

SENATE BILL REPORT

ESSB 6091

As Passed Senate, 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: Agriculture, Water, Natural Resources & Parks: 1/08/18, 1/11/18 [DPS-WM].

Floor Activity:

Passed Senate: 1/18/18, 35-14.

Brief Summary of Engrossed First Substitute Bill

- Establishes that evidence of potable water for a building permit must meet certain requirements based on the Water Resource Inventory Area (WRIA) that the permit is located.
- Establishes that a county or city may rely on or refer to applicable minimum instream flow rules adopted by Department of Ecology (Ecology) for purposes of complying with the Growth Management Act (GMA) relating to water resources.
- Requires that, in certain WRIAs, Ecology must work with the Planning Units in those WRIAs to update the watershed plan to meet certain additional requirements.
- Requires that Ecology establish Watershed Restoration and Enhancement (WRE) committees and adopt WRE plans in other certain WRIAs.
- Requires that Ecology initiate two pilot projects in specified WRIAs to measure all new groundwater withdrawals.
- Creates a Joint Legislative Task Force to review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat and to develop and recommend a mitigation sequencing process and scoring system to address such appropriations.

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.

SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

Majority Report: That Substitute Senate Bill No. 6091 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Van De Wege, Chair; McCoy, Vice Chair; Warnick, Ranking Member; Honeyford and Nelson.

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 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 WRIAs.

Summary of Engrossed First Substitute Bill: Building Permits and Subdivisions. In WRIAs where Ecology has adopted rules pursuant to updated watershed plans or the watershed restoration and enhancement (WRE) plans, and in the 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.

In WRIAs where instream flow rules do not explicitly regulate permit-exempt groundwater withdrawals and there is a completed watershed plan, evidence of an adequate water supply for a building permit must meet certain requirements or be consistent with the updated watershed plan process.

In WRIAs where instream flow rules do not explicitly regulate permit-exempt groundwater withdrawals and a watershed plan was not adopted, evidence of an adequate water supply for a building permit must meet certain requirements or be consistent with the watershed restoration and enhancement plan process, unless the applicant provides certain other evidence of an adequate water supply.

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 apply in areas within WRIAs 3 and 4—Lower Skagit-Samish and Upper Skagit—as a result of a 2013 Supreme Court decision.

In other areas of the state, evidence of potable water may consist of a water well report.

Any permit-exempt groundwater withdrawal associated with a water well constructed before the effective date of this bill is deemed to be evidence of an adequate water supply for a building permit.

If water supply is to be provided by a permit-exempt groundwater withdrawal, the applicant's compliance with the groundwater statute and with applicable instream flow rules is sufficient in determining appropriate provisions for water supply for a subdivision, dedication, or short subdivision.

GMA and County Planning. For the purposes of complying with the GMA relating to surface and groundwater resources, a county or city may rely on or refer to applicable minimum instream flow rules adopted by Ecology. Development regulations must ensure that proposed

water uses are consistent with the permit-exempt groundwater statute and with applicable rules when making building permit and subdivision decisions.

Updated Watershed Plans. 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.

In WRIAs where instream flow rules do not explicitly regulate permit-exempt groundwater withdrawals and there is a completed watershed plan, 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.

Potential impacts on a closed water body and potential impairment to an instream flow for domestic groundwater withdrawals exempt from permitting may be allowed under a watershed plan. Modification of fees or water use quantities may not be applied unless authorized by rules. The provisions related to domestic permit-exempt groundwater withdrawals in the bill only applies to new domestic groundwater withdrawals in certain WRIAs and does not restrict permit-exempt groundwater withdrawals for other use.

Until an updated watershed plan is adopted and new rules have been adopted in these WRIAs, a city, town, or county issuing a building permit or approving a subdivision in these WRIAs must:

- record relevant restrictions or limitations with the property title;
- collect fees of \$500 and transmit \$350 to Ecology;
- record the number of building permits or subdivisions issued under these restrictions;
- annually transmit an accounting of building permits and subdivision approvals; and
- limit domestic use to a maximum withdrawal of three thousand gallons per day per connection.

If an updated watershed plan is not adopted in WRIA 1—Nooksack—by February 1, 2019, the Department of 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, the Department of 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 other WRIsAs where instream flow rules do not explicitly regulate permit-exempt groundwater withdrawals and there is a completed watershed plan by February 1, 2021, the Department of Ecology must adopt rules that meet the requirements of the act for any WRIA without an updated watershed plan.

WRE Committees and WRE Plans. Ecology must establish a WRE committee in WRIsAs where instream flow rules have been adopted that do not explicitly regulate permit-exempt groundwater withdrawals and where a watershed plan was not completed. 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;
- each county and city in the WRIA;
- a representative from the largest irrigation district in the WRIA;
- a representative from the largest publicly owned water purveyor in the WRIA;
- a representative from the local 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.

Ecology must adopt a WRE plan no later than June 30, 2021, in collaboration with the WRE committee. All members of the WRE committee must approve the plan.

At a minimum, the WRE 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 WRE 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.

Potential impacts on a closed water body and potential impairment to an instream flow for domestic 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. Modification of fees or water use quantities may not be applied unless authorized by rules.

If the WRE committee fails to approve the WRE plan by June 30, 2021, 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.

Until a WRE plan is approved and rules are adopted, a city, town, or county issuing a building permit or approving a subdivision in these WRIsAs must:

- record relevant restrictions or limitations with the property title;

- collect fees of \$500 and transmit \$350 to Ecology;
- record the number of building permits or subdivisions issued under these restrictions;
- annually transmit an accounting of building permits and subdivision approvals; and
- until rules have been adopted that specify otherwise, require the following measures: (1) limit domestic use to a maximum withdrawal of 950 gallons per day per connection; and (2) that the applicant manage stormwater runoff on-site to the extent practicable.

Upon the issuance of a drought emergency order, Ecology may curtail these exempt groundwater withdrawals to no more than 350 gallons per day per connection for indoor use only. However, an applicant may use permit-exempt groundwater to maintain a fire control buffer. The provisions related to domestic permit-exempt groundwater withdrawals in the bill only applies to new domestic groundwater withdrawals in certain WRIsAs and does not restrict permit-exempt groundwater withdrawals for other use.

Duties. Ecology must initiate a pilot project in two WRIsAs to measure water use from all new domestic 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, 2020, and December 31, 2027, that includes 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.

Joint Legislative Task Force. A Joint Legislative Task Force (Task Force) 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*, 184 Wn.2d 465, 362 P.3d 9599 (2015). The Task Force must make recommendations to the Legislature by November 15, 2019. Recommendations must be made by a 60 percent majority of the Task Force and the representatives from Ecology, Department of Fish & Wildlife, and Department of Agriculture are not eligible to vote.

Ecology must issue permit decisions for up to five water resource mitigation pilot projects. It is the intent of the Legislature to use the pilot projects to inform the Task Force process while also enabling the processing of water right applications that address water supply needs. Ecology must monitor the implementation of the pilot projects, including mitigation in each pilot project, at least annually through December 31, 2028.

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 until June 30, 2033.

Appropriation: None.

Fiscal Note: Available.

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 on Original Bill: *The committee recommended a different version of the bill than what was heard.* CON: The Hirst decision has had a negative impact and affected property values. The gallon limitation would be onerous. The limitation on outside watering will have adverse effects on 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 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. 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. 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. 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. This bill attempts to provide a structure for addressing the long-term sustainability of the state's shared water resources. 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 clarifies that Ecology's instream flow rules regulate water availability and reduces uncertainty for local governments and landowners.

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: 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: Brin Noren, citizen.