



# Chapter 3

## Building a Local Government Program to Protect Wetlands and Riparian Areas

**M**any Montana communities have begun to develop programs to preserve stream and river corridors, floodplains, lakeshores, and wetlands—as greenbelts, parks, and open space. These locally developed programs reflect the imagination, talents, knowledge, and enthusiasm of interested citizens and local government officials. Because there is no step-by-step, one-size-fits-all process to build conservation programs, it is important to take the time to plan how locally developed regulatory and voluntary programs can be built over time.

### **Box III. Elements of a Local Program**

- Develop an Education Program
- Establish Community Goals
- Gather Supportive Evidence
- Provide Incentives & Technical Assistance
- Develop Regulations
- Implement and Enforce Regulations
- Address Budget Issues
- Coordinate Permit Processes

The elements of a local government wetland and stream conservation program are described in this chapter. Because local elected officials have broad general government powers for planning and enacting programs and policies, wetlands and riparian areas can effectively be protected wherever they exist within the local jurisdiction. These broad government powers also enable local governments to consider cumulative effects on these natural resources.

### **Develop an Education Program**

Community support is essential for local governments who are interested in adding conservation provisions to land use plans or regulations, passing an open space bond for park acquisition, or pursuing other conservation measures. Informed citizens can understand, evaluate, and comment on protection programs. Education and outreach can be accomplished using educational materials, traveling exhibits, forums, workshops, field trips, and public events. Both local governments and citizen groups can undertake any of these efforts. Important topics for education programs include community benefits of wetlands and riparian areas, their location and extent, identified threats, suggested conservation methods, and information regarding the relationship of conservation programs to broader water and land use goals identified by the community. Audiences for

education programs include landowners who own wetlands and riparian areas, citizens, public works departments, community leaders, and interest groups.

Discussions between community leaders and citizens should be encouraged during early stages of land use planning. One effective way to accomplish this is to involve community members in a committee designed to specifically address protection of identified natural resources. 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.

### **Establish Community Goals**

Land use plans and regulations should clearly state

that conservation of wetlands and riparian areas is in the public interest and is a community goal. In particular, specific language in a local growth policy plan will provide direction for subsequent land use regulations adopted by the community, such as zoning, development permit, and subdivision regulations (*see Growth Policy Plan, page 5-1*). Community adoption of a simple policy calling for no net loss of wetlands, support for riparian buffers, and/or a long-term net gain of restored or protected resource areas, can guide conservation programs. Goal statements can also be very specific, such as calling for protection of a particular watershed, or a valuable type of wildlife habitat. General goal statements used by a few Montana communities appear in Box IV. Additionally, suggested goals for growth policy plans appear in Appendix II.

### **Gather Supportive Evidence**

Background research, studies, maps, and other supportive evidence should be gathered on the wetlands and 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. Basic inventory work can be started by gathering existing data from maps and aerial photos. Appendix III contains a list of sources for maps and other background information. If local governments can include funds to map sensitive areas in their budget, and include maps in their land use plans and regulations, they will increase certainty and predictability for landowners and developers.

Inventories can be designed to provide varying levels of information about area resources. Prior to starting inventory work, decisions must be made on the level of detail communities need and can realistically expect to collect. The most basic inventories contain information on the location, size, and type of resources (Rubey Frost and Stenberg, 1992). More extensive inventories can provide greater detail such as threats, landownership, hazards, and special values (Kusler and Opheim, 1996).

Identification of streams, lakes and rivers is relatively

simple, and, consequently, the general location of riparian areas is fairly easy to determine. Wetland mapping is a greater challenge because the accuracy of maps and map scale can be problematic. If existing maps, aerial photographs, and other information are not adequate for a local government's needs, inventory work can be done in phases or as projects arise on a case-by-case basis. For example:

- The jurisdiction can be divided into different units and then inventory work can focus on each section as funding permits. Under this scenario, sections of the jurisdiction with the most pressing problems would receive the highest priority for inventory work.
- Some inventories focus solely on the largest and most obviously diverse areas (e.g. stream and river corridors, lakeshores, and/or large wetland complexes).
- Instead of mapping wetlands and riparian areas, some communities develop selection criteria—and then evaluate projects with field surveys conducted on a case-by-case basis. A discussion of selection criteria appears in Chapter 4.

Because inventory work can be expensive, local governments may be handicapped by limited budgets, inadequate maps or background information, and a lack of expertise among staff. One way to address these issues is to turn to outside assistance for expertise and technical support—universities, state and federal agencies, and other resource professionals. These same experts can be used to assist with the development of local conservation initiatives, and the review of individual development proposals.

### **Provide Incentives and Technical Assistance**

Local governments should consider ways to provide incentives for protection of sensitive areas. For example, special assessments (sewer, water, and levies, for example) could be reduced for landowners who are either willing to protect natural resources or own property in tightly regulated areas. Monetary incentives could also be provided to landowners for donating fee or partial interest in a wetland or stream corridor to a park, open space, or similar use.

## **Box IV. Protection Goals for Wetlands and Riparian Areas**

How do Montana communities justify protection for wetlands and riparian areas? The following goal statements were taken from local government polices and regulations in Montana used as case studies in this handbook.

### **General Protection Statements**

1. Promote public health, safety and welfare.
2. Require development in harmony with the natural environment.
3. Avoid unnecessary environmental degradation.
4. Protect the natural environment, water quality and wildlife.
5. Preserve scenic resources.
6. Preserve environmentally sensitive areas (riverbanks, floodplains, critical watersheds, important wildlife habitat).
7. Balance the greatest public good with the least private injury.
8. Assure that land within the local vicinity retains its desirability, usefulness, and value to its owners and to the public in general.
9. Protect and enhance property values.
10. Protect important recreational values and related economic values of the county's rivers.
11. Assure that new development is designed to minimize the public costs of providing services.
12. Provide for adequate parks and recreation areas.

### **Protecting Streams, Rivers, Lakes, Wetlands and Functioning Floodplains**

13. Promote floodplain stability.
14. Recognize the right and need of watercourses to periodically carry more than the normal flow of water.
15. Restrict or prohibit uses that are dangerous to health, safety, and welfare or property in times of flood, or cause increased flood heights or velocities.
16. Minimize relief efforts associated with flooding and generally undertaken at the expense of the general public.
17. Promote the wise use of floodplains.
18. Require that uses vulnerable to floods be provided with flood protection at the time of initial construction.
19. Maintain normal movement of surface waters.
20. Minimize expenditure of public money for flood control.
21. Keep development out of the floodplain and riparian areas.

22. Ensure that riparian resources remain available to support riparian systems and habitats.
23. Protect the banks of streams and lakes.
24. Protect the rivers and streams of the county.
25. Regulate development immediately adjacent to natural lakes to protect the shoreline or bank.
26. Maintain natural hydrological and ecological functions of wetlands, riparian areas, and other flood prone lands.

### **Protecting Rural Settings**

27. Encourage new growth to be compatible with the county's agricultural and rural character.
28. Protect open space, grazing lands, and the agricultural lifestyle and economy.
29. Encourage new growth to occur near existing communities.
30. Discourage development in certain designated areas.
31. Preserve the local area's rural lifestyle and primarily agricultural land base.
32. Allow development that is compatible with existing growth patterns.
33. Maintain the open and rural residential character of the area.
34. Protect agricultural land uses.
35. Prevent overcrowding.
36. Maintain the integrity of the area.

### **Protecting Water Quality**

37. Protect water quality.
38. Act as a sediment filter.
39. Protect ground water.
40. Protect watersheds.
41. Maintain water resources.
42. Ensure high water quality standards.

### **Protecting Fish and Wildlife Habitat**

43. Preserve large, woody debris that can provide stream habitat and shade to regulate stream temperature.
44. Protect wildlife resources
45. Preserve fish and wildlife habitat

Incentives can go a long way toward generating support for conservation programs.

Providing technical assistance that can help identify boundaries of sensitive areas will help landowners understand how to comply with regulatory and voluntary protection measures, achieve their own land use objectives, and build community support for conservation programs. Additionally, discussions between planners and landowners during early stages of project design can often result in project modifications that minimize the adverse impacts on resources. If regulations have been adopted, assistance should also be provided to negotiating the regulatory permitting process.

### **Develop Regulations**

Without a full range of regulatory and non-regulatory protection programs in place, it is impossible to stop the loss of wetlands and riparian areas and maintain the functions they provide (Rubey Frost and Stenberg, 1992). With community goals established, local governments can consider developing regulations to achieve conservation objectives. Regulations should articulate the attributes of wetlands or riparian areas to be protected, and specify the public purposes and community goals that will be met. The purpose clause of any regulation should clearly state the intent of the regulation. Chapter 4 gives an overview of the details that need to be addressed when developing regulations to protect wetlands and riparian areas. Additionally, Chapter 5 outlines how Montana's land use tools can specifically be used to protect these community resources.

To ensure long-term protection of natural resources, local governments may want to include in their regulations a requirement that development proposals contain a plan outlining how the wetland and riparian resources will be protected over time. Both the City of Missoula and Missoula County require these plans as part of each development proposal (*see City of Missoula and Missoula County, page 5-10*). Required elements of the plans include 1) maps showing the location of wetland and riparian vegetation, buffer areas, and drainage patterns; 2) a

description of the vegetation and types of fish and wildlife habitat available; 3) an assessment of the susceptibility of soils to compaction; and 4) a maintenance and monitoring plan. These management plans may not be altered without permission from the governing body.

Common sense should guide adoption of regulations. All statutory and ordinance procedures with regard to adoption of regulations or ordinances, public hearings and notices, and other requirements need to be followed. Additionally, regulations should not deprive a landowner of all reasonable economic use of their property (*see Box V*).

### **Implement and Enforce Regulations**

In the tug of war between unlimited freedom in the use of private property and the need to protect both private property and the public good from harm, local decision-makers are increasingly recognizing that it is in the public's economic, social, and environmental best interest to guide development away from rivers, streams, and wetlands. Allowing development too close to a waterway can lead to pollution of streams; serious flood damage, including to roads and buildings; and a growing threat to the rural character that is the signature of much of Montana.

Careful evaluation of permits and development plans is essential to implementing local programs. Chapter 4 contains an overview of the steps that should be taken in reviewing individual proposals. If local officials do not have the expertise to ensure that the proposed development will not impact rivers, streams and wetlands, they should seek assistance from state and federal agencies, universities, and other area professionals to aid in the evaluation of projects, develop conditions that minimize impacts, and recommend mitigation when impacts cannot be avoided.

Once a development is authorized, periodic inspections should be conducted. Consistent prosecution of violations to local rules, standards, and permits can help ensure that protection programs are being followed (Kusler and Opheim, 1996). Public

## **Box V. Private Property Rights and Land Use Planning**

Since the inception of land use planning, the courts have developed thresholds for determining whether a particular land use regulation is a legitimate exercise of the “police power” inherent in our government’s authority to protect public health, safety, and welfare. The following standards have emerged from a history of court decisions to guide local governments in determining the validity of regulations.

- The regulation in question must have been adopted in accordance with the applicable enabling statute.
- The regulation must be reasonably related to, and must actually further, public health, safety, or general welfare.
- The regulation must not unreasonably discriminate between similarly situated land.
- The regulation must not be arbitrary or capricious either on its face or as applied to a particular property. It should go no further than is required to achieve its legitimate objective, and, in the case of zoning and development regulations, must conform to an adopted growth policy (*see Growth Policy Plans, page 5-1*).
- The regulation must not have the effect of excluding entire racial, minority, or economic groups from the jurisdiction.
- The regulation must not be considered to be an unconstitutional “taking” of property. The most commonly applied “takings” test is whether the regulation denies a landowner of *all* economically viable use of property without compensation.

In addition to the above guidelines, regulations should contain a process by which local governments consider the concerns of citizens affected by a regulation before final decisions are made. Appeal processes and variances found in regulations address due process rights for citizens.

education programs can facilitate local enforcement. Additionally, volunteer public interest groups and individuals can assist with the reporting of violations.

### **Address Budget Issues**

Most local governments are continually plagued by budget limits for planning. Local programs are faced with limited funds and personnel for mapping, site investigations, and enforcement actions. A number of funding sources are available for local planning efforts. For instance, the Montana Department of Commerce provides annual planning grants for funding the development of plans, regulations, and other related activities such as mapping wetlands and riparian areas. Additionally, Chapter 6 describes several government programs that can assist with different aspects of program development and implementation (e.g. *see DEQ Wetlands Program, page 6-10*). There are also a variety of approaches that may be taken to reduce program costs: 1) to help communities evaluate a proposed development, developers can be required to complete environmental assessment work or undertake other data gathering; 2) a fee can be charged to help defray costs of field inspections and the processing of permits; 3) local officials can decide to use existing maps rather than produce their own; and 4) volunteer groups can be used to monitor developments and report violations.

### **Coordinate Permit Processes**

Thought should be given on how local governments interact with the regulatory programs outlined in Appendix IV. Many local governments condition their approval of a development based on the applicant receiving all necessary permits. However, there is often little follow-up to ensure that permits have been obtained. Instead of assuming that the applicant will receive all permits, it makes sense for local governments to require that final permits be received before a development permit is issued. This requirement ensures that all necessary government authorities have reviewed a project impacting a river, stream, or wetland before a development permit is issued. For example, local governments should not submit a final plat on a subdivision to the Clerk and Recorder’s office until copies of all applicable permits

are received.

Local governments may also want to explore adopting a joint permitting procedure with other regulatory agencies so that landowners have—to the extent possible—one-stop shopping. Such joint permitting procedures may involve several levels of government and types of programs such as the federal Section 404 Program, land use planning regulations, local floodplain rules, and Conservation District permits.

**Please Note:** Chapter 3 was based on the Environmental Law Institute's publication *Our National Wetland Heritage: A Protection Guide* (Kusler and Opheim, 1996) and *A Primer on Land Use Planning and Regulation for Local Government* produced by the Montana Department of Commerce Community Technical Assistance Program (Richard, 1994).

## **Box VI. How Citizens Can Jumpstart Planning and Implementation Processes**

Local land use tools to protect wetland and riparian resources are adopted and enforced by elected officials. These officials respond to constituent and community desires. Active citizens interested in protecting sensitive resources should foster general support among local citizens, and encourage elected officials to enact conservation measures. Citizens can do this by 1) developing or utilizing education material on the benefits of wetlands and riparian resources; 2) writing letters to elected officials and the editor of local newspapers; 3) discussing issues with elected officials; and 4) attending regular council or commissioner meetings. In short, active citizens should make sure that elected officials know that these resources are important and should be protected. Specific places citizens can get involved include:

### **Influencing Growth Policies**

Cities and counties are required to prepare growth policy plans (*see Growth Policy Plans, page 5-1*). The best time for concerned citizens to begin to influence the content of the plan, and to ensure that the plan incorporates strong goals and policy statements relating to protecting wetland and riparian areas, is during the process of preparing the plan. During this process, citizens should attend public meetings and hearings, and speak out about the need and benefit of protecting those lands. Suggested conservation language for growth policy plans appears in Appendix II.

### **Reforming Subdivision Regulations**

When cities and counties revise their local subdivision regulations, citizens should participate in meetings of the planning board and elected officials, and lobby for good standards and requirements to address impacts on wetlands and riparian areas. Suggested conservation language for subdivision regulations appears in Appendix II.

### **Monitoring Individual Subdivision Proposals**

It is important for citizens to be involved when

individual subdivisions are proposed. Within the subdivision process, the subdividing and platting of new development is the most important phase because that process establishes land use patterns, including the locations and design of lots, roads, and other improvements that affect land and water resources. Also, citizens should participate in preliminary plat approval of individual subdivisions. If protection standards have been adopted, citizens can work to ensure that they are applied to each subdivision proposal and acted upon by the planning board and elected officials.

**As Landowners.** In communities where local officials are not preparing or implementing conservation measures in land use tools, landowners can enter into conservation easements to protect wetland and riparian resources. In addition, citizens can work with local landowners who have wetland or riparian resources to encourage formation of a planning and zoning district (*see Planning and Zoning Districts, page 5-5*).

These districts can be designed to develop regulations to protect sensitive resources.