
HOUSE BILL 2877

State of Washington

60th Legislature

2008 Regular Session

By Representatives Kretz and McCune

Read first time 01/17/08. Referred to Committee on Agriculture & Natural Resources.

1 AN ACT Relating to urban creeks; and adding a new chapter to Title
2 35 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** The legislature finds that:

5 (1) This chapter will protect our urban environment and help with
6 the recovery of threatened salmon within urban areas.

7 (2) Creek systems connect urban neighborhoods with the natural
8 environment. Creek systems should be a top priority for our
9 environmental stewardship because they provide salmon and wildlife
10 habitat and open space.

11 (3) The degradation of creeks in our urban areas has reduced their
12 flood-carrying capacity, resulting in severe damage to downstream
13 properties and to critical fish and wildlife habitat, threatening the
14 extinction of salmon within urban creeks.

15 (4) This flooding impact is especially severe when creek segments
16 are directed into underground pipes rather than through natural, open
17 channels. In most circumstances, the pipes also create fish passage
18 barriers, which are illegal and must be removed under state law.

1 (5) Removing a creek from an underground pipe and redirecting it
2 into a natural, open channel abates the ongoing harm by restoring the
3 creek's flood-carrying capacity, water quality benefits, and fish and
4 wildlife habitat. A creek's historic channel contains soils uniquely
5 suited for flood control, and a creek should be redirected into its
6 historic channel if available.

7 (6) This chapter requires private property owners to restore creeks
8 only when carrying out major creekside development. This is required
9 to abate ongoing impacts and to mitigate the direct, indirect, and
10 cumulative impacts of major creekside development, which include
11 increased impervious surfaces, pollution, lighting, noise, trampling,
12 pollution, and shading.

13 (7) This chapter will reduce ongoing flooding and property damage
14 caused by creek degradation. It will also restore fish and wildlife
15 habitat and remove fish passage barriers. Thus, this chapter is
16 necessary to protect the public health, safety, and welfare and is
17 authorized under Article XI, section 11 of the state Constitution, as
18 well as through specific authority under RCW 35.21.090 and elsewhere in
19 state law.

20 NEW SECTION. **Sec. 2.** The definitions in this section apply
21 throughout this chapter unless the context clearly requires otherwise.

22 (1) "Adjacent" means a creek or its buffers are beneath a right-of-
23 way abutting the parcel.

24 (2) "Buffer" means the buffer required under local or state law.
25 For a creek that is underground or being daylighted, buffers must be a
26 minimum of fifty feet wide on each side of the creek, except that
27 buffer averaging is allowed.

28 (3) "City" means a city with a population of five hundred thousand
29 or greater.

30 (4) "Creek" includes any stream or watercourse located in a city
31 with a population of five hundred thousand or greater that flows year-
32 round or potentially supports or historically supported salmonids.
33 This definition applies equally to portions of a creek that have been
34 placed in a pipe or culvert, or that have been relocated, straightened,
35 channelized, or otherwise altered, and applies regardless of whether
36 the watercourse is regulated by the city's critical areas ordinance or
37 shorelines master program.

1 (5) "Daylighting" means restoring a creek segment that was
2 previously directed into a pipe or drainage or sewer system by
3 redirecting it into a natural, open channel.

4 (6) "Development" means development or redevelopment.

5 (7) "Development approval" includes any permit, master use permit,
6 or other approval required as a condition of changing the use of the
7 property or constructing any structure on the property.

8 (8) "Fish passage barrier" includes (a) any culvert failing to meet
9 the standards under WAC 220-110-070(3) or (b) any other impediment to
10 fish passage. This determination assumes the removal of downstream
11 man-made fish passage barriers.

12 (9) "Floodable wetland bench" or "floodway" is a strip of wetland
13 bordering a creek channel that is designed to inundate during high
14 stream flows to provide shelter to fish and decrease downstream
15 flooding.

16 (10) "Long-term creek restoration plan" means a plan that, at a
17 minimum, has the following components:

18 (a) The city's objectives for creek restoration, including at a
19 minimum the policies set forth in section 7 of this act;

20 (b) A plan, timeline, and identification of funding source for
21 accelerating the city's creek restoration programs and implementing the
22 policies set forth in section 7 of this act;

23 (c) A plan and eighteen-month timeline during which the city must
24 evaluate strategies and adopt regulations to further reduce storm water
25 pollution and impacts to creek ecosystems. Strategies to be evaluated
26 include requirements of low-impact development, pervious pavement,
27 increased buffer widths, wetland restoration, increased use of
28 infiltration, and restrictions on pesticide and fertilizer on parcels
29 draining to creeks;

30 (d) A plan and eighteen-month timeline during which the city must
31 update existing creek protection regulations, including critical areas
32 regulations and shoreline master programs;

33 (e) A plan and eighteen-month timeline during which the city must
34 phase out the use of pesticides, herbicides, and fungicides on city-
35 owned land within two hundred feet of creeks;

36 (f) A plan and twenty-year timeline for daylighting creeks on parks
37 and other public property;

1 (g) A plan, regulatory framework, and long-term timeline for
2 daylighting creeks on private property;

3 (h) A plan and timeline for conducting education and outreach to
4 creekside property owners concerning creek and riparian function and
5 best management practices; and

6 (i) A plan and timeline for specific and proactive joint planning
7 and information exchange with other political jurisdictions sharing
8 responsibilities for creeks that flow entirely or partly within the
9 city.

10 Where an existing city program or document satisfies one or more of
11 these requirements, the program or document may be incorporated into
12 the plan by reference.

13 (11) "Major creekside development" means a project that satisfies
14 each of the following criteria:

15 (a) A commercial, multifamily residential, mixed-use, or light or
16 heavy industrial development, subdivision, or short plat that exceeds
17 the state environmental policy act (chapter 43.21C RCW) exemption
18 thresholds set forth in city ordinance;

19 (b) Proposed on a parcel having a combined area of over one-half
20 acre; and

21 (c) At least one such parcel or right-of-way contains a creek or
22 its buffer or is adjacent to a creek or its buffer.

23 NEW SECTION. **Sec. 3.** The city shall adopt a long-term creek
24 restoration plan.

25 (1) Within six months after the effective date of this section, the
26 city shall prepare a draft long-term creek restoration plan. The city
27 shall involve the public and interested organizations in creating the
28 draft plan and shall consider public comments and any existing
29 watershed plans. The city shall hold public meetings and solicit
30 comments from the public and interested organizations on the draft plan
31 and shall adopt a final plan within twelve months after the effective
32 date of this section.

33 (2) The goal of the long-term creek restoration plan is to adopt
34 objectives and timelines for restoring creeks and carrying out the
35 policies and directives of this chapter.

36 (3) The city shall restore creeks in accordance with the long-term
37 creek restoration plan.

1 NEW SECTION. **Sec. 4.** Developers are required to assist in creek
2 restoration when building a major creekside development.

3 (1) Applicants proposing a major creekside development are required
4 to restore the creek running on or adjacent to the development site,
5 satisfying the requirements of section 6 of this act. This requirement
6 must be stated as a condition on any development approval issued to the
7 project. The city shall decide whether such restoration will be
8 carried out by the applicant under the city's supervision or through a
9 city effort funded by the applicant, and shall support the project
10 consistent with subsection (3) of this section.

11 (2) Each applicant for a major development on creekside property
12 shall submit a creek restoration plan as part of its application for
13 development approval. That plan must include a city-approved
14 engineering plan for conducting the restoration required by this
15 chapter concurrent with the development, and the basis for any
16 exemptions requested under section 6(2) of this act. Any public notice
17 issued regarding the major development shall elicit comments on the
18 restoration plan and its consistency with this chapter.

19 (3) The department of fish and wildlife shall coordinate the
20 restoration efforts required by this section and the city shall
21 contribute to such projects to the extent necessary to avoid a
22 constitutional taking of private property and as deemed appropriate to
23 create incentives for restoration. At a minimum, the city shall ensure
24 that development potential on the site is not lost due to the
25 restoration project and shall grant open space credit. The city may
26 also purchase the creek corridor and/or provide loan financing, grants,
27 or other valuable benefit such as density bonuses to support the
28 restoration project to the extent deemed appropriate and allowed by
29 law. The city and the developer should agree upon ownership and
30 maintenance responsibilities for the restored creek, and wherever
31 possible the restored creek should be transferred to public ownership.

32 NEW SECTION. **Sec. 5.** The city shall ensure that creeks are
33 restored concurrently with major creekside development.

34 (1) In the event that the city should fail to enforce section 4 of
35 this act, for whatever reason, the city shall carry out creek
36 restoration as defined in section 6 of this act concurrently with any
37 major creekside development. In accomplishing this, the city shall use

1 all of its authority, including that under RCW 35.21.090. The city
2 shall in such event prepare and solicit comments on the creek
3 restoration plan as set forth in section 4(2) of this act.

4 (2) A creek that is directed through a pipe or that contains a fish
5 passage barrier satisfies the definition of a natural watercourse that
6 is obstructed, broken, inoperative, inadequate, and liable to cause
7 damage to public or private property. To the extent allowed by law,
8 the city shall require a property owner to either daylight such a creek
9 or remove such a barrier, or both, during a major creekside
10 development, or after giving required notice shall carry out the same
11 and bill the costs to the property owner.

12 NEW SECTION. **Sec. 6.** (1) For the purposes of sections 4 and 5 of
13 this act, restoration required during major creekside development
14 includes:

15 (a) Planting native vegetation and removing invasive species;

16 (b) Within the creek buffers, establishing wetland areas, floodable
17 wetland benches, or other means to slow the rate of water, unless
18 topography or other existing structures make such restoration
19 impractical;

20 (c) Removal of fish passage barriers, if such barriers exist on or
21 adjacent to the development site; and

22 (d) Daylighting the creek on the development site, if the creek
23 presently flows through a pipe or culvert section fifty feet or longer,
24 exclusive of a right-of-way crossing, that is either:

25 (i) On the development site; or

26 (ii) Under a street or right-of-way adjacent to the site, if the
27 creek's channel was on the development site at any time prior to being
28 moved to its present location.

29 The creek must be daylighted for the entire length in which it runs
30 on or adjacent to the development site, except that daylighting is not
31 required where it is necessary that the creek cross a right-of-way or
32 an existing structure that is to remain as part of the development.

33 (2) The city or a private party may obtain an exemption from the
34 requirements of subsection (1)(c) or (d) of this section by proving
35 either (a) that the creek segment in question, if restored as required
36 under this section, would have insufficient surface area and/or flow to
37 provide rearing or refugia habitat for juvenile salmonids, assuming

1 removal of downstream man-made fish passage barriers; or (b) that so
2 much of the creek downstream is in pipes that the segment in question
3 will as a practical matter never become accessible to salmonids.

4 (3) Any party wishing to apply for an exemption under this section
5 must submit with the creek restoration plan a written opinion from the
6 department of fish and wildlife certifying that this exemption standard
7 is met, based upon best available science, and pay the costs for such
8 an opinion. Public comment must be solicited on the exemption request.
9 The granting of such an exemption is appealable to the superior court.
10 In such appeal, the parties supporting the exemption shall bear the
11 burden of proving that the standards for granting an exemption are met
12 based upon clear and convincing evidence.

13 NEW SECTION. **Sec. 7.** The following applies to cities with a
14 population of five hundred thousand or greater:

15 (1) Creeks and their buffers must be restored as a means to reduce
16 flood damage to downstream property and to fish and wildlife habitat
17 and to promote salmon recovery.

18 (2) In the few instances where creeks are being directed through
19 underground pipes, the creek shall be redirected into a natural, open
20 channel, except where it crosses a public right-of-way.

21 (3) The opportunity to restore and daylight a creek on private
22 property comes very infrequently, usually only during a major creekside
23 development. A city must take advantage of these rare opportunities by
24 ensuring that creeks are restored and daylighted during major creekside
25 development.

26 (4) The city shall protect the opportunity to restore creeks by
27 prohibiting any future development over creeks or their buffers.

28 (5) Where a creek was previously removed from its historic corridor
29 and diverted into a pipe at a location where it cannot be restored
30 (e.g., a location now covered by a building or road) or into a storm
31 water or sewage system, the city shall protect the opportunity to
32 restore the creek by prohibiting any future development over the
33 creek's historic corridor or, if requested by the parcel owner, an
34 alternative corridor on that same parcel.

35 (6) The city should increase floodable wetland benches (floodways)
36 in creeks to reduce downstream flooding impacts and enhance habitat.

37 (7) The city shall remove fish passage barriers from creeks.

1 (8) The city shall provide for the education of property owners on
2 maintaining creek and riparian function.

3 NEW SECTION. **Sec. 8.** Development may not be allowed to preclude
4 future creek restoration. Under this chapter, creek restoration is a
5 long-term strategy, except where required to be concurrent with major
6 development. To preserve the potential to restore all creeks in the
7 future, the city shall grant no development approval that is
8 inconsistent with the policy stated in section 7 (4) or (5) of this
9 act.

10 NEW SECTION. **Sec. 9.** (1) The intent of this chapter is to
11 accelerate the restoration of creeks within a city. This accelerated
12 restoration effort shall supplement existing creek restoration programs
13 of the city, which shall be maintained at least at their current
14 levels.

15 (2) The city shall create a creek restoration account to fund the
16 costs of this chapter. Within six months after the effective date of
17 this section, the city shall complete a study of new revenue sources
18 available to fund the creek restoration account. Within three months
19 after the study's completion, the city shall adopt the funding
20 mechanisms it finds most appropriate.

21 (3) The additional cost to be incurred by the public shall not be
22 greater than five dollars per household per year within a city required
23 to comply with this chapter. Property owners, businesses, and
24 institutions are also required to assist in funding the creek
25 restoration account, and such a contribution shall also be reasonably
26 limited. This new revenue source and the funds in the account may be
27 used to finance bonds for creek restoration projects to the extent
28 deemed appropriate and allowed by law.

29 NEW SECTION. **Sec. 10.** Within six months after the effective date
30 of this section, a city required to comply with this chapter must
31 prepare a supplemental environmental impact statement for its
32 comprehensive plan that specifically addresses the impact of ongoing
33 development and city activities on creeks. It shall evaluate the
34 impact of increased impervious surfaces, lighting, noise, trampling,

1 pollutants, storm water runoff, and shading, and shall serve as a basis
2 for requiring mitigation of creek impacts.

3 NEW SECTION. **Sec. 11.** (1) The legislature declares that this
4 chapter responds to an emergency posed by ongoing flooding, property
5 damage, and environmental impacts of degraded and piped creeks. This
6 requires abatement of these ongoing impacts. Thus, the restoration
7 requirements imposed by this chapter cannot be defeated by vested
8 rights.

9 (2) Notwithstanding any court construction of subsection (1) of
10 this section, the following vesting rule is enacted by this section.
11 Applications for a major creekside development, as defined in this
12 chapter, shall vest upon submission of a fully complete building
13 application, which shall be construed strictly, and shall at a minimum
14 satisfy the requirements of RCW 19.27.095 and shall also include a
15 creek restoration plan as required by this chapter, a storm water
16 management plan, and a plan for complying with the federal clean water
17 act, the federal endangered species act, and all other applicable
18 environmental laws. This subsection applies notwithstanding the
19 previous issuance of a master use permit, general development plan, or
20 site plan approval.

21 NEW SECTION. **Sec. 12.** The mandates of this chapter create
22 nondiscretionary duties for the city and its agencies, and any resident
23 of the state or organization has standing to seek enforcement of this
24 chapter by mandamus or other action. If the city is found to be in
25 violation of the mandates of this chapter or to have issued any
26 development approval or exemption that is inconsistent with this
27 chapter, the party bringing the action to enforce this chapter is
28 entitled to recover only the reasonable costs and attorneys' fees
29 incurred in maintaining such an action.

30 NEW SECTION. **Sec. 13.** This chapter is to be liberally construed
31 to advance the purposes of this chapter.

32 NEW SECTION. **Sec. 14.** If any provision of this act or its
33 application to any person or circumstance is held invalid, the

1 remainder of the act or the application of the provision to other
2 persons or circumstances is not affected.

3 NEW SECTION. **Sec. 15.** Sections 1 through 14 of this act
4 constitute a new chapter in Title 35 RCW.

--- END ---