

SENATE BILL NO. 345
INTRODUCED BY HAWKS, MOSS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING SETBACK REQUIREMENTS FOR CERTAIN STREAMS; REQUIRING POLITICAL SUBDIVISIONS TO ESTABLISH SETBACK REGULATIONS; AUTHORIZING POLITICAL SUBDIVISIONS TO ISSUE VARIANCES AND COLLECT FEES; AUTHORIZING POLITICAL SUBDIVISIONS TO ADOPT LOCAL REGULATIONS IN LIEU OF STATE STANDARDS THAT MEET CERTAIN REQUIREMENTS; PROVIDING FOR ENFORCEMENT AND PENALTIES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

(Refer to Introduced Bill)

Strike everything after the enacting clause and insert:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 10] may be cited as the "Montana Stream Legacy Act."

NEW SECTION. **Section 2. Intent, findings, and policy.** (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Stream Legacy Act. It is the legislature's intent that the requirements of [sections 1 through 10] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) The legislature finds that:

(a) impacts of development on Montana's rivers and streams, including increased downstream erosion and diminished water quality, are often manifested across local government jurisdictional boundaries;

(b) the state has a duty and legitimate interest in protecting the integrity of its rivers and streams on behalf of all its citizens;

(c) the state has a duty and legitimate interest in protecting people and private property by reducing property loss from flooding and erosion;

(d) maintenance of the integrity of rivers and streams is crucial to the quality and quantity of water available to Montanans for domestic, agricultural, industrial, and recreational use;

- (e) rivers and streams are highly susceptible to impacts from land development;
- (f) fish and wildlife that rely on rivers and streams for habitat belong to all Montanans;
- (g) development practices on lands adjacent to rivers and streams in many cases are causing excessive and unnecessary damage to the banks, beds, and protective vegetation of the state's rivers and streams; and
- (h) through careful management of the lands adjacent to rivers and streams, property owners and developers can achieve their goals without sacrificing water quality or impairing the beneficial uses of the water.

(3) The legislature recognizes that Montana's rivers and streams provide important natural resources that belong to the people of the state and that support the economy, the environment, and the quality of life that Montanans enjoy. It is the policy of the state to ensure that development along rivers and streams proceeds in a way that:

- (a) protects property from flooding and erosion;
- (b) protects water quality and quantity;
- (c) provides opportunities for recreation;
- (d) protects valuable water recharge areas;
- (e) preserves fish and wildlife habitat; and
- (f) preserves the use and enjoyment of private property.

(4) The legislature recognizes that development along the state's rivers and streams occurs at differing levels in different regions of the state. It is the intent of the legislature to provide local governments with the flexibility to implement the provisions of [sections 1 through 10] in a manner that best suits the needs of the citizens of each county.

NEW SECTION. Section 3. Definitions. When used in [sections 1 through 10], unless a different meaning clearly appears from the context, the following definitions apply:

(1) "Channel migration zone" means the area where it is reasonably foreseeable that an active channel of the stream could migrate in the next 100 years because of erosion or avulsion.

(2) "Flood plain" has the meaning provided in 76-5-103.

(3) "Flood-prone area" means the area adjacent to a stream that is predicted to be covered by the floodwater of a flood of 100-year frequency based on:

- (a) an analysis of elevation, without taking into account channel restrictions such as bridge abutments and obstructions; and
- (b) if appropriate, aerial photographs of past floods.

(4) "Ordinary high-water mark" has the meaning provided in 23-2-301.

(5) "Person" means an individual, firm, partnership, company, commercial entity, corporation, or association.

(6) "Political subdivision" means any incorporated city or town, a consolidated government, or a county.

(7) "Setback" means an area of varying width adjacent to a stream where certain uses have the potential to significantly affect private property, wildlife habitat, water quality, fish, or other aquatic resources. Setbacks may not be smaller than the vegetative buffer.

(8) (a) "Tier I streams" includes the following streams as defined by the United States geological survey, excluding lakes and reservoirs:

(i) Beaverhead River;

(ii) Big Hole River;

(iii) Bighorn River;

(iv) Bitterroot River;

(v) Bitterroot River, West Fork;

(vi) Blackfoot River;

(vii) Boulder River as it flows through Jefferson County;

(viii) Boulder River as it flows through Park and Sweet Grass Counties;

(ix) Clark Fork River;

(x) Clark's Fork of the Yellowstone River;

(xi) Clearwater River;

(xii) Dearborn River;

(xiii) East Gallatin River;

(xiv) Flathead River;

(xv) Flathead River, Middle Fork;

(xvi) Flathead River, North Fork;

(xvii) Flathead River, South Fork;

(xviii) Gallatin River;

(xix) Jefferson River;

(xx) Jocko River;

(xxi) Judith River;

(xxii) Kootenai River;

- (xxiii) Little Blackfoot River;
- (xxiv) Madison River;
- (xxv) Marias River;
- (xxvi) Milk River;
- (xxvii) Missouri River;
- (xxviii) Musselshell River;
- (xxix) Poplar River;
- (xxx) Powder River;
- (xxxi) Red Rock River;
- (xxxii) Rock Creek as it flows through Missoula and Granite Counties;
- (xxxiii) Rock Creek as it flows through Carbon County;
- (xxxiv) Ruby River;
- (xxxv) Shields River;
- (xxxvi) Smith River;
- (xxxvii) Stillwater River as it flows through Park and Stillwater Counties;
- (xxxviii) Stillwater River as it flows through Lincoln and Flathead Counties;
- (xxxix) Stillwater River, West Fork, as it flows through Sweet Grass and Stillwater Counties;
- (xl) Sun River;
- (xli) Swan River;
- (xlii) Teton River;
- (xliii) Thompson River;
- (xliv) Tongue River;
- (xlv) Whitefish River;
- (xlvi) Yaak River; and
- (xlvii) Yellowstone River.

(b) A tier I stream begins where a U.S. geological survey map shows its point of origin and ends where it connects to another tier I stream, below which it takes a different name, or where the stream leaves the state.

(c) The term includes only the mainstem of the stream and does not include the upstream forks or tributaries of the stream.

(9) "Vegetative buffer" means the portion of the setback closest to the stream and where existing native vegetation is to be maintained to the greatest extent possible or enhanced, except that weed control is allowed.

NEW SECTION. Section 4. Setback regulation jurisdiction. (1) With the exception of [section 9], the provisions of [sections 1 through 10] do not apply to:

(a) incorporated cities and towns;

(b) unincorporated entities established prior to [the effective date of this act] that are classified as census-designated places by the United States bureau of the census and that are:

(i) within the boundary of a sanitary sewer district created pursuant to Title 7, chapter 13, part 1, 22, 23, 30, or 43; or

(ii) served by a sanitary sewer district under subsection (1)(b)(i);

(c) zoned areas with regulations established on or before [the effective date of this act] that have residential densities of at least 1 unit per acre and are served by municipal sewer and water systems; or

(d) tier I streams regulated by local setback regulations adopted prior to [the effective date of this act] that prohibit all new building construction within 150 feet of streams.

(2) Changes after [the effective date of this act] to local setback regulations adopted prior to [the effective date of this act] must comply with [sections 1 through 10].

NEW SECTION. Section 5. Requirements for setbacks and vegetative buffers. (1) Except as provided in subsection (2), along either side of a tier I stream, there must be a setback of at least 250 feet, as measured from the ordinary high-water mark, that must include a vegetative buffer of at least 100 feet.

(2) When a slope adjacent to the stream rises at a grade of 50% or greater for at least 20 feet above the ordinary high-water mark and no historic evidence of bank erosion exists, the setback for a tier I stream is at least 150 feet, with a vegetative buffer of at least 75 feet.

NEW SECTION. Section 6. Uses within setback -- authorization. (1) Except as provided in [section 8], the following uses are prohibited within setbacks:

(a) any type of new building, including new residential, commercial, or industrial structures, or outbuildings such as a garage or shop;

(b) the installation of a manufactured or prefabricated building;

(c) new onsite wastewater disposal facilities;

(d) an addition to an existing building of more than 50% of the square footage of the existing structure;

or

(e) the construction of a new parking lot or road except when necessary to cross a river or stream.

- (2) The following uses are authorized in a setback:
- (a) the lawful use of land or buildings that existed on or before [the effective date of this act], including:
 - (i) the reconstruction, replacement, or repair of an existing onsite wastewater disposal facility if the updated facility is no closer to the stream than the original onsite wastewater disposal facility; and
 - (ii) the reconstruction or repair of any building destroyed or damaged by accidental causes other than flooding if:
 - (A) the original perimeter of the building is not exceeded; and
 - (B) the reconstruction or repair is commenced within 2 years of the date of destruction;
 - (b) any use conducted on property pursuant to a hydroelectric project license issued by the federal energy regulatory commission or located within the licensed project boundary as determined by the federal energy regulatory commission;
 - (c) agricultural uses, except any use that includes a new building that is serviced by electricity, water, and onsite wastewater disposal facilities and that could be used as a permanent residence;
 - (d) structures and equipment used to collect and transport water from a river or stream for agricultural or industrial uses, including diversion and intake structures, pipes, pumps and pumphouses, and related equipment;
 - (e) structures and infrastructure pertaining to water-related recreation, including but not limited to docks, boat ramps, and fishing access sites;
 - (f) filling for highway, street, and railroad embankments not associated with stream crossings if:
 - (i) reasonable alternative transportation routes outside the setback are not available; and
 - (ii) any encroachment is located as far from the stream channel as possible;
 - (g) repair and improvement of existing roads within the setback; and
 - (h) commercial forest practices subject to the provisions of Title 77, chapter 5, part 3.

NEW SECTION. Section 7. Political subdivision administration -- requirements -- fees. (1) Before January 1, 2009, any political subdivision that has tier I streams within its boundaries and is subject to [section 4] shall implement a permit or certification program for new construction proposed within a setback established pursuant to [sections 1 through 10] to ensure that the requirements of [sections 1 through 10] are met.

- (2) The permit or certification program:
- (a) may be part of a local subdivision, zoning, sanitation, flood plain, or other appropriate local review process;

(b) must allow an applicant to appeal a permit or certification decision to the governing body of the political subdivision within 30 days of the issuance of the decision, with an opportunity for a hearing on the appeal;

(c) must allow an applicant to appeal a decision by the governing body to the court of record within 30 days after the decision of the governing body.

(3) A political subdivision may charge a fee commensurate with existing fees for local subdivision, zoning, sanitation, flood plain, or other appropriate local review processes to cover the costs of implementing the requirements of [sections 1 through 10].

NEW SECTION. Section 8. Variances. (1) A political subdivision shall adopt variance procedures that address the criteria established in subsection (3) for granting variances for uses that otherwise would not be allowed pursuant to [section 6].

(2) An application for a variance must include information that the political subdivision considers necessary to evaluate the variance request, including but not limited to plans, maps, and specifications detailing the request. A delineation of the flood plain boundary for the parcel may be required.

(3) A political subdivision may grant a variance upon finding that:

(a) literal application of [sections 1 through 10] would result in an unnecessary hardship to the property owner as a result of circumstances unique to the parcel, including but not limited to size, shape, topography, or location;

(b) the hardship referred to in subsection (3)(a) is not the result of the actions of the applicant;

(c) the variance is consistent with the general purpose and intent of [sections 1 through 10] and that the variance is not likely to:

(i) adversely impact water quality;

(ii) increase stream bank erosion; or

(iii) increase flood heights or velocity; and

(d) the variance is as small as reasonably possible to accommodate the proposed use while preserving the intent of [section 2] to the greatest degree practicable.

(4) The applicant for a variance has the burden of demonstrating that the variance request meets the criteria established in subsection (3).

(5) If the provisions of [sections 1 through 10] preclude the construction of structures on an otherwise developable parcel in existence on [the effective date of this act], the political subdivision shall:

(a) find that an unnecessary hardship exists under subsection (3)(a); and

(b) upon the applicant's compliance with subsection (2), issue a variance in conformance with subsection (3)(d).

NEW SECTION. Section 9. Local setback standards in lieu of state standards. (1) (a) A political subdivision may enact local setback regulations defining the setback area and vegetative buffer for tier I streams within its jurisdiction. Local setback regulations apply in lieu of the provisions of [section 5] if they meet the minimum requirements of this section.

(b) The setback regulations may:

(i) be part of a local subdivision, zoning, sanitation, flood plain, or other appropriate local review process; and

(ii) define terms.

(2) Locally established setbacks may be of a fixed or variable width and may be larger or smaller than those required in [section 5]. Setbacks may be expressed as a numerical distance in feet or by narrative reference to topography or other physical features if the setback description establishes a definable setback.

(3) Setbacks must be established at a sufficient width, based on peer-reviewed scientific studies and local information, to fulfill the purposes set forth in [section 2] by designating an area along tier I streams where the uses prohibited in [section 6] will not occur. The setback areas should generally encompass the areas described in subsections (3)(a) through (3)(d). Setbacks need not be set at a width that encompasses the entirety of the areas described in subsections (3)(a) through (3)(d) at every point along the stream, as long as the width is reasonably calculated to encompass the following areas:

(a) wetlands adjacent to streams;

(b) flood-prone areas;

(c) the channel migration zone; and

(d) areas adjacent to the stream with slopes greater than 25%.

(4) Local setback regulations must establish vegetative buffers that, based on peer-reviewed scientific studies and local conditions, are wide enough to generally prevent unnatural rates of erosion and sedimentation, protect water quality, and maintain native riparian vegetation.

(5) The numerical distances established in [section 5] may not be used as presumptive maximum or minimum widths for local setbacks or vegetative buffers.

(6) The political subdivision shall prepare a written record in support of its decision to enact a local setback regulation, including references to the peer-reviewed scientific studies and local information that were

used to determine the width of setbacks and vegetative buffers.

(7) Nothing in [sections 1 through 10] may be construed to limit a political subdivision's authority to enact regulations further limiting uses within setbacks or vegetative buffers or to enact regulations establishing setbacks and vegetative buffers for watercourses not governed by the provisions of [sections 1 through 10].

NEW SECTION. Section 10. Enforcement -- penalties. (1) In addition to other remedies, the proper authorities of the political subdivision may institute any appropriate action or proceeding to ensure that a person who commences a use prohibited under [sections 1 through 10] restores the setback and vegetative buffer to the conditions in existence before the prohibited use occurred.

(2) The political subdivision may appoint enforcing officers to supervise and enforce the provisions of [sections 1 through 10].

(3) A knowing violation of [sections 1 through 10] or any regulation adopted pursuant to [sections 1 through 10] is a misdemeanor punishable by a fine not to exceed \$500 a day.

NEW SECTION. Section 11. Notification to tribal governments. The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell Chippewa tribe.

NEW SECTION. Section 12. Codification instruction. [Sections 1 through 10] are intended to be codified as an integral part of Title 76, and the provisions of Title 76 apply to [sections 1 through 10].

NEW SECTION. Section 13. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. Section 14. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 15. Effective date. [This act] is effective on passage and approval.

NEW SECTION. Section 16. Applicability. [This act] applies only to construction projects or activities

for which a completed application for a permit is filed after [the effective date of this act].

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