**WHATCOM COUNTY COUNCIL AGENDA BILL**

<table>
<thead>
<tr>
<th>CLEARANCES</th>
<th>Initial</th>
<th>Date</th>
<th>Date Received in Council Office</th>
<th>Agenda Date</th>
<th>Assigned to</th>
</tr>
</thead>
<tbody>
<tr>
<td>Originator:</td>
<td>Gary Davis</td>
<td>11/21/16</td>
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<td>11/22/2016</td>
<td>Introduction</td>
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<td>Division Head:</td>
<td>Mark Personius</td>
<td>11/23/16</td>
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<td>12/6/2016</td>
<td>Special COTW</td>
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<td>Dept. Head:</td>
<td>Sam Ryan</td>
<td>11/23/16</td>
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<td>12/6/16</td>
<td>Hearing</td>
</tr>
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<td>Prosecutors:</td>
<td>Royce Buckingham</td>
<td>11/28/16</td>
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<td>Purchasing/Budget:</td>
<td>Jack Laws</td>
<td>11/28/16</td>
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**TITLE OF DOCUMENT:**

Interim Ordinance adopting amendments to the Whatcom County Comprehensive Plan and Whatcom County Code Title 15 Buildings and Construction, Title 20 Zoning, Title 21 Land Division Regulations, and Title 24 Health Code, relating to water resources.

**ATTACHMENTS:**

- Memorandum
- Draft Ordinance
- DOE Letter 11/14/16

**SEPA review required?** (x) Yes ( ) NO  
**SEPA review completed?** (x) Yes ( ) NO

**Should Clerk schedule a hearing?** (x) Yes ( ) NO  
**Requested Date** 12/6

**SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE:**

(If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)

Ordinance adopting interim amendments to the Whatcom County Comprehensive Plan and Whatcom County Code Title 15 (Buildings and Construction), Title 20 (Zoning), Title 21 (Land Division Regulations), and Title 24 (Health Code) relating to water resources. (related legislation: Ordinance No. 2016-048, which imposed an emergency moratorium on the acceptance and processing of applications and permits for subdivisions, building permits, and discretionary permits that rely on permit-exempt wells for water supply in closed basins – Council Office file number AB2016-309)

**COMMITTEE ACTION:**

**COUNCIL ACTION:**

**Related County Contract #:**   **Related File Numbers:**   **Ordinance or Resolution Number:**

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**Please Note:** Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County's website at: [www.co.whatcom.wa.us/council](http://www.co.whatcom.wa.us/council)
Memorandum

TO: The Honorable Jack Louws, Whatcom County Executive
   The Honorable Whatcom County Council

FROM: Gary Davis, AICP, Senior Planner

THROUGH: Mark Personius, AICP, Assistant Director

DATE: November 23, 2016

SUBJECT: Interim Ordinance – Water Resources

On November 22, the County Council introduced an interim ordinance on water resources, and that ordinance is scheduled for public hearing and possible adoption on December 6. If adopted, the ordinance would repeal the emergency moratorium (Ordinance 2016-048) adopted on October 25 in response to the Supreme Court decision in Whatcom County and Hirst vs. Growth Management Hearings Board.

The interim ordinance would be effective for no more than six months, or until a new ordinance is adopted. Because the state legislature is likely to take up water issues this session in response to the Supreme Court decision, adopting additional interim ordinances until there is a permanent change to state law could be a favorable option.

The proposed interim code amendments would require Whatcom County to verify the existence of adequate water supply in terms of water quality, quantity, and legal availability prior to accepting applications for project permits that require potable water (including building permits, subdivisions, conditional use permits, etc.). Currently the County Health Department verifies water quality and quantity by signing a Water Availability Notification form. The proposed amendments add legal availability to the items verified on that form. WCC 24.11.060A would add the requirement that applicants prove legal availability through any one of the following five options:

1. A water right permit from the Department of Ecology, or
2. A letter from an approved public water purveyor with sufficient water rights, stating the ability to provide water, or

3. Documentation that water can be supplied by a rainwater catchment system approved by the Whatcom County Health Department, per Department of Ecology Policy 1017, or

4. For a permit-exempt well per RCW 90.44.050, documentation that the well site is located in the Samish River watershed, or in Point Roberts, Eliza Island, or Lummi Island, as shown in Figure 24.11.060, or

5. For a permit-exempt well per RCW 90.44.050 located outside the Samish River watershed, Point Roberts, Eliza Island, or Lummi Island, as shown in Figure 24.11.060, one of the following:
   a. A study prepared by a qualified hydrogeologist licensed in the State of Washington demonstrating a proposed groundwater withdrawal would not impair a senior water right, including instream flows established in Chapter 173-501 WAC where applicable, in accordance with current statutes and case law. Such documentation must be verified by the county either through consultation with the Department of Ecology, or a qualified technical review team appointed by the county. The county may require a third party review by an independent qualified hydrogeologist if the county determines additional technical expertise is needed. The cost of the third party review shall be the permit applicant’s responsibility.

   or

   b. A mitigation plan prepared by a qualified hydrogeologist licensed in the State of Washington, and approved by Whatcom County. The plan shall include:
      i. Evidence that the proposed withdrawal with mitigation in place will not impair a senior water right, including instream flows established in Chapter 173-501 WAC where applicable, in accordance with current statutes and case law. Such documentation must be verified by the county either through consultation with the Department of Ecology, or a qualified technical review team appointed by the county. The county may require a third party review by an independent qualified hydrogeologist if the county determines additional technical expertise is needed. The cost of the third party review shall be the permit applicant’s responsibility.

      ii. A monitoring and reporting plan, including a quality assurance/quality control plan.

      iii. Financial assurance to ensure mitigation measures for the duration of the water use, and prohibit water provided for the purpose of mitigation from appropriation for any other purpose.

The Department of Ecology (DOE) has determined that the Samish River watershed, Point Roberts, Eliza Island, or Lummi Island areas are unaffected by the instream flows and closures in the Nooksack Rule, WAC 173-501 (see the attached November 14 DOE letter and the map in Figure 24.11.060, page 10 of the proposed
amendments). DOE assumes that in the remaining areas of the county "hydraulic connections exist between wells and surface water, and that groundwater pumping will to some extent diminish surface water flows."

Based on the DOE determination, option 5 in the proposed amendment would require applicants proposing to use an exempt well outside the Samish River watershed, Point Roberts, Eliza Island, or Lummi Island areas to prove the well would not impair a senior water right (including instream flows) in order for the Health Department to sign the Water Availability Notification necessary to apply for a project permit that requires potable water. This could be proven either through a study by a licensed hydrogeologist or through mitigation. There may be many different means of providing mitigation; this code provision is broad and would allow for various mitigation programs that can be considered in the coming months. Establishment of a mitigation program is a highly technical and complex process and would require considerable time to effectively develop and implement. Per option 4, permit-exempt wells inside the Samish River watershed, Point Roberts, Eliza Island, or Lummi Island areas would not require such proof.

Option 3 allows an alternative for approved rainwater catchment systems for potable water. DOE’s Policy 1017 interprets state law to allow for collection and storage of rainwater without a water right permit, though it acknowledges that if the agency someday determines that these systems are likely to affect instream values or existing water rights, some restrictions might be enacted.

The proposed amendments do not list trucked water as an alternative for potable water. State and federal public health agencies do not support this option for domestic water supply except in emergency circumstances.

Also included in the draft amendments is the addition of "adequate water supply" to the zoning code definitions, WCC Chapter 20.97. This definition refers to the water quality, quantity, and legal availability requirements of WCC 24.11.060. Additional amendments to Title 21 Land Division Regulations require adequate water supply for short and long subdivisions per the WCC 20.97.451 definition, and amendments to Title 24 Health Code reference the requirements of WCC 24.11.060.

The ordinance would not affect existing residences already using exempt wells, including remodel permits, nor would it affect existing and new residences in public water associations with approved water rights.

In the last five years, about two thirds of all building permit applications in unincorporated Whatcom County were served by public water systems that have sufficient water rights (option 2). The other third relied on permit-exempt wells.
Staff acknowledges that the options available for most of the permit-exempt well lots in the wake of the Supreme Court decision (options 3 and 5) are potentially very difficult and costly. Staff will continue to explore equitable and legal vesting policies that may provide relief for those who have invested considerable effort and money towards development. We will also work toward completing a groundwater model, and will continue our ongoing water resource planning initiatives originally embodied in the Lower Nooksack Strategy (adopted by the WRIA I Joint Board) by examining potential water supply and instream flow solutions, including potential private and public mitigation solutions.

Attachments:

Draft Ordinance, Proposed Amendments
Department of Ecology Letter, November 14, 2016
ANNOUNCED ORDER NO.              

AN INTERIM ORDINANCE ADOPTING AMENDMENTS TO THE 
WHATCOM COUNTY COMPREHENSIVE PLAN AND THE WHATCOM 
COUNTY CODE TITLE 15 BUILDINGS AND CONSTRUCTION, TITLE 20 
ZONING, TITLE 21 LAND DIVISION REGULATIONS, AND TITLE 24 
HEALTH CODE, RELATING TO WATER RESOURCES, AND RESCINDING 
ORDINANCE 2016-048

WHEREAS, an October 6, 2016 Washington State Supreme Court 
decision (Whatcom County, Hirst vs. Western Washington Growth 
Management Hearings Board, No. 91475) has found that Whatcom County's 
Comprehensive Plan does not comply with the Growth Management Act 
(GMA) requirements for protecting water resources; and

WHEREAS, RCW 36.70A.070(1), requires that the land use element of 
a county comprehensive plan "shall provide for protection of the quality and 
quantity of groundwater used for public water supplies."; and

WHEREAS, RCW 36.70A.070(5)(c)(iv) requires that the rural element 
of a county comprehensive plan "shall include measures that apply to rural 
development and protect the rural character of the area, as established by 
the county, by: ... protecting critical areas...and surface water and 
groundwater resources."; and

WHEREAS, RCW 19.27.097(1) states: "Each applicant for a building 
permit of a building necessitating potable water shall provide evidence of an 
adquate water supply for the intended use of the building. Evidence may be 
in the form of a water right permit from the department of ecology, a letter 
from an approved water purveyor stating the ability to provide water, or 
another form sufficient to verify the existence of an adequate water supply. 
In addition to other authorities, the county or city may impose conditions on 
building permits requiring connection to an existing public water system 
where the existing system is willing and able to provide safe and reliable
potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.”; and

WHEREAS, RCW 19.27.095(1) states: “A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.”; and

WHEREAS, RCW 58.17.110(2) requires that “A proposed subdivision and dedication shall not be approved unless the...county legislative body makes written findings that...appropriate provisions are made for...potable water supplies...”; and

WHEREAS, RCW 58.17.170(2) states that lots in a long subdivision “shall be a valid land use notwithstanding any change in zoning laws for a period of seven years from the date of filing if the date of filing is on or before December 31, 2014, and for a period of five years from the date of filing if the date of filing is on or after January 1, 2015,” and, “Any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of ten years from the date of filing if the project is not subject to requirements adopted under chapter 90.58 RCW and the date of filing is on or before December 31, 2007.”; and

WHEREAS, Whatcom County Code (WCC) Chapter 15.04 specifies information required for a complete building permit application; and

WHEREAS, WCC Chapter 20.97 provides definitions of terms used in the code; and

WHEREAS, WCC Chapters 21.04 and 21.05 contain requirements for water supply in short subdivisions and long subdivisions, respectively; and

WHEREAS, WCC Chapter 24.11 contains requirements for drinking water; and

WHEREAS, Whatcom County adopted Ordinance 2012-032, amending its Comprehensive Plan to adopt by reference existing development regulations regulating ground water withdrawals, adding Policy 2DD-2.C.3.6,
which adopts by reference WCC 21.04.090 and 21.05.080, and Policy 2DD-2.C.3.7, which adopts by reference WCC 24.11.050 and 24.11.060; and

WHEREAS, because Comprehensive Plan Policy 2DD-2.C.3.6 adopts by reference WCC 21.04.090 and 21.05.080, and Policy 2DD-2.C.3.7 adopts by reference WCC 24.11.050 and 24.11.060, any amendments to these WCC provisions are also amendments to the Comprehensive Plan; and

WHEREAS, the Growth Management Hearings Board (Board) found the amended Comprehensive Plan lacked the required measures to protect water resources (GMHB Case No. 12-2-0013); and

WHEREAS, on October 6, 2016, the State Supreme Court (Court), in reversing a Court of Appeals decision, upheld the Board’s decision that the County’s Comprehensive Plan does not satisfy the GMA requirements to protect water availability, and stated, “We hold that the Board properly concluded that the GMA requires counties to make determinations of water availability.”; and

WHEREAS, the Court stated, “...the GMA places the burden on counties to protect groundwater resources, and requires counties to assure that water is both factually and legally available before issuing building permits.”; and

WHEREAS, the Court stated, “...The county’s policies incorporate WCC provisions that do not allow water to be withdrawn from ‘an area where [the Department of Ecology] has determined by rule that water for development does not exist.’ ...these ordinances further provide that an application for a permit-exempt appropriation will be approved without any analysis of that withdrawal’s impact on instream flows. The Board found that these provisions result in water withdrawals from closed basins and senior instream flows—flows that the record indicated drop below the minimum levels 100 days out of the year. The Board properly held that this conflicts with the requirement placed on counties to protect water availability under the GMA...”; and

WHEREAS, Chapter 173-501 WAC Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA) 1 identifies water bodies in Whatcom County that are closed or partially closed to further appropriation, by listing their status as “closure,” “partial year closure,” “low flow,” or “minimum flow,”; and
WHEREAS, on October 25, 2016 Whatcom County adopted Ordinance 2016-048, an emergency moratorium on the filing, acceptance, and processing of new applications for project permits for uses that rely on permit-exempt groundwater withdrawals within a closed or partially closed basin, to allow the County time to review its Comprehensive Plan and development regulations in light of the Supreme Court ruling, and to draft and enact the necessary amendments as soon as feasible; and

WHEREAS, the Whatcom County Charter limits an emergency ordinance not to exceed 60 days from the effective date of adoption; and

WHEREAS, RCW 36.70.790 and RCW 36.70.795 allow for adoption of interim official controls as long as a public hearing is held within 60 days of adoption; and

WHEREAS, the County needs additional time to prepare Comprehensive Plan and code amendments that fully and permanently remedy the GMA noncompliance; and

WHEREAS, in accordance with RCW 36.70A.106 Whatcom County Planning and Development Services notified the Department of Commerce of the proposed interim amendment; and

WHEREAS, this ordinance shall be effective for not longer than six months following its effective date, but may be renewed for one or more six month periods if subsequent public hearings are held and findings of fact are made prior to each renewal.

WHEREAS, the County Council is scheduled to hold a public hearing on this issue on December 6, 2016, or a later date;

NOW, THEREFORE, BE IT ORDAINED that the Whatcom County Council adopts the above “WHEREAS” recitals as findings of fact in support of it action as required by RCW 36.70A.390

BE IT FURTHER ORDAINED by the Whatcom County Council that the Whatcom County Comprehensive Plan and the Whatcom County Code are hereby amended, on an interim basis, as shown in Exhibit A; and
BE IT FURTHER ORDAINED that Ordinance 2016-048, an emergency moratorium, is hereby rescinded; and

BE IT FURTHER ORDAINED that this ordinance shall be effective for not longer than six months following its effective date.

ADOPTED this _______ day of __________________, 2016.

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

ATTEST:

_________________________  __________________________
Dana Brown-Davis, Council Clerk  Barry Buchanan, Chairperson

APPROVED as to form:

_________________________  __________________________
Civil Deputy Prosecutor  Jack Louws, Executive

( ) Approved  ( ) Denied

Date: ______________________
EXHIBIT A

Whatcom County Code

AMENDMENTS

TITLE 15 BUILDINGS AND CONSTRUCTION

Chapter 15.04

BUILDING CODES

15.04.020 Amendments to the International Building Code.
A. The IBC is amended as follows:

4. Section 105.3, Application for Permit, is amended to include the following:

To obtain the permit, the applicant shall first file an application therefor in writing on a form furnished by the department of building safety for that purpose. Such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.

2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.

3. Indicate the use and occupancy for which the proposed work is intended.

4. Be accompanied by construction documents and other information as required in Section 107.

5. State the valuation of the proposed work.
6. Be signed by the applicant, or the applicant’s authorized agent.

7. Include signature by the applicant or the applicant’s authorized agent of a statement for guarantee of fee payment. The statement must be signed in the presence of County staff or staff will provide a statement which includes verification of signature by a licensed notary public.

8. Provide verification of approval to connect to a public sewer system or a septic system installation permit issued by the Whatcom County Environmental Health Department for any permit application that requires sewage disposal. The approval to connect or issued septic system permit shall be specific to the project application.

9. For a building necessitating potable water, provide evidence of an adequate water supply for the intended use of the building, as defined in 20.97.451 WCC.

10. Provide additional data and information in the designated sequence, as required by the Building Official.

15.04.030 Amendments to the International Residential Code.

C. Section R105.3, Application for permit, is amended to include the following:

To obtain the permit, the applicant shall first file an application therefor in writing on a form furnished by the department of building safety for that purpose. Such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.

2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.

3. Indicate the use and occupancy for which the proposed work is intended.

4. Be accompanied by construction documents and other information as required in Section 107.

5. State the valuation of the proposed work.
6. Be signed by the applicant, or the applicant's authorized agent.

7. Include signature by the applicant or the applicant's authorized agent of a statement for guarantee of fee payment. The statement must be signed in the presence of County staff or staff will provide a statement which includes verification of signature by a licensed notary public.

8. Provide verification of approval to connect to a public sewer system or a septic system installation permit issued by the Whatcom County Environmental Health Department for any permit application that requires sewage disposal. The approval to connect or issued system permit shall be specific to the project application.

9. For a building necessitating potable water, provide evidence of an adequate water supply for the intended use of the building, as defined in 20.97.451 WCC.

10. Provide additional data and information in the designated sequence, as required by the Building Official.

Title 20 Zoning

Chapter 20.84

Variances, Conditional Uses, Administrative Approval Uses and Appeals

20.84.200 Conditional uses.

20.84.220 Criteria.
Before approving an application for a conditional use permit, the hearing examiner shall ensure that any specific standards of the use district defining the conditional use are fulfilled, and shall find adequate evidence showing that the proposed conditional use at the proposed location:
(5) Will be serviced adequately by necessary public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, adequate water supply as defined in WCC 20.97.451, and sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.

Chapter 20.97

DEFINITIONS

20.97.451 Water Supply, Adequate

"Adequate water supply" means a supply of potable water adequate to serve a land use associated with a project permit in terms of quality, quantity, and legal availability, as documented by a water availability notification signed by the director of the Whatcom County Health Department, per WCC 24.11.060.

TITLE 21 LAND DIVISION REGULATIONS

Chapter 21.04

SHORT SUBDIVISIONS

21.04.090 Water supply.
(1) Water from a public water system(s) shall be provided to serve each lot in a short plat, except as specified in subsection (2) of this section.

(2) For a residential short subdivision, private water supplies may be utilized under the following circumstances:

(a) All lots served by the private water supplies are five acres or larger, unless smaller because of clustering. If the lots are smaller because of clustering, the gross density of the short subdivision shall not exceed one dwelling per five acres; and

(b) The withdrawal is not from a defined portion of an aquifer of known regional ground water contamination that exceeds state standards and that
has been identified by the director of the health department and confirmed by the board of health; and

(c) The water source is ground water and not surface water; and

(d) The applicant demonstrates that adequate water supply exists to serve the subdivision, as defined in 20.97.451 WCC; and

(e) The short subdivision is not located within the designated water service area of a public water purveyor that is shown on the coordinated water system plan map or within one-half mile of an existing water purveyor’s water line; or

(fd) If the short subdivision is located within the designated water service area of a public water purveyor that is shown on the coordinated water system plan map or within one-half mile of an existing water purveyor’s water line and:

(i) The purveyor cannot be provided water service to the applicant within 120 calendar days of submitting a written request and applicable fees to the purveyor unless specified otherwise by the hearing examiner or county council; or

(ii) The purveyor states in writing that it is unable or unwilling to provide the service; or

(iii) The purveyor and applicant are unable to achieve an agreement on the schedule and terms of provision of service within 120 calendar days.

(3) If a public water supply is required, all the requirements of Chapter 246-290 WAC, Group A Public Water Systems, or Chapter 246-291 WAC, Group B Public Water Systems, must be met prior to final plat approval.

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CHAPTER 21.05

PRELIMINARY LONG SUBDIVISIONS

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21.05.080 Water supply.
(1) Water from a public water system(s) shall be provided to serve each lot in a subdivision, except as specified in subsection (2) of this section.

(2) For a residential subdivision with six or fewer residences, private water supplies may be utilized under the following circumstances:

(a) All lots served by the private water supplies are five acres or larger, unless smaller because of clustering. If the lots are smaller because of clustering, the gross density of the subdivision shall not exceed one dwelling per five acres and the number of clustered lots shall not exceed four; and
(b) The withdrawal is not from a defined portion of an aquifer of known regional ground water contamination that exceeds state standards and that has been identified by the director of the health department and confirmed by the board of health; and

(c) The water source is ground water and not surface water; and

(d) If the subdivision is within the designated water service area of a public water purveyor that is shown on the coordinated water system plan map or within one-half mile of an existing water purveyor’s water lines:

(i) The water cannot be provided to the applicant within 120 calendar days of submitting a written request and applicable fees to the purveyor unless specified otherwise by the hearing examiner or county council; or

(ii) The purveyor states in writing that it is unable or unwilling to provide the service; or

(iii) The purveyor and applicant are unable to achieve an agreement on the schedule and terms of provision of service within 120 calendar days.

(3) The applicant shall demonstrate that adequate water right(s) supply exists to serve the subdivision, as defined in 20.97.451 WCC, except when water withdrawal is exempt from obtaining a water right permit under RCW 90.44.050.

(4) If a Group B public water system is created to serve the subdivision, the number of wells shall be limited to the minimum needed to serve the water needs of the subdivision as determined by the health department.

(5) If a public water supply is required, all the requirements of Chapter 246-290 WAC, Group A Public Water Systems, or Chapter 246-291 WAC, Group B Public Water Systems, must be met prior to final plat approval.

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**TITLE 24 HEALTH CODE**

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Chapter 24.11

DRINKING WATER

* * * * *

24.11.050 General requirements.
A. Applicants must submit all required forms, letters and documents to the director.
B. The director will consider applications for water availability proposing to use groundwater, spring water, surface water, sea water or rainwater.

C. The director shall evaluate the availability of a public water system prior to approving the use of a private water system. If it is determined that a public water system is available and willing to provide water, the applicant must connect to that public water system when:

1. The applicant proposes to use surface water, spring water, rainwater, or contaminated groundwater; or

2. The applicant proposes to build on a lot located in a short subdivision or long subdivision that Whatcom County approved based on the availability of public water; or

3. The existing public water system has water lines adjacent to the property line of the applicant and connection is consistent with RCW 36.70A.110(4); or

4. The existing public water system has defined a "service area boundary" in accordance with the Whatcom County Coordinated Water System Plan which includes the property of the applicant.

D. The director will only approve a private or Non Group B 2 party well for proposed short subdivisions or long subdivisions when analytical results of untreated water samples for primary inorganic or organic contaminants do not exceed a maximum contaminate level (MCL) adopted by Washington State Department of Health.

E. Purveyors of public water systems and private water system applicants must comply with Washington State Department of Ecology water right requirements and must demonstrate that they have an adequate water supply for their proposed service per WCC 24.11.060. Compliance will include at a minimum, possession of a water right permit or certificate for:
1. All surface water sources excluding seawater.
2. All groundwater sources using more than 5,000 gallons per day.
3. Irrigating more than one-half acre of lawn or noncommercial garden.

24.11.060 Water availability required.
Prior to issuance of a building permit or other project permits, the applicant must provide Whatcom County planning and development services evidence of adequate water supply as documented by a water availability notification signed by the director, except as described in subsection B. evidence of an adequate water supply to Whatcom County planning and development services (PDS) except when: The water availability notification shall document a supply of potable water adequate to serve a land use associated with a project permit in terms of quality, quantity, and legal availability.

A. The applicant must provide evidence of legal availability in the form of:
   1. A water right permit from the Department of Ecology, or
2. A letter from an approved public water purveyor with sufficient water rights, stating the ability to provide water, or

3. Documentation that water can be supplied by a rainwater catchment system approved by the Whatcom County Health Department, per Department of Ecology Policy 1017, or

4. For a permit-exempt well per RCW 90.44.050, documentation that the well site is located in the Samish River watershed, or in Point Roberts, Eliza Island, or Lummi Island, as shown in Figure 24.11.060, or

5. For a permit-exempt well per RCW 90.44.050 located outside the Samish River watershed, Point Roberts, Eliza Island, or Lummi Island, as shown in Figure 24.11.060, one of the following:
   
   a. A study prepared by a qualified hydrogeologist licensed in the State of Washington demonstrating a proposed groundwater withdrawal would not impair a senior water right, including instream flows established in Chapter 173-501 WAC where applicable, in accordance with current statutes and case law. Such documentation must be verified by the county either through consultation with the Department of Ecology, or a qualified technical review team appointed by the county. The county may require a third party review by an independent qualified hydrogeologist if the county determines additional technical expertise is needed. The cost of the third party review shall be the permit applicant’s responsibility.

   or

   b. A mitigation plan prepared by a qualified hydrogeologist licensed in the State of Washington, and approved by Whatcom County. The plan shall include:

      i. Evidence that the proposed withdrawal with mitigation in place will not impair a senior water right, including instream flows established in Chapter 173-501 WAC where applicable, in accordance with current statutes and case law. Such documentation must be verified by the county either through consultation with the Department of Ecology, or a qualified technical review team appointed by the county. The county may require a third party review by an independent qualified hydrogeologist if the county determines additional technical expertise is needed. The cost of the third party review shall be the permit applicant’s responsibility.
ii. A monitoring and reporting plan, including a quality assurance/quality control plan.

iii. Financial assurance to ensure mitigation measures for the duration of the water use, and prohibit water provided for the purpose of mitigation from appropriation for any other purpose.

B. A water availability notification is not required for:

A. 1. A building A project permit that does not require potable water.

B. 2. A project permit relying on a permit-exempt well per RCW 90.44.050, and proposing (a) a remodel of an existing building or (b) replacement of a demolished or removed building, but not proposing a change of use; however, such permits shall require current documentation of water quality and quantity, as approved by the director. A residential remodeling does not add additional bedrooms or result in an increase of floor-space of more than 50 percent.

C. 3. A project permit relying on surface water withdrawal for potable water, and proposing (a) a remodel of an existing building or (b) replacement of a demolished or removed building, either of which would increase the floor area by no more than 50 percent over that of the existing building; however, such permits shall require current documentation of water quality and quantity, as approved by the director. PDS determines that the building will replace a demolished or removed building and the building will not have more bedrooms or more than 50 percent greater floor space than the previous building.
24.11.070 Determining adequacy of water supply for building permit applications proposing to use an existing public water system.
A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to obtain water from an existing public water system the applicant must:

   1. Submit to the director, an Availability Notification for Public Water form (as amended) signed by an authorized representative of the water system proposing to serve water to the building. The authorized representative:

      a. Must indicate on the form that the water system will provide water to the proposed building.

      b. Must sign a statement that they have reviewed the system records and ensures that the water system complies with Chapters 246-290 and 246-291 WAC and department requirements.

B. The director will review the completed Availability Notification For Public Water (form) for approval. The director will approve the completed form if:

   1. The applicant and the authorized representative met all the criteria listed on the form.

   2. The purveyor of the water system has the approval from DOH or the department to provide water to the building.

   3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A).

24.11.080 Determining adequacy of water supply for of building permit applications proposing to create a new public water system.
Prior to director approval of evidence of an adequate water supply, an applicant proposing to create a new public water system must comply with:

A. Provisions of the Whatcom County Coordinated Water System Plan.

B. Chapters 246-290 and 246-291 WAC, and all other applicable local and state regulations for public water supplies.

C. The applicable sections of this chapter pertaining to public water supplies and water availability.

24.11.090 Determining adequacy of water supply for building permit applications proposing to use a well to serve one single-family dwelling or one single-family living unit.
A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to use a private well, the applicant must:

   1. Notify the director of the intent to use a well.
2. Request that the director conduct a site inspection and approve the proposed well site.

B. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director cannot approve a well location the director will deny the application and give the reasons for denial.

C. If the director approves the well location the applicant shall submit a completed Water Availability Notification Private – 1 Home Well form (as amended) and all required documents to the director for approval.

A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to use a private well, the applicant must submit a completed Water Availability Notification Private—1 Home Well form (as amended) and all required documents to the director for approval.

BD. The director will review the completed form and required documents submitted by the applicant for approval. The director will approve the form if:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A). well site proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

24.11.100 Determining adequacy of water supply for building permit applications proposing to use a well to serve two single-family dwellings or two single-family living units.

A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to use a well to serve two single-family dwellings or two single-family living units, the applicant must:

1. Notify the director of the intent to use a well or wells.

2. Request that the director conduct a site inspection and approve the proposed well sites.

B. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director cannot approve a well location the director will deny the application and give the reasons for denial.

C. If the director approves the well locations the applicant shall submit a completed Water Availability Notification Non-Group B – 2 Home Well form (as amended) and all required documents for each well to the director for approval.
D. The director will review the completed form and required documents submitted by the applicant for approval. The director will approve the form if:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A). The well-site proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

24.11.110 Determining adequacy of water supply for building permit applications proposing to use a spring to serve one single-family dwelling unit or one single-family living unit.
A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to use a spring source, the applicant must:

1. Notify the director of the intent to use a spring.

2. Provide information to the director showing that they cannot drill an adequate well on their property.

3. Request that the director conduct a site inspection and approve the proposed location of the spring.

B. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director does not approve the location the director will deny the application and give the reason for denial.

C. If the director approves the location of the spring the applicant must submit a completed Water Availability Notification Private – 1 Home Spring form (as amended) and all required documents for approval by the director.

D. The director will review the completed form and required documents for approval. The director will approve the application if:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A). The spring-site proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.
24.11.120 Determining adequacy of water supply for building permit applications proposing to use a spring to serve two single-family dwelling units or two single-family living units.

A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to use a spring source, the applicant must:

1. Notify the director of the intent to use a spring.

2. Provide information to the director showing that an adequate well cannot be drilled on their property.

3. Request that the director conduct a site inspection and approve the proposed location of the spring.

B. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director does not approve the location, the director will deny the application and give the reasons for denial.

C. If the director approves the location of the spring the applicant must submit a completed Water Availability Notification – 2 Home Spring form (as amended) and all required documents for approval by the director.

D. The director will review the completed form and required documents for approval. The director will approve the application if:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A). The spring or spring sites proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

24.11.130 Determining adequacy of water supply for building permit applications proposing to use surface water, sea water or rainwater for one or two single-family dwelling units or two single-family living units.

A. The director shall not approve use of surface water, sea water, or rainwater as evidence of an adequate water source unless the applicant:

1. Cannot obtain water from an existing public water supply.

2. Cannot use an approved source of groundwater from a well.

3. Could only use contaminated groundwater.

B. Prior to director approval of evidence of adequate water supply the applicant must:
1. Meet all applicable requirements for surface water, sea water or rainwater treatment design, maintenance and operation contained in Whatcom County health and human services Water Availability for a Private Surface Water Source (as amended) Notification as determined by the director.

2. Provide evidence of legal availability of water for the proposed project per WCC 24.11.060(A). The surface water site proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

3. Meet all other state and local regulations.

4. Sign and have recorded with the Whatcom County auditor’s office the following documents:

   a. A document stating which contaminate the untreated source water exceeded.

   b. A document stating that the applicant has had a water treatment system designed that meets Whatcom County health and human services Water Availability Approval for a Surface Water Source (as amended), and secures a potable water supply for the building.

   c. A document stating that the applicant has installed a treatment system according to the design reviewed by the director and treated water sample results that verify system performance.

   d. A document stating that the applicant agrees to adhere to the operation, maintenance, and monitoring plan for the designed treatment system.

   e. A document stating that the applicant understands that the obligation to comply with treatment system design, installation, operation and monitoring lies with the applicant and not Whatcom County.

   f. When the public system is available, any person obtaining water from contaminated source must provide current test results showing water treatment is adequately maintaining water quality below maximum contaminant levels (MCL). If the quality does not meet the MCL, the applicant is required to hook up to a public system.

24.11.140 Determining adequacy of water supply for short subdivisions, long subdivisions or binding site plans proposing to use an existing public water system.
A. Prior to director approval of availability of an adequate water supply where the applicant proposes to obtain water from an existing public water supply to service lots of a short subdivision, long subdivision, or a binding site plan the applicant must:
1. Provide to the director an Availability Notification for Public Water (as amended) form or a letter signed by an authorized representative of the water system proposing to serve water to each lot. The authorized representative of the public water system:

   a. Must indicate that the water system will provide water to each proposed lot.

   b. Must sign a statement that they have reviewed the system records and ensures that the water system is in compliance with Chapters 246-290 and 246-291 WAC and department requirements.

B. The director will review the completed form or letter to determine the availability of adequate water. The director will make a determination of adequate water when:

1. The applicant and the authorized representative meet all the criteria listed on the form.

2. The purveyor of the water system has the approval from DOH or the department to provide water to the short subdivision, long subdivision or binding site plan, except for Group A water systems the following conditions also apply:

   a. DOH has issued a green operating permit to the purveyor; or

   b. DOH has determined that the purveyor significantly complies with Chapter 246-290 WAC

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A).

24.11.150 Determining adequacy of water supply for short subdivisions, long subdivisions or binding site plans proposing to use a new public water system.

Prior to director approval of availability of an adequate water supply where the applicant proposes to create a new public water supply to service lots of a short subdivision, long subdivision, or a binding site plan the applicant must comply with:

A. Provisions of the Whatcom County Coordinated Water System Plan.

B. Chapters 246-290 and 246-291 WAC, and all other applicable local and state regulations for public water supplies.

C. The applicable sections of this chapter pertaining to public water supplies and water availability.

24.11.160 Determining adequacy of water supply for short subdivisions or long subdivisions proposing to use a private well or private wells to serve one single-family dwelling or one single-family living unit.
A. Prior to director approval of availability of an adequate water supply where the applicant proposes to use a private well or private wells to service lots of a short subdivision or long subdivision the applicant must:

1. Notify the director of the intent to use a private well or wells.

2. Request that the director conduct a site inspection and approve the proposed well sites.

B. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director cannot approve a well location the director will deny the application and give the reasons for denial.

C. If the director approves the well locations the applicant shall submit a completed Subdivision Water Availability form (as amended) and all required documents for each well to the director for approval.

D. The director will review each completed form and required documents for approval. The director will approve the availability of adequate water when:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A). The well-site or well-sites proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

24.11.170 Determining adequacy of water supply for short subdivisions or long subdivisions proposing to use a well to serve two single-family dwellings or two single-family living units.
A. The applicant shall create a Group B Public water supply as defined in Chapter 246-291 WAC when WCC Title 21 requires the applicant to provide public water service to each lot. This includes a water system where one well services two lots.

B. Prior to director approval of availability of an adequate water supply where the applicant proposes to use one well to service two lots of a short subdivision or long subdivision when public water is not required the applicant must:

1. Notify the director of the intent to use a well or wells.

2. Request that the director conduct a site inspection and approve the proposed well sites.

C. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director cannot approve a well location the director will deny the application and give the reasons for denial.
D. If the director approves the well locations the applicant shall submit a completed Subdivision Water Availability form (as amended) and all required documents for each well to the director for approval.

E. The director will review each completed form and required documents for approval. The director will approve the availability of adequate water when:

1. The applicant met all the criteria listed on each of the forms.

2. The applicant submitted all of the required documents.

3. The applicant has provided evidence of legal availability of water for the proposed project per WCC 24.11.060(A). The well-site or well-sites proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.
November 14, 2016

Jack Louws, Whatcom County Executive
311 Grand Avenue, Suite 108
Bellingham, WA 98225-4082

RE: Ruling in Whatcom County v. Western Washington Growth Management Hearings Board

Dear Mr. Louws:

As requested by Whatcom County staff I am writing to you about the recent Washington State Supreme Court decision in Whatcom County v. Western Washington Growth Management Hearings Board, Supreme Court No. 91475-3 (also known as Hirst). This decision directly affects determinations of water availability for new permit-exempt well withdrawals in Whatcom County, and clarifies the obligation the Growth Management Act (GMA) places on counties to ensure that water is legally available before issuing a building permit under RCW 19.27.097, or subdivision approval under RCW 58.17.110. The Department of Ecology (Ecology) recognizes the significance of this decision, and the impact it may have on landowners who are wanting to rely on permit-exempt wells for new homes.

Under the recent decision in Hirst, and the 2011 decision in Kittitas, Ecology’s role is to coordinate and provide technical assistance to counties in determining legal water availability. Ecology is providing this information for you to use in making your decisions under the GMA.

The Supreme Court’s holdings in Hirst

In Hirst, the Supreme Court ruled that Whatcom County’s GMA Comprehensive Plan and development regulations violated the GMA by failing to ensure that new private wells did not impair rivers and streams protected under Chapter 173-501 WAC, the instream flow rule for the Nooksack watershed. The decision states:

“The GMA requires counties to ensure an adequate water supply before granting a building permit or subdivision application. The County merely follows the Department of Ecology’s ‘Nooksack Rule’; it assumes there is an adequate supply to provide water for a permit-exempt well unless Ecology has expressly closed that area to permit-exempt

1 Kittitas County et al v. Eastern Washington Growth Management Hearings Board et al. 122 Wash.2d 144, 256 P.3d 1193
appropriations. This results in the County’s granting building permits for houses and subdivisions to be supplied by a permit-exempt well even if the cumulative effect of exempt wells in a watershed reduces the flow in a watercourse below the minimum instream flow.\textsuperscript{2}

Ecology views the Court’s decision as applying prospectively from the date of the Court decision.

The Instream Resources Protection Program for the Nooksack Water Resource Inventory Area (WRIA) 1, Chapter 173-510 WAC

An instream flow is a specific stream flow level (in cubic feet per second, cfs) measured at a control point location on a given stream, that is established to protect instream resources including fish, game, wildlife, scenic, aesthetic and other environmental values, navigational values, birds, and recreational values.\textsuperscript{3} Once established in a rule, instream flows are considered appropriations under the state water code\textsuperscript{4} and must be protected from impairment by junior uses of water. When Ecology issues any new, junior, consumptive water rights, they are conditioned to be either interruptible or fully mitigated to prevent impairment of instream flows.

Closures are findings that water is not available for new appropriations. A closure is not considered an appropriation under the state water code. A withdrawal of groundwater that is hydraulically connected to surface water is not allowed to impact a closed surface water body. Groundwater is generally not available for new appropriation for domestic uses in a basin that is closed for any portion of the year, because domestic uses require an uninterruptible water supply.

WAC 173-501-030 establishes regulatory instream flow levels on 30 rivers and streams. In addition, WAC 173-501-040 establishes year-round or seasonal closures on 44 surface water bodies, including 27 of the rivers and streams with regulatory instream flow levels.

Instream flow provisions apply to three reaches of the Nooksack River. New uses of water from those regulated river reaches, and tributaries to those regulated river reaches, are junior to the adopted instream flows. New appropriations must be interrupted when instream flows are not met.

The Washington State Supreme Court\textsuperscript{5} ruled that new uses of water, including permit-exempt withdrawals of groundwater, must have no effect on closed surface water bodies, and must not impair regulatory instream flows. The court also indicated that there is no differentiation between \textit{de minimis} or significant impairment, and that no impairment is allowed.


\textsuperscript{3} RCW 90.22, Minimum Water Levels and Flows, and RCW 90.54, the Water Resources Act of 1971

\textsuperscript{4} RCW 90.03.345

\textsuperscript{5} Postema, ET AL., Appellants, v. The PCHB, ET AL., Respondents, 142 Wn.2d 68 (2000)
Water availability for permit and land use decisions

Our analysis of stream flow data in WRJA 1 indicates instream flows have not been met on average 142 days per year, and there are no years when instream flows have been fully met for the entire year. This means water for new domestic uses is not available year-round in any regulated reach, tributaries to those regulated reaches, or in closed or partially-closed basins, without documentation that there would be no impact to surface waters.

An electronic, interactive map showing domestic water availability in Whatcom County reflecting instream flows and closures is provided at this link: http://www.ecy.wa.gov/programs/wr/rights/domwtravail.html . Ecology has also created a webpage about the Hirst decision that we are updating as information becomes available: http://www.ecy.wa.gov/programs/wr/hwrd/hirst.html.

In its ruling in Hirst, the Court ordered that to meet the legal water availability requirement the County must review new development proposals to ensure new consumptive uses of water will not impact instream flows or closed water bodies. To approve new building permits or subdivisions the County must determine that water use by the new proposal will not affect closed surface water bodies or impair streams with instream flows that are not being met.

A review to determine legal water availability must consider hydraulic continuity between the proposed well withdrawal and protected surface water bodies. In glacial deposits found in the Puget Lowlands it is generally assumed that hydraulic connections exist between wells and surface water, and that groundwater pumping will to some extent diminish surface water flows. One exception to this are instances where wells are located directly adjacent to the Salish Sea and thus only decrease groundwater that would otherwise discharge to saltwater.

Areas in Whatcom County that we determine to be unaffected by the instream flows and closures in WAC 173-501 include:

- Lummi and Eliza islands.
- Point Roberts.
- The portion of the Samish subbasin of WRJA 3 that is located in Whatcom County. This area is not covered by a rule.
- Limited coastal areas where withdrawals that are not in hydraulic continuity with regulated surface water bodies, which must be determined on a case-by-case basis.

Under the Supreme Court’s decision in Postema, projects proposing to rely on well water have the opportunity to demonstrate that their proposed withdrawal is not hydraulically connected to closed or regulated surface waters, or that they can provide adequate mitigation to offset new consumptive use impacts. This requires a site-specific analysis that is typically conducted by a licensed hydrogeologist. Ecology can provide you with water right examinations from the Nooksack watershed that provide examples of this type of analysis.
Water Solutions

In light of the Hirst decision current options for property owners to obtain a legal source of water in the Nooksack basin include:

- Connection to a public water supply where it is available in a timely and reasonable manner.
- Drilling a well in a location that has no impact on regulated surface water bodies. This will require an analysis demonstrating no effect on protected water bodies.
- Mitigation: offsetting the impact on stream flows through a mitigation plan approved by Whatcom County. Under the Supreme Court’s recent decision in Foster’s mitigation of the legal injury (or impairment) to the senior instream flow water right must be water-for-water, in-place, in-time, and for the same duration as the proposed water use (most often in perpetuity). Ecology is able to provide technical assistance on mitigation, however, we don’t have resources to review individual proposals submitted under your interim ordinance.
- Rainwater collection in accordance with Water Resources Policy 1017 Regarding Collection of Rainwater for Beneficial Use.

In closing, we hope this information is helpful to Whatcom County. We are providing this information to assist Whatcom County in meeting the obligations provided in the Supreme Court’s Hirst decision. Ecology is firmly committed to working with your staff to provide additional service as needed. We will also prioritize our workload to provide consultation to the County on water availability questions, and will assist the county in its efforts to implement the court ruling.

If you have any questions contact Kasey Cykler, WRIA 1 Water Master at our Bellingham Field Office, (360) 715-5222, or kasey.cykler@ecy.wa.gov.

Sincerely,

[Signature]

Thomas Loranger
Water Resources
Program Manager

cc:  J.E. “Sam” Ryan, Whatcom County, Planning & Development Services, Director
     Mark Personius, Whatcom County, Planning & Development Services, Assistant Director
     Tyler Schroder, Whatcom County, Deputy County Executive
     Gary Stoyka, Whatcom County, Natural Resources Program Manager
     John Wolpers, Whatcom County, Environmental Health Manager
     Tom Buroker, Ecology, Water Resources NWRO Section Manager
     Mark McCaskill, Dept. of Commerce, Growth Management Services, Managing Director

6 Sara Foster v. Ecology, City of Yelm, WA PCHB - Supreme Court Decision October 8, 2015