

# HOUSE BILL REPORT

## HB 1885

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**As Reported by House Committee On:**  
Agriculture & Natural Resources

**Title:** An act relating to clarifying the roles of state and local governments in the regulation and mitigation of water resources.

**Brief Description:** Clarifying the roles of state and local governments in the regulation and mitigation of water resources.

**Sponsors:** Representatives Springer, Dent, Blake, Manweller, Koster, Haler and Muri.

**Brief History:**

**Committee Activity:**

Agriculture & Natural Resources: 2/7/17, 2/16/17 [DP].

**Brief Summary of Bill**

- Permits a county or city to refer to applicable Department of Ecology (Ecology) instream flow rules when complying with the Growth Management Act's requirements regarding the protection of surface water and groundwater resources and to determine the existence of an adequate potable water supply when approving an application for a subdivision or similar development.
- Permits an applicant for a residential building permit to provide evidence of an adequate water supply by presenting a water well report for certain permit-exempt groundwater withdrawals.
- Establishes a fee of up to \$250 to be charged in connection with an application for a building permit that will rely on a permit-exempt groundwater withdrawal for its water supply; the fee must be remitted to Ecology for the purpose of supporting the collection of accurate information regarding permit-exempt groundwater withdrawals.
- Authorizes Ecology to condition a water rights permit on mitigating impacts to fish and other aquatic resources.
- Directs Ecology to establish a program to mitigate cumulative impacts of permit-exempt domestic wells in basins where Ecology has adopted a minimum instream flow rule.

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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.*

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## HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

**Majority Report:** Do pass. Signed by 9 members: Representatives Blake, Chair; Chapman, Vice Chair; Dent, Assistant Ranking Minority Member; Lytton, Orcutt, Pettigrew, Robinson, Springer and J. Walsh.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Buys, Ranking Minority Member; Chandler, Fitzgibbon, Kretz, Schmick and Stanford.

**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 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 and 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.

#### 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 other verification of 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 of an acre. Single or group domestic uses or industrial purposes not exceeding 5,000 gallons per 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.

#### Beneficial Use.

A beneficial use of water includes, but is not limited to, use for domestic water, irrigation, fish, shellfish, game and other aquatic life, municipal, recreation, industrial water, generation of electric power, and navigation.

#### 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 29 watersheds plus the mainstem of the Columbia River. 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). A WRIA is, generally speaking, an area determined to be a distinct watershed. There are 64 WRIAs identified by Ecology. Each WRIA is identified by a number and may contain a local watershed planning group with an identified lead entity.

## **Summary of Bill:**

### Growth Management Act.

When planning for and regulating development, a county or city may rely on or refer to applicable Department of Ecology (Ecology) water resource management rules when complying with the Growth Management Act's requirements regarding the protection of surface water and groundwater resources.

### Residential Building Permits.

An applicant for a residential building permit may provide evidence of an adequate water supply by presenting a water well report for a permit-exempt groundwater withdrawal that is not prohibited by an instream flow rule. In basins where instream flow rules have been adopted, a county or city may impose a fee of up to \$250 for a building permit that will rely on a permit-exempt withdrawal for its water supply. The purpose of the fee is to support the collection and management of accurate information regarding exempt withdrawals. Funds collected from the fee must be remitted to Ecology.

### Subdivision Approvals.

When approving an application for a subdivision or similar development, a city, town, or county may rely on Ecology's instream flow rules to determine the existence of an adequate potable water supply.

### Beneficial Use Applications and Minimum Instream Flows.

When Ecology receives an application for a permit to make beneficial use of public waters for a water body subject to minimum instream flows, the basis on which Ecology must condition the permit is expanded to allow for conditioning the permit on mitigating the impacts to fish and other aquatic resources.

### Mitigation of Cumulative Impacts in Basins with Minimum Instream Flows.

Ecology must establish a program to mitigate cumulative impacts of permit-exempt domestic wells in basins where Ecology has adopted a minimum instream flow rule. The mitigation program must address the cumulative impacts of domestic permit-exempt withdrawals on a watershed or sub-basin basis. The mitigation program must not require individual mitigation in connection with each permit-exempt domestic withdrawal, except where groundwater mitigation is required by the county through an adopted mitigation program. The mitigation program must either protect minimum instream flows, or must mitigate impacts to fish or aquatic resources.

Ecology may establish a program to mitigate cumulative impacts of permit-exempt domestic wells in basins where permit-exempt domestic withdrawals are causing significant adverse cumulative impacts to fish species of concern, or where land use and growth projections establish a strong likelihood of significant adverse cumulative impacts.

On the request of a county, Ecology must permit a county with jurisdiction over a watershed resource inventory area to administer the cumulative impacts mitigation program for the relevant area. The mitigation program may also be administered by another entity through agreement, so long as both the county and Ecology are parties to any such agreement.

Definition of "Withdrawal of Water."

The "withdrawal of water" under the Water Resources Act of 1971 is defined to mean the removal of water from any source for a beneficial use.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony:**

(In support) The Department of Ecology (Ecology) is the water expert; where they have instream flows rules, it makes sense to be able to rely on those rules. This is a good start on the right path to a solution. The Pierce County (County) interpretation of *Hirst v. Western Washington Growth Management Hearings Board* is that each applicant must prove they have water, an interpretation that affects about 95 percent of the county. The County has processed about 3,200 permits over the past 10 years that would have been affected by *Hirst*, and this year that County has processed four. Requiring an individual hydrologic analysis costs between \$2,000 and \$15,000 per house. It makes more sense to handle this at a regional level. Mitigation projects should be as large as possible. There are literally people who cannot build their homes right now.

There have been a number of canaries in the coal mine regarding water over the years. Solutions are needed that address growth in both rural areas and urban areas. The days of exempt wells not considering impact on other water users are probably over. It does not make sense for counties to have obligation to determine water availability. This bill allows counties to come up with mitigation plans and to provide flexibility for the mitigation to work.

Construction in rural areas where there are instream flows has been shut down. The Growth Management Act contemplates rural growth. It is a good idea to take the onus off counties to do the hydrological connection work. *Hirst* invites a legislative fix. Exempt wells comprise about 1 percent of wells. Counties have halted development in response to *Hirst*. Counties do not have expertise to manage water resource decisions. *Hirst* is having a negative economic effect across the state, possibly in the hundreds of millions of dollars.

Other states have recognized that there is water in rural areas that is not part of the standard permitting system. Some states have a blanket domestic priority for home wells; this bill is not asking for that. You can either choose to work within Ecology's rules or you can pass a law that overrides those rules, and this bill works within those rules. The bill requires mitigation for significant impacts, and places the mitigation obligation on counties. The Kittitas County process works because there is now an instream flow rule for the Yakima River and there are thousands of senior water rights, so it's easy to do a water bank there. Those elements are not present in western Washington.

(Opposed) The bill allows counties to rely on Ecology's often unhelpful and defective regulations. It requires mitigation only for permit-exempt wells that are causing serious adverse impacts, and falls short of the simple impairment standard. A water solution needs to call for water management, things like conservation and reclaimed water. Each basin is different; there is no one-size-fits-all solution. Instream flows are important for salmon, especially in small tributaries. The bill does not make sense in the Sakgit River basin. The bill does not provide a clear and protective mitigation standard; the law needs to be clear that mitigation must be scientifically sound. New uses must not impair senior water rights.

*Hirst* and *Foster v. Washington State Department of Ecology* were good decisions. They sent a message that it is time to address the state's water resources seriously. The bill allows out-of-kind mitigation, which is often inadequate. There is great concern about the impact of exempt wells. In King County, big estates with large lawns are being built, and even though they are on a municipal water system, they then also drill a well. It is almost impossible to distinguish between a well for domestic purposes and a well for other purposes. Exempt wells should still have to meet the impairment standard, not the significant cumulative impact standard.

*Hirst* represented a big change in how water is managed in rural areas. The bill does multiple things: it overturns *Hirst*, it overturns *Foster*, and it places severe restrictions on future Ecology programs. It also lets local governments rely on outdated instream flow rules. There are two problems with that: there are instream flow rules for only about half of the streams in the state, and the rules established prior to 1991 are not up to date. The most troubling part of the bill is that it allows for out-of-kind mitigation that does not replace water in streams. This bill goes to all water rights covered by a permit. Salmon are dying in streams because of lack of water and high temperatures, and more riparian vegetation does not solve that. In-kind mitigation is better.

Instream flows are a property right of the state, with a set priority date. Those flows protect fisheries. This bill would allow junior water rights to impair senior water rights. Exempt wells represent 17 percent of the water consumed statewide for residential uses.

(Other) There is opposition to this bill because it reverses *Hirst*. Tribes have been asking for solutions to permit-exempt wells. There are instances of exempt wells being drilled to irrigate lawns. This bill would allow for reliance on instream flow rules, even when the flow rules were written without consideration of exempt wells. Washington has been developed on the backs of salmon. There are several salmon species listed on the Endangered Species Act because of that. Last summer, there was poor salmon survival because of low flows and high temperatures. The state needs to do a better job of managing existing water rights, and a much better job of balancing development and habitat. Without fish and wildlife habitat, Washington would not have the tourism it has. There is strong opposition to out-of-kind mitigation. Culverts and log structures do not do any good if there is no water. The suggestion that 1 percent of water withdrawals in the state are from permit-exempt wells is misleading; if you go higher in the watershed outside the city, almost all water comes from exempt wells. Small streams are most impacted by exempt wells, which is where most of the fish production comes from. Counties do not have the technical capabilities to handle complex water rights issues; there is a need for stronger Ecology development. There needs to be both physical and legal availability of water before housing is developed.

There is a concern with the bill's provision that only a county may operate a water bank. Some private entities would also like to have the option of running a water bank. Finding the reasonable balance is difficult and important. The *Hirst* decision has made that job more difficult, and more important. This bill clarifies that water withdrawals can be either temporary or permanent. It makes sense to allow for reliance on Ecology rules. In-lieu fees are also useful. There is a concern that the fee as currently proposed does not adequately cover mitigation.

**Persons Testifying:** (In support) Representative Springer, prime sponsor; Laura Berg, Washington Association of Counties; Derek Young, Pierce County; Carl Schroeder, Association of Washington Cities; Michael Ennis, Association of Washington Business; Bill Clarke, Washington Realtors; and Kathleen Collins, Washington Water Policy Alliance.

(Opposed) Emily Haley, Swinomish Tribe; Carla Carlson, Muckleshoot Tribe; Jan Himebaugh, Building Industry Association of Washington; Bruce Wishart, Sierra Club; Trish Rolfe, Center for Environmental Law and Policy; Dawn Vyvyan, Yakama Nation and Puyallup Tribe; and Anne Savery, Tulalip Tribe.

(Other) Jeff Dickinson, Squaxin Island Tribe; Daryl Williams, Tulalip Tribe; Kathleen Gano, Suncadia; and David Christensen, Department of Ecology.

**Persons Signed In To Testify But Not Testifying:** None.