Attachment A

King County

2016 King County Comprehensive Plan

WATER AVAILABILITY AND PERMITTING STUDY

Final Report

Response to Ordinance 18427, Attachment A, Work plan Action 13
December 31, 2018

I. Purpose of Report

The purpose of this final report is to complete the review and analysis and follow-up on the December 1, 2017 Initial Report regarding Ordinance 18427, Workplan Action 13. The impetus for the work program item was the Washington Supreme Court's 2016 Hirst decision regarding the use of private wells. Since the workplan action item was added to the 2016 King County Comprehensive Plan and since the Initial Report was completed, the State Legislature adopted Engrossed Substitute Senate Bill (ESSB) 6091 in direct response to the Hirst decision, now codified in chapters 19.27, 58.17, 90.03 and 90.94 Revised Code of Washington. ESSB 6091 clarifies local government obligations to determine legal water availability for exempt wells. This report outlines King County's response to Hirst based on the changes in state law enacted by ESSB 6091.

II. Background

The Initial Report was developed in accordance with Ordinance 18427, which adopted the 2016 King County Comprehensive Plan. A listing of action items to be performed in the intervening four-year period was included in the adopted plan. Action 13 reads:

> **Action 13: Water Availability and Permitting Study.** The recent Washington State Supreme Court decision in Whatcom County v. Western Washington Growth Management Hearings Board (aka, Hirst) held that counties have a responsibility under the Growth Management Act to make determinations of water availability through the Comprehensive Plan and facilitate establishing water adequacy by permit applicants before issuance of development permits. Hirst also ruled that counties cannot defer to the State to make these determinations. This case overruled a court of appeals decision which supported deference to the State. The Supreme Court ruling will require the County to develop a system for review of water availability in King County, with a particular focus on future development that would use permit exempt wells as their source of potable water. This system will be implemented through amendments to the King County Comprehensive Plan and development regulations. The County will engage in a Water Availability and Permitting Study to address these and related issues. This study will analyze methods to accommodate current zoning given possible water availability issues and will look at innovative ways to accommodate future development in any areas with

insufficient water by using mitigation measures (e.g. water banks). This study will not include analysis of current water availability.

- *Timeline:* Eighteen month process. Initial report will be transmitted to the Council by December 1, 2017; final report, with necessary amendments, will be transmitted to the Council by December 31, 2018[1]. This report may inform the scope of work for the next major Comprehensive Plan update.
- *Outcomes:* Modifications, as needed, to the Comprehensive Plan, King County Code and County practices related to ensuring availability of water within the Comprehensive Plan and determining the adequacy of water during the development permit process.
- *Leads:* Performance, Strategy and Budget. Work with the Department of Permitting and Environmental Review, Department of Natural Resources and Parks, Department of Public Health, Prosecuting Attorney's Office, and King County Council. Involvement of state agencies, public and non-governmental organizations.

III. The Hirst Decision

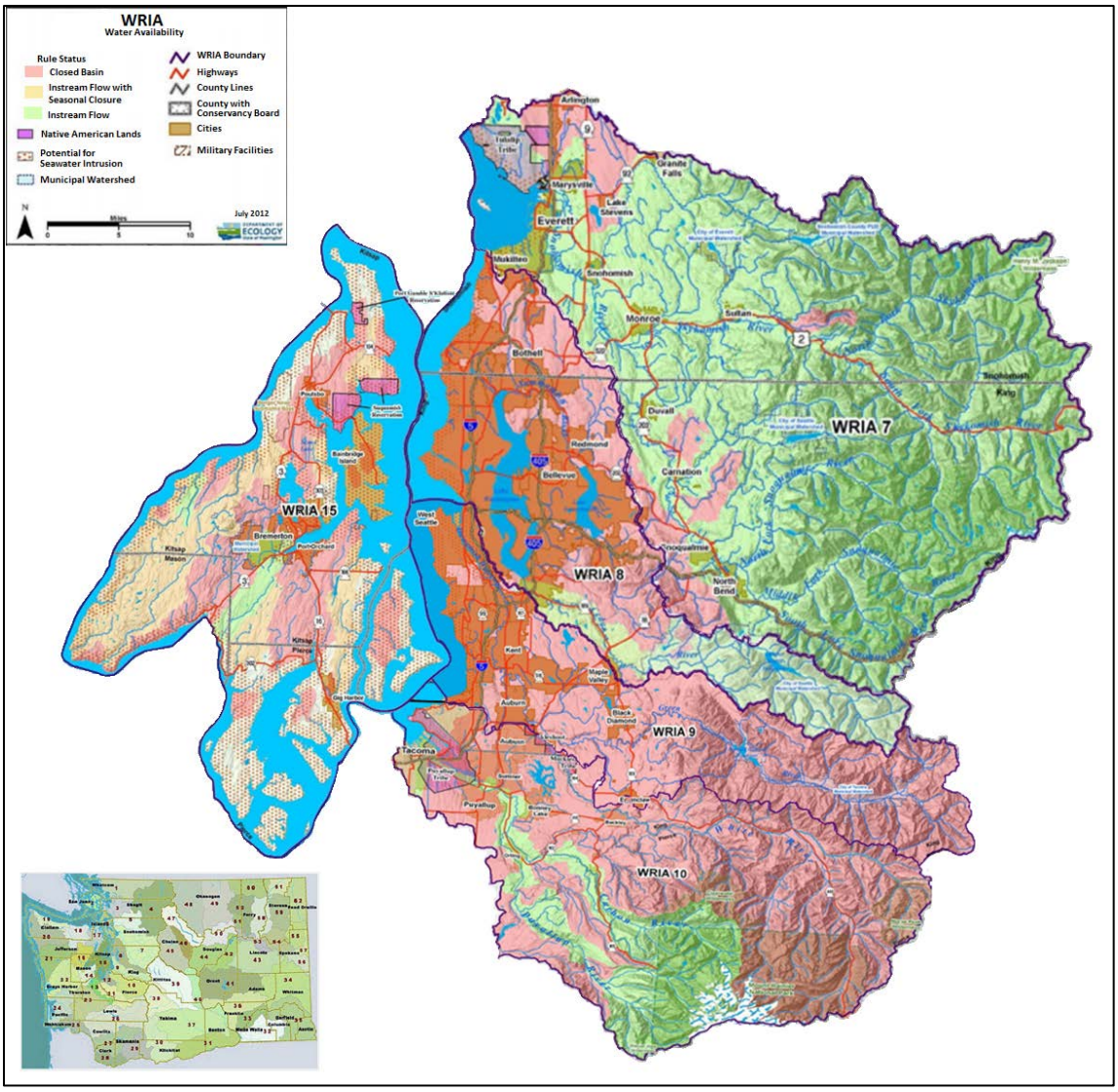
On October 6, 2016, the Washington Supreme Court issued a ruling in the case of Whatcom County v. Western Washington Growth Management Hearings Board, more commonly known as the Hirst decision. The court ruled that Whatcom County failed to comply with the Growth Management Act (GMA) requirement to protect water resources within its comprehensive plan. While the case directly related to Whatcom County, it appeared to require local adoption of policies and regulations to guide jurisdictions in making independent determinations about legal water availability for permit exempt wells within subdivision or building permit review. The County interpreted the Hirst decision as creating prospective obligations for adoption of planning and development regulations which became the impetus for Action 13.

A **permit exempt well** refers to a withdrawal of water that is not required to have a groundwater permit from the state Department of Ecology in accordance with RCW 90.44.050. In Washington State, prospective water users must obtain authorization in the form of a water right permit or certificate from the Washington State Department of Ecology ("Ecology") before withdrawing groundwater. The groundwater permit exemption allows the users of small quantities of groundwater to construct wells and develop their water supplies without first obtaining a water right permit from Ecology. A well serving an individual property or small group of properties for domestic water use is typically under the State threshold (5,000 gal/day) and is therefore considered a permit exempt well withdrawal.

As outlined in the Hirst decision, Whatcom County's comprehensive plan was found to be deficient, in part, because it allowed proposed development using a permit exempt well for water supply in a basin that is closed or partially closed to surface water withdrawals by Ecology without regard to legal water availability. This means that a determination of adequate water needs to consider or demonstrate that the groundwater withdrawal will not impair a senior water right, including instream flows. This is referred to as a showing of "**legal water availability**."

[1] The transmittal date for the final report was extended to December 31, 2018 with the adoption of the 2018 King County Comprehensive Plan on October 29, 2018, per Ordinance No. 18810.

Instream flows refers to the quantity of water in a river, stream, or other water bodies as established in a rule to protect instream values. Ecology is charged by state law to protect and preserve instream resources and values by setting the amount of water necessary for protecting fish, wildlife, and recreation. A **closed basin** refers to a defined water basin or sub-basin that is closed to the granting of new water rights in order to protect streams, as well as existing water users, from being affected by new uses. To provide a sense of scale for this, the following map shows in pink the extent of the closed basins in watersheds that are partly or fully in King County.



Historically, local comprehensive plans and associated development regulations did not require a land use applicant to demonstrate *legal* water availability, nor did the local government explicitly address legal water availability within the approval process when permitting a structure dependent on a permit exempt well for water.

IV. The Hirst Response – ESSB 6091

In January 2018, the Washington State Legislature approved Engrossed Substitute Senate Bill (ESSB) 6091, which was in direct response to the Hirst decision, as described above. Since the Bill was designated as an emergency action, the Bill went into effect on January 19, 2018. The adopted statutes resolved the legal water availability issue for new domestic water withdrawals from permit exempt wells by finding water to be "legally available" in certain locations if specific conditions related to use of water from the permit exempt well are attached to the land use decision and a fee is paid. In addition, the legislation:

- Focuses on fifteen watersheds, including five in King County, that were impacted by the Hirst decision, and also establishes standards for rural residential permit-exempt wells in the rest of the state;
- Divides the fifteen basins into those that have a previously adopted watershed plan under chapter 90.82 Revised Code of Washington and those that do not (the five basins in King County do not have watershed plans);
- Allows counties to rely on instream flow rules in preparing comprehensive plans and development regulations and for water availability determinations;
- Lays out these interim standards that will apply until local watershed restoration committees develop plans to be adopted into rule:
    - allows a maximum annual average for new domestic water use, depending on the watershed;
    - establishes a one-time $500 fee for landowners building a home using a permit-exempt well in the affected areas;
- Retains the current maximum of 5,000 gallons per day limit for permit-exempt domestic water use in watersheds that do not have existing instream flow rules;
- Invests $300 million over the next 15 years in projects that will help fish and streamflows; and
- Creates a Legislative task force to review state policy on mitigation for water right impacts.

The legislation applies to all building and subdivision applications in unincorporated King County that rely on new connections to permit exempt wells that are installed after January 18, 2018 and are located in water resource inventory areas (WRIA) 7, 8, 9, 10 and 15. By June 30, 2021, Ecology is required to prepare and adopt a flow restoration and enhancement plan for each WRIA. Ecology has an additional two years to adopt rules implementing these plans if a rule is needed.

The King County Department of Permitting and Environmental Review requires compliance with King County Code 21A.28.040 and the new legislation. For each building permit or subdivision application that is dependent upon connection to permit exempt well installed after January 18, 2018, the following is required:

- $500 for each building permit application;
- A copy of the Department of Ecology Water Well Report;
- Permit conditions and recorded legal documents that:

    - limit withdrawals to domestic use only to a maximum annual average of 950 gallons per day (gpd) per connection, up to a maximum of 5,000 gpd per well; and
    - limit water withdrawals to 350 gpd for interior use only under declared drought conditions.
- Management of stormwater on-site, maximizing infiltration and low impact development techniques, to the extent practicable; and
- For properties located within an approved water service area, connection to public water when service becomes available.

Conditions restricting water use may not be changed or removed unless authorized through a rule adopted by Ecology implementing the watershed restoration and enhancement plan for the WRIA.

V. Implications for King County – Development on Permit Exempt Wells

The Hirst decision and subsequent changes to state law most directly affect rural development proposing to use permit exempt wells as the source of water supply. In King County, this is an issue almost exclusively for development in the Rural Area, as the vast majority of new development in urban King County is served by public water systems. In the Rural Area, most development is residential and occurs on single lots or through short subdivisions (two-to-four lots.)

King County has had a long-standing preference for limiting new permit exempt wells and requiring new development to be connected to larger public water systems, known as Group A water systems. This has been an important measure in advancing public health and protecting the environment. In accordance with the King County Comprehensive Plan policy F-233, in both the Urban Growth Area and Rural Areas, all development is required to be served by an existing Group A public water service, except in limited circumstances:

> F-233 In both the Urban Growth Area and Rural Areas of King County, all new construction and all new subdivisions *shall be served by an existing Group A public water systems* except in the circumstance when no Group A public water system can provide service in a timely and reasonable manner per Revised Code of Washington 70.116.060 and 43.20.260 or when no existing system is willing and able to provide safe and reliable potable water with reasonable economy and efficiency per Revised Code of Washington 19.27.097. *(emphasis added)*

Within the Urban Growth Area, any system other than a Group A water system is considered interim and only approved if no other options are available. Individual wells are permitted on a single lot only as an interim facility:

F-234 In the Urban Growth Area, individual *private wells are not permitted* unless application of Policy F-233 to a proposal for a single-family residence on an individual lot would deny all reasonable use of the property. In that case, the well would be allowed only as an interim facility until service by a public water system can be provided. The individual well must meet the criteria of the King County Board of Health Title 13. *(emphasis added)*

F-235 In the Urban Growth Area, if an existing Group A water provider cannot provide direct or indirect service to new development under Policy F-233, a new public water system may be established if it is owned or operated by the following, in order of preference:

a. By a satellite management agency approved by the State Department of Health under contract with the Group A system in whose service area the system is located, provided that the existing Group A water system remains responsible for meeting the duty to serve the new system under Revised Code of Washington 43.20.260; or
b. By a satellite management agency approved by both the State Department of Health and King County.

All new public water systems formed in the Urban Growth Area *shall connect to the Group A water system in whose service area the new system is located when direct service becomes available.* Such a connection shall be made by the homeowner or association in a timely and reasonable manner. *(emphasis added)*

In the Rural Area, again, the preference is for connection to a Group A system to limit the proliferation of individual wells, especially in closed basins. The Growth Management Act defines the provision of domestic water systems as an appropriate governmental service in both urban and rural areas. However, in King County, it is recognized that not all parts of the Rural Area can be served by an existing Group A system. Consequently, an explicit hierarchy was established to account for the circumstance when Group A water would not be available:

F-236 In the Rural Area, King County *land use and water service decisions support the long-term integrity of Rural Area ecosystems*. Within the Rural Area, individual private wells, rainwater catchment, Group B water systems, and Group A water systems are all allowed. If an existing Group A water provider

cannot provide direct or indirect service to new development per the exceptions in Policy F-233, a new public water system or private well may be established if it is owned or operated by the following, in order of preference:

a. By a satellite management agency approved by the state Department of Health under contract with the Group A system in whose service area the system is located, provided that the existing Group A water system remains responsible for meeting the duty to serve the new system under Revised Code of Washington 43.20.260; and
b. By a satellite management agency or an existing Group B system approved by both the State Department of Health and King County.

If service cannot be obtained by means of the above stated options, then water service may be obtained by creation of a new system, use of private wells or rainwater catchment. All new public water systems formed in the Rural Area shall connect to the Group A water system in whose service area the new system is located when direct service becomes available. *(emphasis added)*

The attachments at the end of the report depict the current situation in King County:

Service Requirements Flow Chart in Attachment 1. The process for verifying evidence of available water for a building or subdivision permit is illustrated in the flow chart provided by the Department of Permitting and Environmental Review (DPER), which follows the hierarchy of service as outlined in the Comprehensive Plan Policies.

Map of Water Service Agency Areas in Attachment 2. The Department of Natural Resources and Parks (DNRP) maintains the map of water service areas, which is used to guide the applicant to the appropriate Group A water purveyor for water service.

Map of Estimated Number of Parcels with Potential for Permit Exempt Wells in Attachment 3. Since the entirety of King County is not covered by a Group A water purveyor, King County did an analysis of the possible increase in the number of individual permit exempt wells. The estimated number of permit exempt wells are represented on this map.

Map of Water Availability Rule Status in Unincorporated King County in Attachment 4. The majority of rural King County is located within a closed basin, as defined by Ecology, as depicted on this map.

What is not reflected on these maps are the potential number of commercial, industrial and private, non-potable irrigation wells that are also not required to have a groundwater permit from the Ecology, and that are not generally regulated by King County.

VI. Implications for King County – Watershed Restoration Enhancement Committees

ESSB 6091 requires the Department of Ecology to establish a Watershed Restoration and Enhancement Committee (WREC) in certain WRIAs. This includes all five WRIAs located either entirely or partially within King County. Ecology will chair and convene each WREC and invite stakeholders to participate in the process of developing a watershed restoration and development plan for each WRIA. The following are the requirements for each plan:

- Identify projects that, at a minimum, offset the consumptive impact of projected new permit-exempt domestic water use over the next 20 years.
- Projects must replace the consumptive water use with water as a priority.
- Planning groups must prioritize projects that replace consumptive use from new domestic permit-exempt withdrawals in the same basin or tributary and during the same time that use occurs. If that is not possible, the committee can recommend projects that replace water during critical times for fish.
- Committees may also choose to go above and beyond these requirements, such as recommending changes to the instream flow rule, permit-exempt well fee (now set at $500), daily water use allocation for permit exempt wells (now set at 950 gpd) or others.

The plan must be approved by all committee members. If not approved, the draft plan will be sent to the State Salmon Recovery Funding Board for its technical review. The Board may make recommendations to amend the final draft plan so that, if necessary, actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the WRIA. Ecology would then consider all the information and adopt or amend a rule if needed. When approving the plan, Ecology must also determine that actions in the plan will result in a "net ecological benefit" to instream resources in each watershed.

Ecology released initial guidance criteria to determine net ecological benefit in June 2017. Final guidance, which will be used for evaluation of the plans King County will engage in, is in development and is expected by summer, 2019. Ecology defines net ecological benefit as meaning the "anticipated benefits to instream resources from actions designed to restore streamflow will offset and exceed the projected impacts to instream resources from new water use."

The County could receive funding to participate in each of the planning process, including up to $25,000 for the first watershed process it engages in, and up to $15,000 for each additional watershed process per year. King County is potentially eligible to receive up to $255,000 during

the three year process if it chooses to engage with all five King County WRIAs. Ecology initiated the formation of the WRECs in October 2018.

VII. Next Steps

The Hirst decision and subsequent state legislation provides a new framework for water provision for certain types of rural development in King County. King County will continue to operate under the goal of limiting permit exempt wells in closed basins to maintain in-stream flows. King County will direct building applicants first to Group A systems, as outlined in the Comprehensive Plan and associated code provisions. Finally, while King County already has systems in place to limit the number of new permit-exempt wells in the county, refinement of the process should be evaluated.

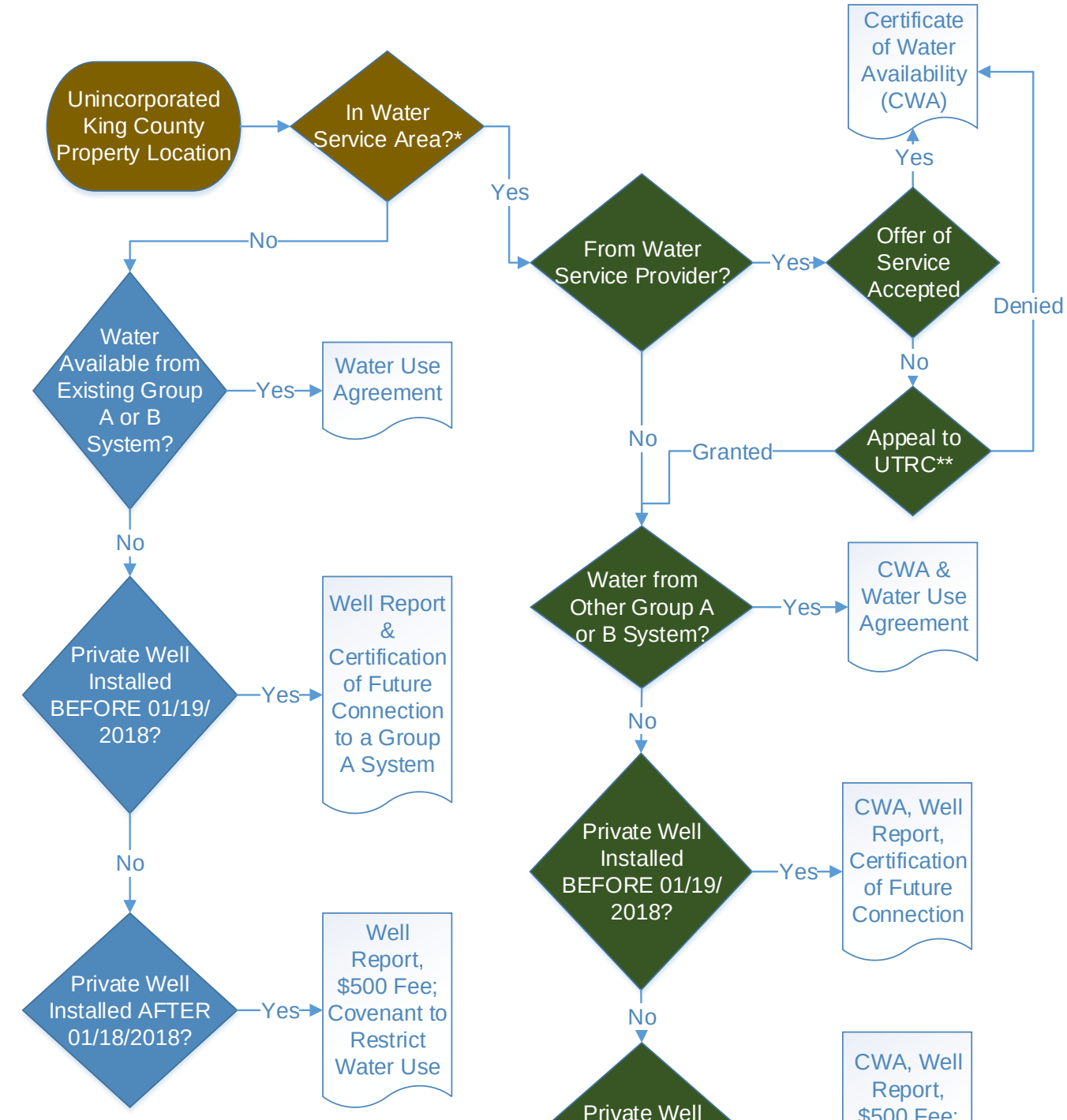
Hirst Task	Due Date	Executive Action
King County Comprehensive Plan Policies	September 30, 2019	Update text and policies in the Services, Utilities, and Facilities to add context for Hirst decision and subsequent legislation
King County Code 13.24	September 30, 2019	Update regulations to implement any Comprehensive Plan policy changes
Group B systems	December 31, 2019	Analyze policies and regulations regarding Group B water systems to better align with the Hirst decision and subsequent legislation and to recognize that King County Public Health no longer has a Group B program
Commercial, industrial, and irrigation wells	December 31, 2019	Analyze policies and regulations regarding irrigation wells to better align with the Hirst decision and subsequent legislation
Watershed Restoration and Enhancement Committees	Ongoing	DNRP's Water and Land Resources Division is going to staff this effort.

VIII. Attachments

Attachment 1: Service Requirements Flow Chart
Attachment 2: Map of Water Service Agency Areas
Attachment 3: Map of Estimated Number of Parcels with Potential for Permit Exempt Wells
Attachment 4: Map of Water Availability Rule Status in Unincorporated King County

King County
Department of Permitting and Environmental Review (DPER)

Water Service Requirements



*Online mapping service, link on page 2

**Utility Technical Review Committee, link on page 2

Water Service Area Provider Notes:

If the water service area provider is not willing or able to provide a Certificate of Water Availability (CWA) that indicates water is not presently available at a property, a letter or email to that effect from the water service area provider will be sufficient in lieu of the CWA.

If the water service area provider is not willing to sign the Certification of Future Water Connection, an email or letter to that effect from the water service area provider will be sufficient and the applicant can record the certification with the email or letter as an attachment, in lieu of the water district signature.

The certification of future connection for properties not located in a water service area need only to be signed by the owner.

If you feel the offer of water availability from the water service provider is not timely and/or reasonable, you can appeal their determination of water availability to the Utility Technical Review Committee (UTRC), King County Department of Natural Resources and Parks. The link to their appeal procedures and application requirements are included below.

Resources:

Parcel Located in King County, Check Jurisdiction and Zoning

* Interactive Water Service Area Maps

Certificate of Water Availability (CWA)

Dept. of Ecology, Well Construction & Licensing and Well Notice of Intent

Certification of Future Water Connection

Certification of Future Water Connection to a Group A System

Water User Agreement

Groundwater Maps and Reports

Public Health, Private Wells, Plumbing, Gas Piping and Onsite-Sewage Systems

Covenant to Restrict Water Use

** Utility Technical Review Committee (UTRC) - Water Service Appeal Procedures and Forms

WATER SERVICE AGENCY SERVICE AREAS

In Unincorporated King County

Shoreline Water Dist.
Bothell
Woodinville Water Dist.
Northshore Util. Dist.
Seattle Public Utilities
Duvall
KC Water Dist. 119
Redmond
Union Hill Water Assoc.
Kirkland
Redmond
Ames Lake Water Assoc.
Lake Washington
Bellevue
Lake Sammamish
Sammamish Plateau Water and Sewer Dist.
Fall City Water Dist.
Mercer Island
Seattle Public Utilities
Issaquah
Coal Creek Util. Dist.
Snoqualmie
KC Water Dist. 20
KC Water Dist. 125
Renton
KC Water Dist. 90
North Bend
Sallal Water Assoc.
KC Water Dist. 49
Mirrormont Svcs.
KC Water Dist. 19
Soos Creek Water and Sewer Dist.
Highline Water Dist.
Cedar River Water and Sewer Dist.
Kent
KC Water Dist. 111
Covington Water Dist.
Tacoma
Lakehaven Util. Dist.
Auburn
Black Diamond
Muckleshoot Indian Reservation
Pacific
Enumclaw
Puget Sound
KITSAP COUNTY
KING COUNTY
KING COUNTY
PIERCE COUNTY
SNOHOMISH COUNTY
KING COUNTY
KING COUNTY
CHELAN COUNTY
KITTITAS COUNTY
KING COUNTY
KING COUNTY
PIERCE COUNTY

Data Sources:
King County Departments of Assessments, and Natural Resources and Parks

Date: 11/29/2018
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King County GIS Center

N

0 1 2 3 4 5 6 Miles

November 2018

- Water Service Agency Service Areas – Within Urban Growth Area
- Water Service Agency Service Areas – Within Rural Area
- Tribal Lands
- Urban Growth Area
- King County Boundary
- Freeways

ESTIMATED NUMBER OF PARCELS WITH POTENTIAL FOR A PERMIT EXEMPT WELL

In Unincorporated King County
With Disqualifying Factors

Data Sources:
U.S. Forest Service, King County Departments of Assessments, Natural Resources and Parks, and Permitting and Environmental Review

Parcels Used for Estimate:
- Outside Urban Growth Boundary
- Outside Water Service Agency Service Areas
- Outside Forest Production District
- Outside Agriculture Production District
- Not Encumbered by KC Park or TDR Conservation Easements
- Not Enrolled in the Farmland Prservation Program
- Not Owned by Public Agencies
- Without Appraised improvements < $10,000
- Have at least 1 acre of land outside of 100 year Flood Plain and Severe River Channel Migration Hazard Areas

Date: 11/20/2018
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King County GIS Center

N

0 1 2 3 4 5 6 Miles

November 2018

- Potential Sites for Exempt Water Wells
- ~10 Est. Number of Parcels in Geographically Proximate Area
- Forest Production District
- Agricultural Production District
- Public Owned Parcels
- 100 Year Floodplain or Severe Channel Migration
- Conservation Easements
- Water Service Agencies service areas
- Incorporated City
- City in Rural Area
- Tribal Lands
- Urban Growth Area Boundary
- King County Boundary
- Freeways

WATER AVAILABILITY RULE STATUS IN UNINCORPORATED KING COUNTY

With Estimated Number of Parcels
With Potential for a Permit Exempt Well

Snohomish

Cedar-Sammamish

Duwamish-Green

Puyallup-White

~50 ~110 ~30 ~80 ~110 ~40 ~50 ~20 ~70 ~60 ~40 ~140 ~20 ~40 ~10 ~250 ~60 ~210 ~40 ~20 ~220 ~60 ~230 ~40 ~20 ~0 ~0

SHORELINE, LAKE FOREST PARK, BOTHELL, WOODINVILLE, KENMORE, KIRKLAND, REDMOND, DUVALL, CARNATION, SKYKOMISH, SNOHOMISH COUNTY, KING COUNTY, CHELAN COUNTY, KITSAP COUNTY, KING COUNTY, Lake Washington, Lake Sammamish, Puget Sound, YARROW POINT, HUNTS POINT, CLYDE HILL, MEDINA, BELLEVUE, BEAUX ARTS, SAMMAMISH, MERCER ISLAND, SEATTLE, NEWCASTLE, ISSAQUAH, SNOQUALMIE, NORTH BEND, RENTON, BURIEN, TUKWILA, NORMANDY PARK, SEATAC, DES MOINES, KENT, COVINGTON, MAPLE VALLEY, AUBURN, FEDERAL WAY, BLACK DIAMOND, ENUMCLAW, ALGONA, PACIFIC, MILTON, KING COUNTY, PIERCE COUNTY, KITTITAS COUNTY, KING COUNTY, KING COUNTY, PIERCE COUNTY

Data Sources:
Washington State Department of Ecology, U.S. Forest Service, King County Departments of Assessments, Natural Resources and Parks, and Permitting and Environmental Review

Parcels Used for Estimate:
- Outside Urban Growth Boundary
- Outside Water Service Agency Service Areas
- Outside Forest Production District
- Outside Agriculture Production District
- Not Encumbered by KC Park or TDR Conservation Easements
- Not Enrolled in the Farmland Prservation Program
- Not Owned by Public Agencies
- Without Appraised improvements < $10,000
- Have at least 1 acre of land outside of 100 year Flood Plain and Severe River Channel Migration Hazard Areas

Date: 11/20/2018
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King County GIS Center

N

0 1 2 3 4 5 6 Miles

November 2018

- WRIA boundaries derived from terrain data
- Potential Sites for Exempt Water Wells
- ~10 Est. Number of Parcels in Geographically Proximate Area

Water Availability Rule Status
- Closed Basin
- Instream Flow with Seasonal Closure
- Instream Flow
- Incorporated City
- City in Rural Area
- Tribal Lands
- Urban Growth Area Boundary
- King County Boundary
- Freeways