

**Lessons Learned from Two Western Montana Counties
Initiating Processes to Adopt Stream Protection Measures
in Land Use Regulations**

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Montana local governments have a responsibility to protect public health and the environment. In their work to address these issues, local officials are increasingly recognizing (1) the important benefits that both wetlands and riparian areas contribute to the overall protection of public health and the environment; and (2) how local land use planning regulations can be used to address these issues.

Successful land use planning in Montana is slow, deliberative, and sometimes grueling work. Because there is no step-by-step, one-size-fits-all process to successfully adopt stream protection measures at the local government level, it can be instructive to examine the specific circumstances encountered by different Montana local governments as they pursued protection of streams—and the lessons that were learned during the process. This report looks at the circumstances surrounding efforts to protect streams in two western Montana counties—Missoula and Flathead. Lessons learned from each of these processes are reviewed.

Missoula County

Missoula County has been interested in protecting streams and riparian areas for many years. A county-wide *Inventory of Conservation Resources* published in 1992 indicated that riparian areas were severely threatened with alteration and loss.¹ In 1995 this translated into adoption of stream protection measures in county subdivision regulations. These regulations, which are still in place today, determine stream and wetland buffer size on a case-by-case basis. The buffer size is determined using ecologically-based riparian resource protection standards designed to protect fish and wildlife habitat, water quality, water quantity, stream channels and banks, and other aquatic resources.

Although Missoula County's subdivision regulations are providing some protection for area streams, several specific issues surrounding these existing regulations have prompted interest by the county in adopting additional stream protection measures, including:

1. Subdivision regulations only apply to land being newly subdivided. Consequently, when riparian protection measures are located in subdivision regulations, different parcels of land are treated differently—depending on when the parcel was subdivided. In Missoula County, riparian protection measures have been in subdivision regulations since 1995. Consequently, these regulations do not apply to parcels subdivided prior to this date, or to those parcels created outside of the subdivision review process (e.g. family transfer).

¹ Missoula County Rural Planning Office. 1992, *Inventory of Conservation Resources for Missoula County, Montana*. Adopted by Board of Missoula County Commissioners, BCC-92-524, 53 pp.

If a local government—such as Missoula County—is interested in comprehensively protecting stream corridors, wetlands, and/or riparian areas, it should consider adopting regulations that apply to all new building construction along a stream (no matter when the lot was subdivided). Regulations adopted through the zoning process fit this description. However, zoning regulations are not routinely used at the county level in Montana, making this task a significant challenge.

2. Under Missoula County’s subdivision regulations, the buffer size is determined from a list of plants typical of local wetlands and riparian areas, floodplain maps, and other factors. There are several challenges associated with this approach:
 - Vegetation may have been removed by human activities. Under these circumstances a lack of vegetation may not be a good indicator of buffer width.
 - Riparian vegetation generally does not exist on the bluffs overlooking a river. Under this circumstance, floodplain maps and a lack of vegetation are not good indicators of buffer width.
 - Floodplain maps are useful when they are accurate and available. This combination can be challenging for Montana local governments. Floodplain maps are extremely expensive to develop (to meet traditional FEMA standards, maps can cost approximately \$25,000 per stream mile).² Additionally, even where these maps are available, flood events can change the location of the floodplain when streams naturally migrate and change their course. When this happens, floodplain maps become inaccurate. Because of the cost of floodplain maps, local governments can not afford to keep maps up-to-date. As a result, most of Montana’s floodplains are either not mapped—or have out-of-date maps.
3. Since every stream, parcel of land, wetland, and land use is unique, Missoula County’s site-specific buffers are tailored for each subdivision. While this approach is more science-based, it also presents some challenges, including:
 - More site evaluation required by staff, which makes the process expensive to implement and administer;
 - A requirement for staff training to ensure that regulations are consistently applied and can be enforced; and
 - Less predictability for landowners and developers.

Missoula Explores Adopting Stream Protection Measures In Zoning in 2007:

In 2006, Missoula County partnered with a Missoula-based nonprofit conservation organization, the Clark Fork Coalition, to draft stream protect standards for possible inclusion in county zoning regulations. Clark Fork Coalition staff completed their work on the draft regulations in March 2007 (*see Attachment I*). Subsequently, a joint press release was issued by the County and the Clark Fork Coalition announcing public meetings focused on these draft standards (*see Attachment II*). The standards were then taken out to nine public meetings/listening sessions throughout the county, where significant, vocal, and highly organized opposition developed to the regulations (*see Attachment III*):

² K. Boyd, Applied Geomorphology, written communication, 2008.

One person summed up the public meeting process like this, “[The] Public feels misled about [the] public process – after all, [the] regulations are written and “Now you want input?” - and [the] process goes awry.”

A Missoula County planner wrote (April 19, 2007), “Thought you might be interested in what we are facing here re: setbacks...Petitions to the BCC [Board of County Commissioners] to stop the process are coming to the BCC by mail and the phone is ringing constantly with opponents voicing their “concerns”. And we still have 5 more “informational meetings” to go...”

After the public meetings, Missoula County decided to go “back to the drawing board” on their stream protection standards because of the opposition generated by the draft regulations.

What Lessons can be Learned from the Missoula County Process in 2007?

Although not an exhaustive list, a few of the problems identified with the 2007 Missoula County process, include:

- **Regulations that were seen as top-down.** Although the draft regulations were presented as just that—DRAFT—regulations, vocal members of the public decided that the regulations looked detailed and complete. As a result, many of the citizens opposed to the regulations expressed anger because they thought that the regulations were just being railroaded through a ‘token’ public input process. Once angry, it was almost impossible to change people’s minds about the nature of the public input process, even though planning staff listened to and recorded the public’s comments at each meeting. A summary of the concerns raised during the public meeting process appears in Attachment IV.
- **Outspoken opposition dominated public meetings.** During the public meeting process, which took place over the course of a month, the opposition became increasingly vocal and organized. Many of the same opponents to the regulations showed up at every public meeting, becoming more and more vocal and articulate at each session. As these individuals became more vocal, they were able to intimidate other citizens in attendance and dominate each meeting.
- **No broad-based support for the regulations.** Very few individuals who supported the stream protection regulations spoke at the public hearings. Additionally, there was no significant work by conservation organization advocates supporting the regulations to “rally the troops” and show up at the hearings in significant numbers. Additionally, because the Clark Fork Coalition was partnering with the county, their contract took this important conservation organization out of the role of being an advocate for the regulations, effectively muzzling an important advocate in support of riparian protection.
- **Public meetings were intimidating to supporters.** Dealing with very vocal opposition can be very intimidating. There was some concern that county staff assigned to the stream protection process lacked the skills needed for dealing with the public, particularly with a hostile crowd. Land use planning issues are often controversial and emotional. It is

important to think about how public meetings should be structured so that civility is maintained, staff maintains control, and all citizens have a chance to participate equally.

- **Specific “frequently asked questions” should have been anticipated and responses prepared.** It is helpful to anticipate the questions that will arise in any public process surrounding stream protection measures—and develop thoughtful responses to some of the more challenging issues that are raised. For example, Missoula County staff wish that they had more background on the following issues:
 - A better understanding of all existing (federal, state, local) regulations dealing with streams, stream banks, etc., would have allowed staff to explain when each of these regulations is used and what the regulations address and do not address.
 - A better understanding of the problems associated with jurisdictions (in Missoula County’s case, the city of Missoula) that are perceived to be impacting waters and riparian areas, but the jurisdiction will not be subject to any proposed county regulatory program.³
- **Challenges to adopting zoning at the county level in Montana.** Because all local governments are required to adopt and enforce subdivision regulations, protecting Montana’s streams and wetland is more commonly found in subdivision regulations than in zoning. Zoning is not routinely used at the county level in Montana. In fact, as of 2009, only six of Montana’s fifty-six counties had county-wide zoning (Anaconda-Deer Lodge, Butte-Silver Bow, Cascade, Choteau, Lake, and Powell Counties). So, in addition to Missoula County taking on the challenging issue of stream setbacks, they were also taking on the ‘zoning’ issue. A lack of public support for zoning, especially in rural areas, is a political reality in much of Montana.

Next Steps for Missoula County and Stream Protection:

In 2009, Missoula County continues to be interested in adopting stream protection measures through educational and regulatory programs—and potentially through zoning. After the 2007 attempt failed, it took the county staff time to decide how to proceed. The county is currently developing a community-based process that should generate more support from citizens. To begin that effort, in February 2008, the county appointed a Stream Protection Program Technical Advisory Committee. This committee is composed of 14 individuals with backgrounds in hydrology, fisheries, forestry ecology, water quality, and similar fields. The committee, which has met regularly in the last 18 months, has been assigned the task of collecting scientific information regarding stream protection measures; guiding the county and a yet-to-be-appointed Citizen Working Group on technical issues needed to complete stream protection regulations; and exploring what information/additional studies the county may need to complete before recommendations are developed. Additionally, the County’s Water Quality District sponsored a pilot Channel Migration Zone (CMZ) study on 16 miles of the Clark Fork River. This study, based on similar work completed on the Yellowstone River, will explore the potential for using CMZ maps to guide decision makers on where new riverside development should be allowed and not allowed.

³ P. O’Herren, Missoula County Rural Initiatives, written communication, July 31, 2009.

In addition to the Technical Advisory Committee, the County plans to create a Citizen Working Group to “help guide the process and evaluate alternative approaches that will effectively protect streams, floodplains, and riparian resources.” As of July, 2009, this Citizen Working Group has not been established yet.⁴

Flathead County

Flathead County began revising its subdivision regulations in 2006. In order to protect streams, initial drafts of the regulations allowed the County Commission to require stream setbacks where needed. These proposed regulations were revised by the Flathead County Planning Board to include two options: (1) comply with numeric construction setbacks based on stream size, or (2) propose a site-specific Riparian Resource Management Plan with site-specific setbacks. This version of the regulation was adopted by the Flathead County Planning Board in early 2007 as part of their recommended subdivision regulations (*see Attachment V*). These regulations then went before the Flathead County Commission for approval.

The Commission held two public hearings on the proposed subdivision regulations, one in March and one in May 2007. When County Commissioners conducted these public meetings, the stream setback provisions proved controversial, with citizens supporting and opposing the measures with equal vigor. Consequently, the County Commissioners and staff decided to send stream setbacks—along with several other provisions—back to the Flathead County Planning Board for additional work and consideration. Therefore, the subdivision regulations adopted by County Commissioners on July 12, 2007 did not include stream setback provisions. However, during this process, the Commissioners gave the Flathead County Planning Board clear instructions to rework the controversial provisions for later consideration. As a result, in July 2007 the Planning Board immediately began working again on stream setback provisions. Their rationale, in part, follows:

Planning Board Rationale

“Riparian areas provide protection from river channel changes, important habitat for associated fish and wildlife, water quality and quantity, flood control, bio-diversity forage, recreational uses and a visually attractive environment....

...The planning board spent over twelve hours working on this section, broken into four workshops. More than seven hours of that time was devoted to listening to public comment. Ample testimony was presented demonstrating the existence of strong scientific evidence that riparian resources need effective buffers to protect water quality and providing other benefits to the county. Public comment also indicated a strong objection to the “one size fits all” approach to setbacks. Many expressed a desire [to] present a scientific case for setbacks on a site specific basis. There were also objections to the use of deed restrictions, variances procedures and the possibility that setbacks could create public easements on private property. Many comment, from both sides of the issue,

⁴ P. O’Herren, Missoula County Rural Initiatives, written communication, July 31, 2009.

objected to areas within municipal sewer districts being exempt from the regulations. It was also clear that many of those commenting did not realize that the proposed regulation only applied to land that was included in a subdivision application. The board considered all of these concerns in the proposal.”⁵

With stream setback provisions still under consideration by the Flathead County Planning Board for the subdivision regulations, opponents and proponents of these regulations launched campaigns for and against the regulations, including taking out newspaper ads (e.g. *see Attachment VI*), holding public forums (e.g. *see Attachment VII*), advocating for and against the regulations before the Flathead County Planning Board, and using other strategies. After 14 months of consideration, the Planning Board had spent over 100 hours in workshops considering what to include and what not to include in the subdivision regulations. Many of those hours were spent considering the stream setback provisions.

In September 2008, the Planning Board voted for a second time to send their recommendations to the Flathead County Commission for approval, including the option of either complying with numeric stream setback standards or develop a site-specific Riparian Resource Management Plan. In October 2008, a new round of County Commission public hearings were held, with opponents dominating the meeting on October 23, and supporters dominating the meeting on October 31 (*see Attachment VIII*). And just when the momentum seemed to be building in support of adopting the stream setback provisions, a lawsuit arrived: on November 21, the Montana Building Industry Association sent a letter to the Flathead County Commissioners threatening a lawsuit over the county subdivision regulations. The lawsuit included objections to the yet-to-be-adopted stream setback provisions. Specific language from the lawsuit complaint on stream setbacks read:⁶

(PB) 4.7.xx Stream Riparian Protection Requirements (will require provision renumbering)

This section will require a separate letter devoted entirely to this issue. In the meantime, I believe it is sufficient to note that what you have created is effectively a zoning provision, shoehorned into your subdivision regulations. Nonetheless, however this is enacted, this is a matter of the highest public concern, and should be dealt with separately, not as part of a general overhaul of your subdivision regulations.

Just days after being threatened with a lawsuit, County Commissioners announced a compromise on stream setbacks at their December 1 work session on the subdivision regulations. They removed all reference to numeric stream setbacks, and adopted a provision that requires setbacks to be determined on a case-by-case basis by developing a site-specific Riparian Resource Management Plan. These rewritten regulations, which appear in Attachment IX, were adopted on December 8, 2008 and went into effect on January 15, 2009.

⁵ Flathead County Approved Subdivision Regulations: Sections for Further Consideration by the Planning Board, June 12, 2007 Planning Board Special Meeting, 72 pp.

⁶ Complaint and Demand for a Jury Trial Letter Dated November 21 2008, Montana Building Industry Association, written by the law firm Datsopoulos, MacDonald & Lind, P.C., 41 pp.

What Lessons can be Learned from the Flathead County Process?

In spite of much opposition, a few of the reasons that the Flathead County process kept moving, include:

- **Buy-in from the Planning Board.** The Flathead County Planning Board spent considerable time working on the regulations. During that process, the Planning Board developed a clear understanding of the arguments for and against stream protection measures and developed a sense of ownership in the regulations. When stream protection measures did not make it into the changes made to the county subdivision regulations adopted in 2007, the Planning Board immediately started working on a new draft.
- **Broad-based support advocating for the regulations.** Numerous conservation and citizen groups supported the stream protection measures. The conservation groups that worked cooperatively to support this measure included Citizens for a Better Flathead, Flathead Lakers, Flathead Audubon, Montana Audubon, Flathead Valley Chapter of Trout Unlimited, Flathead Wildlife Association, Resource Media, and Montana Conservation Voters. These organizations were able to turn people out at hearings, get letters of support into Commissioners, and quickly respond to questions raised by opponents. The work of citizens was also complimented by several government agencies that came out in support of the stream protection measures: the Flathead Basin Commission, U.S. Fish & Wildlife Service, and Montana Fish, Wildlife & Parks all supported the measures publically. This strong support countered the strong opposition.
- **Citizens engaged in the public input process.** In addition to broad-based support for the regulations, citizens who attended the public meetings (on both sides of the issue) genuinely felt they could influence the outcome of the regulation.

Although the above circumstances kept the process to adopt stream setbacks moving in Flathead County, the regulations that were ultimately adopted changed dramatically in the last few weeks. In the end, Flathead County ended up with regulations similar to the regulations Missoula County currently has—with identical challenges (*see page 2, numbers # 2 - 3*). Specifically, the Flathead Subdivision Regulations:

- Require a site-specific analysis and development of a management plan to determine the appropriate setback; this requirement can add expense to the developer, as well as to the local government's subdivision review process;
- Do not contain any numeric setback distances; and
- Because the setbacks are determined on a case-by-case basis, the distances are not always predictable for landowners.

Some of the challenges that Flathead County faced that shaped the outcome, include:

- **Vocal, well-organized opposition.** The opposition to stream setbacks—and all land use planning efforts in Flathead County—has a strong network with active participation from certain individuals.
- **The timely threat of a lawsuit.** Only a week before the Flathead County Commission was to adopt stream setbacks, an official *Complaint and Demand for a Jury Trial* was

sent to Commissioners by the Montana Building Industry Association (MBIA). Although this lawsuit was threatened, ultimately it was never filed.

Campaigning for Stream Protection Measures: Lessons Learned

In addition to the ‘lessons learned’ described above, other strategies should be considered that make any land use planning campaign more successful. This section summarizes some of the most important strategies to think about before launching an effort to adopt land use regulations. Although many guidebooks and articles have been written on this topic, any campaign aimed at adoption of significant land use regulations should:

1. **Develop a Campaign Plan.** In order to succeed at passing land use regulations, thought must be given to a host of issues that increase the likeliness of success. Basic campaign planning tools can be found on the internet. The more developed and strategic a campaign plan, the better. Passing significant land use regulations takes clear messaging, strategic planning, broad support, and a majority vote by decision makers. Additionally, securing the resources to run such a campaign is also critical.
2. **Gather Supportive Evidence.** Background research, studies, maps, and other supportive evidence should be gathered on the wetlands and/or riparian areas found in the community. Well executed community data gathering, studies, and planning efforts are important to the process of developing, enforcing, and defending regulations, programs, and policies. This information also helps local citizens understand the benefits of a regulation.
3. **Assess Local Circumstances:** Honestly assessing how local circumstances may create opportunities or hurdles with the public, elected officials, and other key individuals, will strengthen chances of success. For example, is the snow pack high? Is there flooding this spring? If homes are being flooded as a result of poor (or more likely no) land use planning, more members of the public will immediately understand the need for stream setbacks. If there hasn’t been a flood in decades, it will take more work to get the public educated about the need for a regulation. How’s the economy? If the housing market is in a slump, more members of the public will be likely to resist regulations that may cause more hurdles for the housing industry—no matter how important the regulation is. Is there a development boom? It can be easier to launch a campaign in support of streamside protection when the problem or risk is concrete and easy to understand.
4. **Encourage Public Involvement.** Public hearings often force the public to take sides on an issue when what many citizens really want are informational sessions and opportunities to raise issues of concern and/or to have their questions answered. Public processes that rely solely on public hearings can actually discourage public participation. Most citizens would rather avoid controversial hearings; they also avoid hearings where citizens are not granted an adequate opportunity to become more informed and ask questions.

As an example, in Flathead County, the Planning Board encouraged public involvement by holding public workshops every two weeks over a 14-month period to gather input and discuss various draft provisions. Additional public input was solicited at several full public

meetings held during their review process, allowing Planning Board members to obtain feedback and check their previous work.

And based on what Missoula County learned during their public meeting process on stream protection measures, they have worked to improve their public involvement process. The County now conducts “open houses” or “office hours” in rural communities with various stations to encourage information exchange. Feedback from citizens on this approach has been positive: open houses are less threatening to the public and provide a better opportunity for information sharing, questions and answers, and providing comments. Public meetings and hearings will always be a part of the process, but the public has been quite clear that they want a chance to listen, be heard, and provide comment in a manner that large public meetings do not always provide.⁷

- 5. Build a Strong Coalition.** The more diverse the group supporting a stream regulation, the better. Building a broad, diverse coalition is important—and takes time, planning, good communication, and energy. Coalitions can be built in several ways. They can grow by strategically building a network of supporters from diverse backgrounds, as was done in Flathead County; or they can be developed by establishing a local government-appointed committee that is given the task of specifically addressing stream protection at the local level, as is currently being done in Missoula County. Either way, citizens working together can become knowledgeable about the challenges and opportunities available for local resource protection; develop community-based solutions for dealing with conservation issues; and carry their conservation proposals to the community as a whole.

It should be noted that building a coalition to develop stream protection regulations can be tricky in Montana because some individuals and groups will never support any regulations. However, carefully recruited individual members from these same organizations might be more open to supporting protective regulations. For example, while some statewide organizations have lobbied against stream protection measures, individual industry members have publically supported these measures.

- 6. Shape Messages Carefully.** It is important to understand how to frame the message on stream protection issues. Understanding what messages work—and which ones don’t work—is critical. For example, the Flathead County supporters of stream setbacks developed messages based on the known benefits of protecting our streams and our shared appreciation of clean water. Key talking points helped communicate ideas more clearly and persuasively to the general public. Basic message tools on water, stream conservation, and related issues can be found on the internet, for example:
 - Water Words That Work: <http://waterwordsthatwork.com/>;
 - Factsheet X: From the Trenches – Tips and Tools for Effective Presentations: <http://www.usawaterquality.org/volunteer/pdf/GuideBook/conservationlanguage.pdf>;
 - Environmental Protection Agency: Polluted Runoff (Nonpoint Source Pollution): <http://www.epa.gov/nps/outreach.html>
 - Getting in Step - A Guide for Conducting Watershed Outreach Campaigns: <http://www.epa.gov/owow/watershed/outreach/documents/getnstep.pdf>;

⁷ P. O’Herren, Missoula County Rural Initiatives, written communication, July 31, 2009.

- Lessons Learned Regarding the “Language of Conservation” from the National Research Program: <http://www.conservationcampaign.org/wizard/index.cfm?ID=108>;

One final thought on message development: although message development is important for any land use campaign, it is also important to think about the messenger. Having articulate spokespeople is important—but having credible spokespeople is just as critical. Spending time to find credible spokespeople, known in the community, can be significant.

7. **Understand Why Land Use Regulations *Protect Private Property*.** While supporters of stream protection measures have a somewhat complicated message, the message of most citizens opposed to these measures is simple: most of the opposition believes that private property rights are violated if land use regulations are implemented—and somehow property is being “taken” from the landowner without compensating him or her. This debate has been going on since the inception of land use planning, when our government was given the authority to protect public health, safety, and welfare. Understanding how land use planning is about balancing issues like property rights and the needs and vision of a community is critical.

It is also important to understand why stream protection regulations are not a “taking” of private property. In fact, quite the opposite is true. Development activity along streams can significantly impact downstream landowners. Because of this fact, the Association of State Floodplain Managers developed a “no adverse impact” goal for local and state governments. (see <<http://www.floods.org/index.asp?menuID=349&firstlevelmenuID=187&siteID=1>>). This program is designed to help manage floodplains to reduce flood and erosion losses, as well as control new development which increases flood risks and losses. “No adverse impact” principles readily illustrate how stream protection regulations actually *protect* private property rights by ensuring that actions of upstream landowners do not adversely impact downstream landowners.

Adopting local land use planning regulations allows local citizens to control their future. Ensuring that new buildings are set back a safe and reasonable distance from the banks of Montana’s streams and rivers protects people, property, and the streams of this state—streams that are recognized internationally for their outstanding economic, biological, and recreational values.

Many local governments in Montana are interested in stream protection. By examining the specific circumstances encountered in Missoula and Flathead Counties as they pursued protection of streams through land use planning regulations, lessons can be learned so that other local government officials and interested parties can be better prepared to successfully accomplish their goal.

ATTACHMENTS

ATTACHMENT I: Regulations for Missoula County Drafted by Clark Fork Coalition Staff

ATTACHMENT II: Press Release Announcing Missoula County Public Meetings

ATTACHMENT III: Clark Fork Chronicle Article About Public Hearing

ATTACHMENT IV: Summary of Public Comments from Spring 2007 Stream Protection Meetings

ATTACHMENT V: Stream Setback Regulations Recommended by Flathead County Planning Board in 2007

ATTACHMENT VI: Ad Placed Against Stream Setbacks, Daily Inter Lake, October 18 2007.

ATTACHMENT VII: Newspaper Article on One of Several Pro-stream Forums, Daily Inter Lake, February 11, 2008

ATTACHMENT VIII: Article on Public Hearing on Stream Setback Provisions in Flathead County, Daily Inter Lake, November 1, 2008.

ATTACHMENT IX: Streamside Setback Regulations Adopted in Subdivision Regulations by the Flathead County Commission on December 8, 2008 (Effective January 15, 2009).

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