarantee the owner will be able to obtain a permit, nor will it necessarily result in a conclusive answer as it is difficult to determine what the impact will be to instream flows.

The State Supreme Court decision has caused home building to virtually stop in the rural areas. The cost and uncertainty have created a de facto moratorium since counties are unable to issue permits without proof that there is no impact on instream flows. There will be a negative economic impact to rural development in Washington with financial losses to rural landowners approaching hundreds of millions of dollars. Thousands of properties are now unbuildable, adding to our state's dire housing shortage. Moreover, mortgage lenders will not loan money for a building that does not have reliable water. This bill will reestablish the proper relationship between the county and the Ecology, taking things back to the way they were before the Hirst Decision. It is Ecology's job to manage water resources and the county's job to regulate land use. The rural areas need to be able to build the right number of homes in the right places and that is only possible under Ecology's rules.

CON: Section five of this bill undermines the basic principles of water law. It makes instream flows a lesser water right than other water rights. This bill will allow permit exempt wells to harm fish and wildlife that rely on instream flows for their survival. This would also be harmful to anyone who relies on salmon for food, recreation, and cultural activities. The Hirst lawsuit was filed because of consumer protection reasons, and to encourage the counties to make sound planning decisions as required by the GMA. This bill removes the requirement that counties only allow development in areas where there is legally available water. Although the bill provides for a legal path to challenge to protect their water right, this is very expensive.

This bill is based on a misleading premise that permit exempt well impacts are de minimis based on Ecology's assessment that these wells make up 0.9 percent of consumptive water use. Permit exempt wells comprise about 17 percent of similar domestic use in the state. While it is true that the cumulative impact of these wells still represents a small amount of the state's overall water use, exempt wells can have a significant negative impact on flows of smaller tributaries. The provisions of this bill are contradictory; on the one hand upholding the rules established by Ecology in one section and then in the other allowing permit exempt wells to have a super priority over those rules.

OTHER: The bill could be improved if it acknowledges that some wells may cause impairment to instream flows and then outlines a process for mitigating those impairments. This bill recognizes that counties should be able to rely on Ecology's rules, since Ecology manages water resources, but does not completely refill the tool chest that was eliminated in the last few years. Managing impacts beyond house-by-house and minimizing the impact on individual homeowners is preferred, and it is not necessary to subordinate instream flows to do that. Mitigation needs to be addressed, not only for permit exempt wells but also for municipal use.

Persons Testifying: PRO: Al French, Spokane County; Nancy Belsby, WA Cattlemen's Assoc; Ken Garceau, citizen; Jan Himebaugh, Building Industry Assoc of WA; Mike Ennis,

Assoc of WA Business; Carl Schroeder, Assoc of WA Cities; Bill Clarke, WA Realtors; Glen Smith, WA State Ground Water Assoc; Kathleen Collins, WA Water Policy Alliance; Frederick Cardenas, citizen; Kim Thornton Henning, citizen; Sue Ann Croft, citizen; Laura Berg, WA State Assoc of Counties; Judson Willis, Lexar Homes; Bud Blake, Thurston County Commissioner; Teri Jeffries, Mason County Commissioner; David Danton, Lexar Homes; Zach Nutting, citizen; Derek Young, Pierce County; Evan Sheffels, WA Farm Bureau, WA Cattlemen's Assoc.

CON: Carla Carlson, Muckleshoot; Denise Smith, League of Women Voters; Dawn Vyvyan, Puyallup Tribe and Yakama Nation; Marie Sullivan, Confederated Tribes of the Umatilla Indian Reservation; Emily Haley, Swinomish; Jeff Dickison, Squaxin Island Tribe; Bruce Wishart, Sierra Club; Trish Rolfe, CELP; Bryce Yaddon, Futurewise.

OTHER: David Christensen, Ecology; Tim Ballew II, Chairman, Lummi Nation; Michael Garrity, WA Dept. of Fish and Wildlife; Lisa Pelly, Trout Unlimited.

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