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Washington Legislature Adopts a "Hirst Fix," and Department of Ecology Considers Comments on Its Interpretation of the New Legislation

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The Washington Legislature recently passed Engrossed Senate Substitute Senate Bill 6091 ("ESSB 6091"), also known as the "*Hirst* Fix," which seeks to redress some of the implications of the recent *Hirst* decision issued by the Washington State Supreme Court by easing restrictions on new domestic wells in rural areas. The law also initiates a significant new mitigation planning effort in most watersheds in the state to offset impacts of those new wells. The Governor signed ESSB 6091 into law on January 19, 2018, resolving a contentious and vexing legislative impasse that had spanned two legislative sessions and had held the Capital Budget hostage.

The Washington State Department of Ecology has solicited and is now considering comments on its recently-released "Initial Policy Interpretations" of ESSB 6091 ("Ecology's Interpretation"). Ecology's Interpretation explains it is "not a comprehensive analysis" but rather documents Ecology's initial insights on ESSB 6091's extent and implementation. Both ESSB 6091 and Ecology's Interpretation are of critical importance to rural land owners who want to drill domestic wells on their property and counties responsible for reviewing building permit and subdivision applications. Additionally, the statute's new mitigation planning effort will involve a wide range of other water right holders and stakeholders, including water utilities, farm owners, and other water rights holders with an interest in the framework for water rights mitigation.

Background

On October 6, 2016, the Court in *Hirst* concluded that the Growth Management Act ("GMA") requires counties to take a much more expansive role in the regulation of water availability for rural development than counties had previously assumed. But for ESSB 6091, the decision would have forced many counties to increase the level of analysis of water availability and impacts during their review of building permit and subdivision applications. The decision focused on "permit-exempt withdrawals" – groundwater withdrawals that are exempt from Ecology's permitting process and are commonly used for domestic water supply in rural areas where water from municipal water suppliers is not available. The Court held that the GMA imposes an obligation on counties to conduct an analysis, before issuing a building permit or subdivision approval, to determine whether permit-exempt withdrawals will impair senior rights, including so-called "instream flows" (minimum flow levels for rivers and streams, which are adopted in Ecology's regulations and treated as water rights). According to the Supreme Court, even though Ecology does not engage in pre-approval impairment analysis for permit-exempt withdrawals, "the GMA explicitly assigns that task to local governments." But for ESSB 6091, the decision would have prevented further rural residential development that relied on permit-exempt withdrawals in areas where minimum flows are not met unless the landowner agreed to provide costly mitigation that is difficult or impossible to achieve in many basins.

Almost immediately after the Court issued the *Hirst* decision, a public outcry erupted as residents in rural areas throughout the state became concerned about their ability to secure domestic sources of drinking water for new development. Legislators on both sides of the aisle sought to take action, but were sharply divided on the approach. Many sought an outright repeal of the *Hirst* decision. Others proposed legislation that would maintain the central holding, but would give counties and Ecology regulatory tools

for implementing it. The 2017 legislative session ended in rancor, stalemate and inaction. However, activity resumed in 2018 and culminated in ESSB 6091.

ESSB 6091

The legislation bears the ambitious title of "an act relating to ensuring that water is available for development." In its specifics, ESSB 6091 seeks to provide direction on what constitutes "evidence of adequate water supply" sufficient to support a building permit application when the project applicant intends to use a permit-exempt withdrawal. The legislation has several key components.

As a general matter, the law focuses primarily on new domestic water uses, but it also includes a "grandfather" provision addressing existing wells. Pursuant to a new section added in RCW 19.27.097(5), permit-exempt withdrawals established before the effective date of the legislation are deemed to be evidence of adequate water supply so long as they were constructed in accordance with laws establishing well construction standards. ESSB 6091, §101. This applies to wells constructed before the *Hirst* decision as well as any wells constructed in the fifteen months between the date of the Court's decision and the effective date of ESSB 6091. As described below, the full geographic extent of this "grandfather" provision is subject to interpretation.

With respect to new permit-exempt withdrawals, ESSB 6091 divides the state into categories, generally organized by watersheds (also known as "water resource inventory areas" or WRIAs), based on several factors, including rulemaking and watershed planning status:

- **No Ecology rules, no water rights adjudication**. In areas that are not governed by instream flow rules and outside of adjudicated basins, evidence of adequate water supply for new permit-exempt withdrawals can be demonstrated by a water well report required under state laws governing well construction. ESSB 6091, §101 (adopting new RCW 19.27.097(1)(g)). The statute does not require local governments to complete any further analysis to determine whether the water supply is physically or legally available. This approach codifies many counties' pre-*Hirst* practice, but is limited to areas outside of watersheds with instream flow rules and adjudicated water rights.

- **Yakima River basin**. In the three watersheds that have been subject to an ongoing "general adjudication" pursuant to the Water Code, the statute allows Ecology to "impose requirements to satisfy adjudicated water rights." ESSB 6091, §101 (adopting new RCW 19.27.097(1)(e)). This provision seeks to recognize the existing legal process that has been ongoing since 1977 to legally determine the extent and validity of surface water rights of thousands of water users in those limited watersheds (including whether the surface water rights are valid, how much water each can use, and the priority of those rights during shortages). It leaves Ecology, not counties, responsible for determining specific requirements on use of permit-exempt withdrawals. Ostensibly, the statute anticipates that Ecology would "impose requirements" on permit-exempt wells as part of curtailment or other regulatory orders issued to implement the adjudication and enforce senior priorities.

- **"Modern" Ecology rules**. In watersheds with more recent instream flow rules that expressly regulate permit-exempt withdrawals (those with instream flow rules adopted after 2000), ESSB 6091 requires compliance with the instream flow rule. ESSB 6091, §101 (adopting new RCW 19.27.097(1)(b)). This section preserves and relies on Ecology's existing regulatory approach in its more "modern" instream flow rules that limit use of new permit-exempt withdrawals.

- **"Old" Ecology rules**. In watersheds with older instream flow rules that do not expressly regulate permit-exempt withdrawals (those with instream flow rules adopted prior to 2000), ESSB 6091 allows new permit-exempt withdrawals provided that several criteria are met: the applicant must pay a $500 fee that will fund mitigation efforts to offset consumptive water use; the withdrawal is limited to either 950 or 3,000 gallons per day, depending on the WRIA (both

represent a reduction from the 5,000 gallons per day contemplated by the water right permitting exemption in RCW 90.44.050); the restriction on water supply is recorded against title; and, the local government compiles and transmits to Ecology an accounting of the building permits and subdivisions issued relying on permit-exempt wells under the statutory program. ESSB 6091, §101 (adopting new RCW 19.27.097(1)(c) and (1)(d)); *id.* at §202; *id.* at §203.

Additionally, in these watersheds, the statute requires mitigation and restoration planning to mitigate the cumulative impact of the permit-exempt withdrawals on instream resources. The statute builds on existing watershed planning processes used in some watersheds, requiring the existing planning units in those basins to amend existing plans to address the statute's new mitigation obligations. ESSB 6091, §202. In watersheds without planning units, the statute requires creation of new committees to accomplish the mitigation planning. ESSB 6091, §203.

As part of that planning process, the Planning Units or Planning Committees can impose different fees and restrictions on annual quantity than the defaults set by statute. Whether by committee or planning unit, the planning process must identify mitigation projects necessary to offset permit-exempt domestic use. The statute provides some flexibility from typical "in-time" and "in-place" requirements by allowing mitigation projects in different basins from the location of the impact, and by allowing projects that replace consumptive water use only during critical flow periods. However, the statute does not authorize "out-of-kind" habitat restoration mitigation projects to satisfy the new statutory standard.

The new planning effort must be completed by 2021, with the exception of the Nisqually watershed, which must be completed by 2019. If the deadlines are not met, the statute requires Ecology to adopt rules accomplishing the planning objectives.

- **Skagit River basin**. Finally, the statute carves out two watersheds in the Skagit River basin and simply acknowledges, without seeking to define, the "additional requirements" that apply in those areas as a result of the Supreme Court's decision in *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571 (2013). Those watersheds have been an arena for conflict between land development and instream flow protection for over a decade. In the court decision that is cited in the RCW (a very unusual approach for statutory drafting) the Court invalidated Ecology's amended instream flow rule that had reserved water for rural development because it improperly reallocated water that the preexisting rule had allocated to instream flow protection. Since that decision, the areas within those watersheds are currently subject to partial moratoria on development. ESSB 6091 offers no relief or change for this watershed.

In addition to the amendments to RCW 19.27.097. the law also resolves the contentious issue of adequate water supply with amendments to the GMA and subdivision statute. ESSB 6091 amends the GMA to allow counties and cities to "rely on or refer to" applicable instream flow rules to satisfy their GMA obligations to protect water resources, codifying the pre-*Hirst* approach of many counties. The statute amends the subdivision statute to nominally create a less rigorous standard for demonstrating availability of water for subdivision applications. Specifically, the statute confirms that an applicant intending to rely on a permit-exempt withdrawal need only demonstrate consistency with RCW 90.44.050 and with applicable instream flow rules to support a subdivision application. However, as explained below, the exact information needed to support subdivision applications is subject to interpretation.

In addition to providing further specificity on requirements for adequacy of water supply, the statute also establishes a process to fund and explore potential expansion of mitigation opportunities for all water rights appropriations in response to another case: *Foster v. Yelm*. *Foster* significantly increased the degree of difficulty of Ecology's and water suppliers' efforts to serve growing communities while mitigating impacts on instream resources. Specifically, the Court concluded that out-of-kind mitigation

strategies cannot be used to mitigate impairment of instream flows. In response, ESSB 6091 establishes a process to develop and recommend legislative changes to facilitate a mitigation sequencing strategy for new water rights – one that could allow some applicants to provide out-of-kind mitigation, but only after following the required "sequencing" analysis, which first asks whether impacts can be avoided or minimized before turning to the question of whether mitigation should be provided in-kind or out-of-kind. This approach would borrow a concept that is common in other regulatory contexts (including, for example, shoreline development and wetlands permitting) but was not authorized under the water code as interpreted by the Court. The section establishes a task force responsible for generating legislative recommendations and includes five water resource mitigation pilot projects. The work of the task force begins this summer.

Finally, to achieve these mitigation strategies the law directs Ecology to implement a state-wide stream flow restoration and enhancement program. Over the next 15 years, the legislature "intends to appropriate $300 million" for the planning program to restore flows "to levels necessary to support robust, healthy, and sustainable salmon populations." ESSB 6091, §304. Ecology's first steps implementing the law include developing criteria and procedures for an adopted basin plan, mitigation project feasibility, the "net environmental benefit" standard, and funding of planning and project proposals.

Ecology's Policy Interpretations

Ecology's Interpretation offers Ecology's initial interpretation of ESSB 6091 and Ecology intends to issue further informal guidance in the near future. Formal guidance or rulemaking could follow later. For the most part, the document recites provisions of the new law, but Ecology also advances more nuanced points of interpretation that merit attention going forward.

First, Ecology takes the position that the "grandfather" clause added to RCW 19.27.097(5) (the provision that deems permit-exempt withdrawals established before the effective date to be evidence of adequate water supply) applies only to "*Hirst*-affected basins" – i.e., those with pre-2000 instream flow rules. Based on Ecology's Interpretation, the clause does not apply to the watersheds with post-2000 instream flow rules, the Skagit River basin or the Yakima adjudicated basin. Although Ecology does not cite to a provision of the new law for its interpretation, the plain language of that section of the statute appears broader on its face and applies to "Any permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed in accordance with the provisions of chapter 18.104 RCW before the effective date of this section…" In other words, the grandfather provision itself does not include a geographic limitation, and Ecology may explain its interpretation in future guidance materials.

Second, the new law's focus on "new domestic groundwater withdrawals" has led to questions about allowable quantity in different scenarios. Ecology interprets ESSB 6091 as governing two different categories of exempt uses pursuant to RCW 90.44.050, the "exempt well" statute: domestic water use; and watering of a non-commercial lawn or garden. RCW 90.44.050 lists each use separately as exempt uses. Nevertheless, because the statute authorizes special limitations in the event of a drought that would restrict domestic withdrawals to 350 gallons per day for "indoor domestic use," Ecology interprets the phrase "domestic use" (and the associated larger default quantity limitations of 950 or 3,000 GPD) as addressing both domestic water use and watering of a non-commercial lawn or garden. Some have offered an alternative reading that the "domestic" component applies to indoor use only, and a rural homestead would also be allowed to withdraw groundwater for lawn and garden use.

Third, Ecology infers that the law "does not place additional requirements per se at the subdivision stage." This interpretation is likely based on the fact that the operative portions of the statute were added to RCW 19.27.097, which only governs building permits. Additionally, the statute amends RCW 58.17.110 to confirm that the subdivision approval, including the finding that "appropriate provisions" for water supply, are determined through compliance with RCW 90.44.050 and adopted instream flow rules. Nevertheless, the statute includes some inconsistencies by imposing on cities and counties the obligation to take some of the same steps at the time of subdivision approval as is required at the

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building permit stage, including: recording of relevant restrictions limiting quantity of water; collecting fees from applicants; and including subdivisions with building permits in the local government's inventory of new domestic uses for reporting to Ecology.

Next Steps

Several interest groups and stakeholders are unhappy with ESSB 6091, representing both sides of the spectrum, including those who believe the statute does not adequately project ecological resources and others who feel it did not go far enough to provide relief for rural residents. As with any new approach to resolving controversial policy debates, there is a potential for litigation challenging ESSB 6091. Because the statute addresses water rights and responds to the Supreme Court's interpretation of the law, appeals might resemble the recent constitutional challenges to another water rights statute in *Lummi Indian Nation et al, v. State of Washington*, in which opponents unsuccessfully argued that legislative amendments to respond to a court case and that affect priority of water rights violate due process and separation of powers.

In any event, ESSB 6091 will change the status quo for counties, with some already repealing regulations adopted in the aftermath of the *Hirst* decision, and others adopting emergency regulations to immediately implement the relief offered by statute. Those jurisdictions that have multiple types of WRIAs within their boundaries may have to adopt a more complicated approach because they may have to adopt different rules and processes for each of the affected watersheds.

A wider range of stakeholder interests, including senior water rights holders and municipal water suppliers will invariably want to take part in the upcoming mitigation planning efforts in various basins or the legislative task force work to develop recommendations on mitigation sequencing.

For more information

For more information about the *Hirst Fix*, or to discuss potential implications of the decision, please contact Tadas Kisielius, Adam Gravley, or Duncan Greene at (206) 623.9372.

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