

SENATE BILL REPORT

2E2SSB 5239

As Passed Senate, June 29, 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: Senate Committee on Ways & Means (originally sponsored by 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, 2/09/17 [DPS, DNP, w/oRec].

Ways & Means: 2/21/17, 2/23/17 [DP2S, DNP, w/oRec].

Floor Activity:

Passed Senate: 2/28/17, 28-21.

First Special Session: Passed Senate: 5/02/17, 28-18.

Second Special Session: Passed Senate: 6/13/17, 28-20.

Third Special Session: Passed Senate: 6/29/17, 28-21.

Brief Summary of Second Engrossed Second Substitute Bill

- Establishes that evidence of potable water for a building permit may include a water well report for a permit-exempt groundwater withdrawal that is not prohibited by Department of Ecology's (Ecology) water resources rules.
- Allows a local jurisdiction to rely on Ecology's water resources rules when approving a 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 water right permit may be conditioned to mitigate impacts to fish or aquatic resources and need not be limited to measures that require water to be replaced.

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, TRADE & ECONOMIC DEVELOPMENT

Majority Report: That Substitute Senate Bill No. 5239 be substituted therefor, and the substitute bill do pass.

Signed by Senators Warnick, Chair; Hawkins, Vice Chair; Brown, Honeyford, Pearson and Short.

Minority Report: Do not pass.

Signed by Senators Chase, Ranking Minority Member; Wellman, Assistant Ranking Minority Member; McCoy and Van De Wege.

Minority Report: That it be referred without recommendation.

Signed by Senator Takko.

Staff: Karen Epps (786-7424)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5239 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Braun, Chair; Brown, Vice Chair; Rossi, Vice Chair; Honeyford, Vice Chair, Capital Budget; Bailey, Becker, Fain, Miloscia, Padden, Rivers, Schoesler, Warnick and Zeiger.

Minority Report: Do not pass.

Signed by Senators Ranker, Ranking Minority Member; Frockt, Assistant Ranking Minority Member, Capital Budget; Carlyle, Darneille, Hasegawa, Keiser and Pedersen.

Minority Report: That it be referred without recommendation.

Signed by Senators Rolfes, Assistant Ranking Minority Member, Operating Budget; Billig and Conway.

Staff: Jed Herman (786-7346)

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 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 Second Engrossed Second Substitute Bill: Evidence of potable water for a building permit may include a water well report for a permit-exempt groundwater withdrawal that is not prohibited by an applicable water resources management rule adopted by Ecology. Providing evidence of an adequate water supply does not require impairment review by the

applicant or the local permitting authority. 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. When approving a subdivision, dedication, or short subdivision, impairment review is not required by the applicant, city, town, or county.

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.

Approval of a water right permit must:

- comply with mitigation requirements established in minimum flow rules, or
- mitigate impacts to fish or aquatic habitat by providing replacement water rights resulting in no net annual increase in the quantity of water diverted or withdrawn from the water body or by providing other measures designed to mitigate the impact of the water appropriation.

Mitigation that does not involve the replacement of water rights offsetting impacts in time and in place may be allowed only if Ecology determines that in-time and in-place water mitigation is not reasonably available and the proposed mitigation will protect fish and aquatic habitat. An applicant may propose mitigation of impacts that are not caused by the applicant's water diversion or withdrawal.

Ecology must collect a fee of \$300 on the construction of a water well to be used for projects designed to measure or improve stream flow, projects that restore or enhance aquatic habitat, or water infrastructure projects. The fee may not be used in any manner so as to require mitigation when a water well is being constructed. Fees must be deposited in the water resources project account and the Director of Ecology may seek the advice of an advisory committee when allocating or spending the fees. Ecology must submit a report to the Legislature by December 1, 2020, regarding the use of the fees.

The ability of any person to pursue a cause of action for the protection of the person's water right is not affected by this bill.

Appropriation: None.

Fiscal Note: Available.

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 on Original Bill (Agriculture, Water, Trade & Economic Development): *The committee recommended a different version of the bill than what was heard.* 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 (Agriculture, Water, Trade & Economic Development): 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 (Agriculture, Water, Trade & Economic Development): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: This legislation is needed because the courts have made decisions that stop people from being able to make use of their own land. Several land and homeowners' properties are now worthless. Many had plans to build a house on their property, but after the Hirst decision, local government would not grant them a building permit. Local government representatives need this legislation. This issue represents as much as \$157 million opportunity cost. Any loss of instream flows due to residential well water use is de minimis. Several courts have already thrown out previous laws passed by the Legislature; a clear law is needed. We can fix the Hirst and Foster cases with a policy bill for zero fiscal cost; we can address mitigation banking in subsequent legislation. DOE overestimated the fiscal cost, this bill finds the middle ground: move the bill forward. As a working man, I need help so that I can build my house.

CON: We are opposed to this bill. We need legislation with a balanced approach to allowing people to develop their land and protecting senior water rights and needs for healthy fish populations.

Persons Testifying (Ways & Means): PRO: Senator Judy Warnick, Prime Sponsor; Carl Schroeder, Association of Washington Cities; Sue Ann Croft, citizen; Galina Yarovoy, citizen; Colby Richards, citizen; Glen Smith, Washington State Ground Water Association; Laura Berg, WA State Assoc. of Counties; Cindy Alia, Citizens Alliance for Property Rights; Glen Morgan, Citizens Alliance for Property Rights; Jimmy Skerjanc, realtor; Kathleen Collins, Washington Water Policy Alliance; Bill Clarke, WA Realtors; PUD Association; Pierce Water Cooperative; Zach Nutting, citizen.

CON: Bruce Wishart, CELP / Sierra Club.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.