



Legislature Addresses Whatcom County v. Hirst

January 24, 2018 by [Jill Dvorkin](#)

Category: [Water Resources](#), [Court Decisions](#), [AGO Opinions and Regulations](#)



Last week, the Washington State legislature passed a bill to address the *Whatcom County v. Hirst* decision, which was issued by the state supreme court in October 2016. In *Hirst*, the court held that local jurisdictions planning under the Growth Management Act (GMA) have a duty to determine legal and physical water availability for development and cannot simply defer to Department of Ecology adopted rules (see this [series of blog posts](#) for more background

on Hirst).

The *Hirst* decision left many local governments wondering how or whether they could continue to issue development permits that rely on permit-exempt wells in areas subject to instream flow rules or other stream closures. Despite it being a legislative priority, the legislature was unable to reach an agreement on a *Hirst* “fix” last year. However, 2018 is a different story. On January 18, the legislature passed [ESSB 6091](#), and the next day, Governor Inslee signed this bill into law. The new law goes into effect immediately.

For jurisdictions affected by this decision, the legislation provides some clarity and a path forward for permitting development in rural areas. This blog post will summarize the contents of the bill, with a focus on how the legislation affects local governments.

An Overview of the New Legislation

If the provisions of the new law are followed, local governments can rely on Department of Ecology rules to satisfy their obligations under the GMA for demonstrating water availability. The new law creates categories based on Water Resource Inventory Areas (WRIAs), or geographic areas used to establish instream flow and other water resource-related rules.

The legislation establishes a new permitting and watershed planning scheme for WRIAs subject to instream flow rules adopted before 2001 (highlighted in light green in the table below). The remaining WRIAs (highlighted in light gray in the table below) may continue to rely on existing Ecology rules to satisfy GMA requirements related to surface and groundwater resources.

The WRIAs with the pre-2001 instream flow rules are the focus of the legislation because these rules are generally silent as to permit-exempt wells. In these areas, local jurisdictions continued to issue permits for developments relying on permit-exempt wells even when their issuance might have affected instream flows. The Nooksack Rule in Whatcom County, which was the subject of the *Hirst* decision, was one such rule.

Type of WRIA	Affected WRIAs (WRIA Numbers)	Summary of Legislation
WRIA with pre-2001 instream flow rule with watershed plan adopted pursuant to RCW 90.82	Nooksack (1); Nisqually (11); Lower Chehalis (22); Upper Chehalis (23); Okanogan (49); Little Spokane (55); Colville (59)	May issue permits relying on exempt wells for \$500 fee and 3000 gpd* limitation on withdrawal; Must amend watershed plan to offset impacts
WRIA with pre-2001 instream flow rule with no watershed plan	Snohomish (7); Cedar Sammamish (8); Duwamish Green (9); Puyallup White (10); Chamber Clover (12); Deschutes (13); Kennedy Goldsborough (14); Kitsap (15)	May issue permits relying on exempt wells for \$500 fee and 950 gpd* limitation on withdrawal; Committee established to create plan to offset impacts
WRIA with post-2001 instream flow rule that regulates permit-exempt well withdrawals	Stillaguamish (5); Quilcene Snow (17); Elwah Dungeness (18); Lewis (27); Salmon Washougal (28); Walla Walla (32); Wenatchee (45); Entiat (46); Methow (48); Middle Spokane (57)	Comply with GMA and subdivision statute if follow existing instream flow rule
WRIA subject to the Swinomish v. Skagit County decision	Lower Skagit Samish (3); Upper Skagit (4)	Exempt from legislation
WRIA with existing water rights adjudications	Lower Yakima (37); Naches (38); Upper Yakima (39)	Exempt from legislation; Adjudications govern
WRIA with no instream flow rules	All others	May continue to issue permits consistent with RCW 90.44.050 (permit exempt well provision)

*gpd = gallons per day

With passage of this legislation, jurisdictions affected by *Hirst* will now be able to issue permits for developments relying on permit-exempt wells even if they potentially impact instream flows, provided certain limitations and requirements are met.

New Permitting Requirements

In WRIAs with pre-2001 instream flow rules with adopted watershed plans pursuant to RCW 90.82, a local government must:

- Collect a \$500 fee from applicant for development relying on permit-exempt well (and remit \$350 of this to Ecology);
- Limit withdrawal to **3000 gpd** (max average usage; no metering; indoor/outdoor use allowed);
- Record water limitations on title; and
- Track all building permit and subdivision approvals and provide to Ecology annually.

In WRIAs with pre-2001 instream flow rules with *no* watershed plan, a local government must:

- Collect a \$500 fee from applicant for development relying on permit-exempt well (and remit \$350 of this to Ecology);
- Limit withdrawal to **950 gpd** (max average usage; no metering; indoor/outdoor use allowed);
- Record water limitations on title;
- Track all building permit and subdivision approvals and provide this information to Ecology annually; and

- Ensure that new development manages its stormwater onsite to the extent practicable by maximizing infiltration, including using LID techniques. If local regulations are more stringent as to stormwater management, those must be followed.

New Watershed Planning Requirements

In addition, local governments located in WRIAs with a pre-2001 instream flow rule must work with Ecology and other stakeholders to develop a plan that will offset any potential impacts resulting from the new, permit-exempt well withdrawals.

The plans may include recommendations related to the purchase of senior water rights, water conservation, groundwater monitoring, and the development of natural and constructed infrastructure, among other things. Plans may also include recommendations to modify the fee and gallon limits set forth in the legislation (both increase and decrease). To approve a plan, Ecology must determine that actions will result in a net ecological benefit to instream resources within the WRIA (accounting for new projected uses over 20 years).

In WRIAs with pre-2001 instream flow rules with adopted watershed plans, planning units established under [Chapter 90.82 RCW](#) will be utilized to develop an amended watershed plan that conforms to the requirements of the new law. Most WRIAs in this category must adopt their plans by February 2021, otherwise Ecology will step in to complete the plan. The Nooksack and Nisqually WRIAs must complete a plan by February 2019, otherwise Ecology must adopt a plan by August 2020.

In WRIAs with pre-2001 instream flow rules with *no* adopted watershed plan, watershed restoration and enhancement committees will be established, chaired by Ecology, and with representatives from specified stakeholder groups. The WRIAs in this category must have a completed plan by June 2021. If the committee cannot approve the plan, it will be referred to the salmon recovery funding board for technical review and Ecology can then make changes to it without committee approval.

This downloadable [map](#) shows which WRIAs with pre-2001 rules do and do not have watershed plans.

Other Provisions

The legislation also includes the following provisions:

- Two metering pilot programs in the Dungeness (18) and Kittitas (39) WRIAs, paid for by Ecology.
- Creation of a legislative task force to address the *Foster v. Dept. of Ecology* decision, with five pilot projects identified to be implemented to inform the task force's recommendations.
- Establishment of a \$300 million fund over 15 years for watershed enhancement projects.

Finally, the bill recognizes the validity of existing wells established in accordance with [RCW 18.104](#) with respect to showing adequacy of water supply under the building permit and subdivision statutes.

Questions? Comments?

If you have any questions about how this new law affects your jurisdiction, please contact me at jdvorkin@mrsc.org or (206) 625-1300. The [Washington State Association of Counties](#) (WSAC) will also be providing guidance on the legislation.

If you have questions about other local government issues, please use our [Ask MRSC form](#) or call us at (206) 625-1300 or (800) 933-6772.



About Jill Dvorkin

Jill joined MRSC as a legal consultant in June 2016 after working for nine years as a civil deputy prosecuting attorney for Skagit County. At Skagit County, Jill advised the planning department on a wide variety of issues including permit processing and appeals, Growth Management Act (GMA) compliance, code enforcement, SEPA, legislative process, and public records. Jill was born and raised in Fargo, ND, then moved to Bellingham to attend college and experience a new part of the country (and mountains!). She earned a B.A. in Environmental Policy and Planning from Western Washington University and graduated with a J.D. from the University of Washington School of Law in 2003.

[VIEW ALL POSTS BY JILL DVORKIN](#) ▶

[Leave a Comment](#) ▼

Comments

0 comments on Legislature Addresses Whatcom County v. Hirst

Blog post currently doesn't have any comments.

© 2015 MRSC of Washington. All rights reserved. [Privacy & Terms](#).