

EXECUTIVE'S OFFICE

Jack Louws
County Executive



WHATCOM COUNTY COUNCIL

COUNCILMEMBERS

Barbara E. Brenner
Rud Browne
Barry Buchanan
Todd Donovan
Ken Mann
Satpal Sidhu
Carl Weimer

Bellingham Herald Op Ed, for print Sunday, December 11, 2016

Written by Jack Louws, County Executive and Barry Buchanan, Council Chair

Water, Water Everywhere....

In October, the Washington Supreme Court issued its decision on the legal case Hirst et al vs Whatcom County. This court decision concerns whether property owners can use permit exempt wells for their drinking water source on undeveloped properties, including short and long plat developments. Acting on advice from legal counsel, the County Executive and county planners, the County Council adopted an emergency moratorium on November 9 to follow the directive handed down by the Supreme Court. The primary goal of passing the moratorium was to keep as much future decision making on this issue in the hands of County government instead of with the Growth Management Hearings Board. Further, we did not want to jeopardize future investment nor exacerbate financial burden, beyond what has already occurred, during this unforeseen and uneasy time. If the Council had not taken this step and allowed permits to continue being issued, there was a real risk that the Growth Management Hearings Board would invalidate County planning efforts and the validity of permits issued after the decision. This outcome would have caused even greater hardship on the impacted members of our community.

The emergency ordinance was just for 60 days. The work to develop a long-term solution will take longer than that. The first step towards that solution is the interim ordinance that was put in place by Council on December 6.

It is very important to be clear that Whatcom County did not ask to be in this position and this interim ordinance is in direct response to the Washington State Supreme Court decision. The Court decision forces Whatcom County to take over the Department of Ecology responsibility of determining legal water when reviewing and approving new development permits. The decision has led counties throughout the state to be reactive in trying to find the balance between growth management and water use planning. A number of counties have taken actions similar to those taken by Whatcom County. At the same time, previous Supreme Court cases have already severely limited the options available to the state and local governments to address these problems, including not allowing even seemingly insignificant instream flow impairment and limiting water bank/mitigation options for real-world solutions. Any action we take will be reviewed by the Hearings Board for compliance with GMA and the Supreme Court's decision, so we must be careful and methodical about how we go about the process.

The Whatcom County Council has also passed a resolution requesting that the Washington State Legislature amend the Growth Management Act (GMA) to clarify that counties shall bear no responsibility for interpreting, determining, or adjudicating legal water availability for exempt wells.

What the Interim Ordinance does:

- ***It lifts the emergency moratorium*** on acceptance of permit applications—dependent upon a permit exempt well—that was put in place November 9. That means the Health Department and Planning and Development Services may again accept and process these building permit and subdivision applications *in certain areas and in limited circumstances where instream flows will not be impaired*.
- ***It identifies ALL the legal sources of potable water potentially available for development in Whatcom County***, and the *limited circumstances* upon which permit exempt wells can be determined to be legal sources of water, per the Supreme Court’s decision.
 - First, for permit exempt wells, the Ordinance will require a finding from a hydro-geologist that the well would not impair—in any way—an adopted minimum instream flow in the Nooksack basin. Most of the county’s streams are subject to some kind of closure. The Department of Ecology presumes most groundwater in the county is in “continuity” with those closed streams, so proving no impairment through a hydrogeological analysis will be very difficult in most areas.
 - Second, if impairment of any kind is shown from a proposed well, another option in the Ordinance is for the new well proposal to provide a mitigation plan that eliminates the impairment. As we have already stated, due to several related Supreme Court decisions about water use, mitigation is a very difficult solution to implement, at the moment.

Keep in mind the Ordinance does not affect existing residences already using exempt wells, including remodels, and will still allow existing and new residences in public water associations with approved water rights as well as rainwater catchment systems in rural areas where public water is not available.

Our next steps will take longer than the next thirty days to accomplish because the issues associated with them are increasingly complex and difficult to solve. Next steps include:

1. **Requesting changes to state law** to relieve the burden of unworkable judicial water impairment and mitigation standards now in place that don’t give us enough tools to solve the problem, as well as requesting technical and financial assistance from the state to deal with the challenges of providing an adequate *public* rural water supply;
2. **Determining legal vesting policies** for pending development and water use applications and approvals by analyzing those in process prior to the effective date of the Court’s decision-- including looking at the financial impact to folks who have spent a significant amount of effort on securing what was legal water until just a month ago;
3. **Fully funding and completing the County’s groundwater model** to better understand the surface water/groundwater hydrology in the county so at least the burden of determining impairment to adopted instream flows can be borne by the County and not individual applicants in the future;
4. **Continuing our on-going water supply planning** originally embodied in the Lower Nooksack Strategy adopted by the Water Resource Inventory Area 1 Joint Board (WRIA 1) by examining potential water supply and instream flow solutions; looking more deeply at the potential mitigation solutions (including opportunities and obstacles) to impairment from both an individual well use and basin-wide perspective (such as water banks and stream augmentation) and evaluating private vs. public mitigation solutions, effectiveness and costs; and finally
5. **Achieving GMA Compliance with the Growth Management Hearings Board.**

We have heard from citizens who are impacted by this court decision. It is a financial and life changing impact particularly for those citizens and their families who are caught mid-project, many with permits nearly in hand whose dreams are on hold but whose financial commitments continue regardless of the ruling. We ask for your patience and understanding as we work with the State and others to find a solution as quickly as we can.

There have been a number of questions on individual well situations and we are reviewing ALL correspondence and suggestions in looking for solutions. We will continue to work with our legislators and the Washington State Association of Counties to find a legislative solution.

In summary the only real solution to this is to have a change in the law put through this legislative session. We encourage you to reach out to your State legislative delegation and let them know we need their support.

Continuing information on this issue can be located on the county website: [https://wa-whatcomcounty.civicplus.com/2487/Exempt-WellWater-Information](https://whatcomcounty.civicplus.com/2487/Exempt-WellWater-Information). There is a notification list for those who would like to subscribe for updates.

For more information contact Jack Louws, County Executive, 360 778 5200.