

Significant Water Rights Bill Passes, Alters State Supreme Court Rulings in *Hirst* and *Foster* Cases

Legal Alert
January 23, 2018

Senate Bill 6091, signed by Governor Inslee on January 19, 2018, is the most significant water rights bill to pass the Legislature in over a decade. Passage of the new law signals what many hope will be the end of the debate over the impacts of permit-exempt wells springing from the Washington State Supreme Court's decision in *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016). A link to the bill can be found [here](#).

The *Hirst* decision placed the onus on local governments and landowners to assess and mitigate impacts to protected ground and surface water resources by a proposed permit exempt well. Such withdrawals are permitted under the Water Code's 5,000 gallon per day exemption (RCW 90.44.050). With the passage of SB 6091, new domestic exempt wells in many of the State's Water Resource Inventory Areas ("WRIAs") no longer need to provide mitigation in order to receive permit approval, even where those withdrawals could impact protected in-stream flows.

The new law also creates a task force to reexamine the Supreme Court's ruling in *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015), under which only in-kind (water-for-water) mitigation was permitted for new water appropriations. While the task force is underway, several "pilot projects" may be approved where out-of-kind mitigation, e.g., habitat restoration, may be approved to address potential impacts of new groundwater withdrawals on regulated instream flows.

Highlights of the new law include the following:

Availability of Water for Building Permits

Under the new legislation, applicants for building permits and subdivision approval will still need to provide evidence of adequate water supply. See RCW 58.17.110; RCW 19.27.097. However, through SB 6091, the Legislature clarified that local governments can, in fact, rely upon applicable state laws and

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rules governing adequate water supply when making local permitting decisions.

In WRIsAs with an existing Watershed Plan¹ that does not explicitly regulate permit-exempt withdrawals, the Department of Ecology (“Ecology”) must review and update the plan, provide recommended projects and actions that will protect and enhance in-stream resources and support the recovery of endangered salmonids. In these WRIsAs, until rules are otherwise adopted, an applicant must pay a fee of \$500, and may obtain approval for a new permit-exempt withdrawal for domestic use only for a maximum annual average withdrawal of 3,000 gallons per day per connection.

In WRIsAs with a partial or no Watershed Plan² that does not explicitly regulate permit-exempt withdrawals, Ecology must prepare and adopt a watershed restoration and enhancement plan for each watershed by June 30, 2021. Until rules are adopted that say otherwise, applicants may pay a fee of \$500 to the permitting authority and obtain approval for a new exempt well for domestic use only, for a maximum average annual withdrawal of 950 gallons per day per connection.

In WRIsAs where existing instream flow rules have been adopted that explicitly regulate permit-exempt groundwater withdrawals³, those rules still apply.

Task Force on *Foster*

A joint legislative task force was also created to do the following: (1) review the treatment of surface water and ground water appropriations as they relate to in-stream flows and fish habitat; (2) recommend a mitigation sequence process and scoring system to address such appropriations; and (3) review the *Foster* decision. As a part of this review, Ecology will issue permit decisions for up to five water resource mitigation pilot projects. The pilot projects will be used to inform the task force process while enabling permitting to meet water supply needs. Significantly, Ecology may approve use of out-of-kind mitigation measures to address impacts to instream flows following the application of mitigation sequencing rules. Certain cities, irrigation districts, and nonprofit mutual water systems located in Pierce, Kitsap, Thurston, and Whatcom counties have been designated as eligible for participation. Applicants must notify Ecology of their intent prior to July 1, 2018.

\$300 Million in Funding

The bill provides \$300 million dollars in funding for instream flow restoration and related watershed planning actions, including potentially refining “standards for water use quantities” for exempt withdrawals authorized by the bill and for enhancing in-stream resources for endangered salmonid.

Other Exemptions Unchanged

It is important to note that other exemptions for permit exempt groundwater withdrawals such as those for commercial, industrial, stock- watering and watering of a lawn or non-commercial garden not exceeding ½ acre have not changed as a result of SB 6091. See RCW 90.44.050.

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SB 6091 creates a fairly complex web of regulations for assessing what rules applicants must abide by when pursuing plans to rely on an exempt well. If you have any questions about the bill, the resulting regulatory scheme, or pilot projects, please contact Foster Pepper attorneys [Joe Brogan](mailto:joe.brogan@foster.com), at joe.brogan@foster.com or (206) 447-6407; or [Tacy Hass](mailto:tacy.hass@foster.com), at tacy.hass@foster.com or (206) 447-8978.

¹ *WRIAs with an existing Watershed Plan include WRIAs 1, 11, 22, 23, 49, 55, and 59.*

² *WRIAs with a partial or no Watershed Plan include WRIAs 7, 8, 9, 10, 12, 13, 14, and 15.*

³ *These WRIAs include 5, 17, 18, 27, 28, 32, 45, 46, 48, and 57.*