

FACT SHEET 1: Have Montana Local Governments Identified Shortcomings in their Adopted Stream Protection Regulations?



In general, stream protection measures adopted by local governments appear to be assisting with the long-term protection of wetlands and streams. However, this fact sheet examines two situations identified by Montana local governments where stream protection standards need to be improved. These two exceptions are openly discussed at the local government level and suggest that several existing regulations may not provide adequate protection.

Subdivision Regulations versus Zoning

For Montana local governments, the two main regulatory tools used to protect streams and wetlands are subdivision regulations and zoning. However, these two tools are not equally able to protect these resources. This fact has raised concerns from local governments about their ability to protect riparian resources long-term.

Subdivision Regulations. Montana law requires local governments to adopt and enforce regulations to regulate the process of subdividing land. As a result, all Montana counties have adopted subdivision regulations. Montana local governments that include stream protection measures in their subdivision regulations include Cascade, Flathead, Gallatin, Lewis & Clark, Madison, Meagher, and Missoula Counties; and the cities of Bozeman and Missoula. Because subdivision regulations only apply to land being newly subdivided, these setbacks do not apply to lots and tracts that were in existence before the stream setback provisions were adopted. This inconsistency can create problems for local governments.

Madison County explains the problem of using subdivision regulations to protect streams as follows: “Construction setbacks from water bodies have been mandatory for property being subdivided on the Madison River since 1993, the Big Hole and Jefferson Rivers since 1994, and countywide since 2000. Unless voluntarily agreed upon by the sub-divider (very rare), setbacks do not apply to parcels created prior to these dates...”¹

Because of this concern, in October 2007, Madison County Commissioners were approached by a group of concerned citizens asking that the County draft an ordinance to require uniformity of streamside setback restrictions for all new buildings constructed along the Madison River and its tributaries. “Uniformity” in this case refers to the desire that the setback restrictions contained within county subdivision regulations be applied to all parcels of land within the proposed planning area. Since that time, Madison County established a citizen-based Streamside Protection Steering Committee that has been working to develop new regulations that apply to all buildings located near a stream. This Committee is slated to make recommendation to the Madison County Planning Board in September 2009.

¹ Madison County. 2008. *Streamside Protection: Frequently Asked Questions*, Last updated August 27, 2008. Prepared by: Jim Jarvis, Madison County Planning Office, 3 pp.

In addition to Madison County, currently both Missoula and Lewis & Clark Counties have also identified a need to put stream protection measures in their zoning regulations, in addition to their subdivision regulations. These two counties have not established a timeline on when such regulations may be considered by their respective Planning Boards.

Zoning Regulations. Having stream/wetland protection provisions adopted through zoning is more protective of the resource. Zoning regulations apply to each new building. Consequently, all new buildings—regardless of their location—are subject to any setback requirements, including new buildings proposed for an existing lot in an approved subdivision. Because zoning regulations apply to each new building, they are much more difficult for counties to adopt. Although all Montana Counties have subdivision regulations, only 6 counties have adopted county-wide zoning. Of those six counties, three have county-wide provisions that contain stream setbacks (Choteau, Lake, and Powell Counties).

The ability for counties to adopt zoning regulations that include stream protection measures is critical for the long-term conservation of riparian resources in Montana.

For a more complete discussion on specific land use tools and how they can be used to protect streams, rivers, riparian areas, and wetlands, see *A Planning Guide for Protecting Montana's Wetlands and Riparian Areas* (Ellis and Richard, 2008; available at www.mtaudubon.org). This publication describes the strengths and weaknesses of the major land use planning tools available in Montana so that decision makers will understand the level and effectiveness of stream protection provided by each tool.

A Loophole Discovered: Beaverhead County's Big Hole River Ordinance

One situation identified by Montana local governments where stream protection standards need to be improved comes from Beaverhead County. This example illustrates how local government regulations may not provide the protection to streams that was intended by drafters of the regulations.

The 150-mile Big Hole River travels through four counties: Beaverhead, Deer Lodge, Madison, and Silver Bow. In 2005, these four counties adopted almost identical protection measures for the Big Hole River. The regulations specify that all four counties will review all proposed buildings within 500 feet of the river; a 150-foot minimum setback for new buildings is generally required. This setback standard is applied on a site-specific basis, with some opportunity for expansion or shortening, depending on local circumstances.

In 2006, a landowner applied to Beaverhead County for permits to locate two manufactured homes on a site located approximately five miles upstream from the town of Wise River. Beaverhead County is

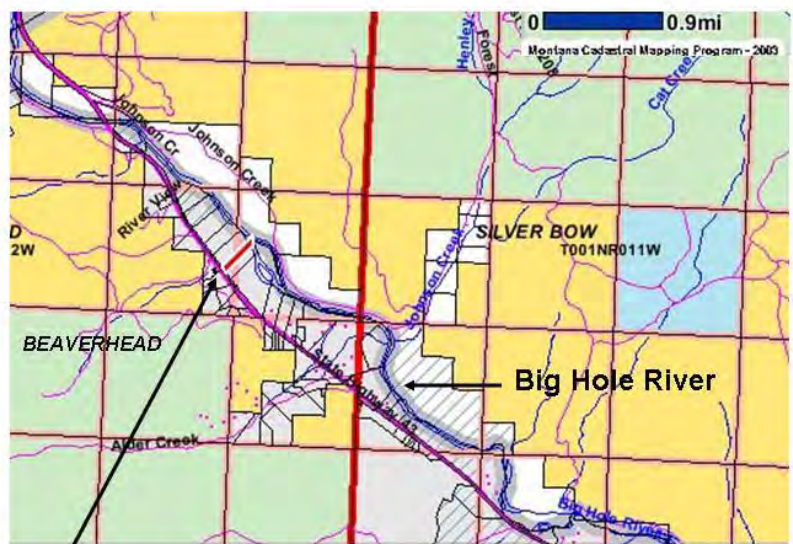


Figure 1. Location of lots with 2 manufactured homes (highlighted in red) in Beaverhead County on the Big Hole River.

on one side of the river and Butte-Silver Bow County on the other (*see Figure 1*). At this location, the Big Hole River's floodplain is more than 600 feet wide, with a small, higher-elevation bench on either side of the river.

The permit applicant proposed to put two manufactured homes approximately 155 feet from the river bank within the 100-year floodplain. This area is known to flood. In fact, the road to the home sites has been covered by 2 feet of water during spring floods. In order to obtain authorization, each manufactured home needed three different permits—issued by two different Beaverhead County staff: a septic system permit, floodplain permit, and Big Hole Ordinance permit. The circumstances surrounding each permit are described below.

Septic System Permit. In Montana, septic systems may not be located in the floodplain. In fact, they are required to be at least 100-feet from the floodplain. The permit applicant received a septic system permit because the parcel had adequate room to locate the septic systems on the bench above the floodplain, using a pump to transport waste more than 1,000 feet from the manufactured homes.

Floodplain Permit. In most Montana counties, including Beaverhead County, homes are allowed to be located in the 100-year floodplain (the 100-year floodplain = the floodway + flood fringe), as long as the home is NOT located in the floodway portion of the floodplain. The floodway carries most of the flood water in a stream; the flood fringe is outside of the floodway. Building in the flood fringe comes with some risk because it allows structures to be built in an area subject to shallow flooding. In fact, the 100-year floodplain has a 26% chance of flooding over the life of a 30-year mortgage. During this same period, the same house has only a 9% chance of being destroyed by fire.² Because of this risk, the following two regulations are in place in Montana when houses are located in the floodplain:

- Buildings need to be elevated at least 2-feet above the predicted water level for a 100-year flood (called the base flood elevation); and
- Structures may not increase the water level of a 100-year flood by more than one-half (1/2) foot.

The permit applicant was granted conditional floodplain permits because the manufactured homes met the letter of the law: the manufactured homes were elevated above the floodplain, and, in an area where the floodplain is more than 600 feet wide, it is easy to prove that the manufactured homes would not increase the elevation of a 100-year flood more than one-half foot.

Big Hole River Ordinance. When the permit applicant applied for Big Hole River Ordinance permits—which should be issued in 20 working days—he had already obtained the other two permits. Because these permits were seen as a test of the new Big Hole River Ordinance, several things occurred next:

- The Beaverhead County planner asked that the permit applications be reviewed by the Big Hole River Conservation Standards Review Board. The Board, which includes representatives from all four Big Hole River counties, was created to review variances regarding the ordinance when someone has proposed building a structure closer than 150-feet of the high water mark of the river. As mentioned above, the manufactured homes were proposed to be 155 feet from the riverbank, so this meeting was not required.
- The Beaverhead County Commissioners tried to stop the conditional floodplain permit from becoming valid based on the following circumstances: one of the conditions of the floodplain permits was that the applicant had to sign an agreement holding the county harmless from all liability that might result from a flood. Because the County Commissioners felt that the agreement should be signed by all parties, the

² Kolman, Joe. 2008. *A Flood Story*. The Interim. October 2006. Montana Legislative Service Division, Helena, Montana, 6 pp.

agreement was drafted so both the County Commissioners and permit applicant needed to sign the document. Therefore, if the Commissioners chose to not sign the agreements, the floodplain permits would be invalid. However, because of specific wording in the floodplain permits, in the end, only the applicant was required to sign the liability agreements—which he did willingly—making the floodplain permits valid.

The above two activities took time. Consequently, in the end, the 20-day permit deadline ran out for the Big Hole River Ordinance permits to be issued. As a result, the applicant was allowed to install his manufactured homes without these last permits ever being issued.

The two manufactured homes have now been installed next to the Big Hole River (*See Figure II*). Through this process, many lessons were learned, including:

- County staff should work to better coordinate their permit process. Because permits were issued without coordination, this project moved forward in a way that may not have been possible otherwise.
- Future floodplain permits should contain a provision that requires the liability agreement to be signed by both the Commission and the applicant before the floodplain permit becomes valid. Therefore, if the County Commission chose not to sign the agreement, the floodplain permit would not be valid.
- Ultimately, the regulations protecting the Big Hole River need to be strengthened. Of the three different permit processes involved, the floodplain regulations are probably the most likely regulation to strengthen.

Figure II. Two manufactured homes located on the Big Hole River in Beaverhead County near Wise River. These homes are located approximately 155 feet from the river, within the 100-year floodplain, but beyond the minimum setback established by the Big Hole River Ordinance. Photo by Chris Boyer, Kestrel Aerial Services.



100-year Floodplain extends to approximately this point.

Approximate location of septic drain field.

Many individuals who worked on the Big Hole River protection measures did not feel these two manufactured homes should have been allowed to be installed. Although the homes met the letter of the law, they did not provide the desired level of protection for the Big Hole River. Consequently, the authorization of these two manufactured homes has caused local officials and watershed groups to reexamine stream protection measures to determine how the regulations need to be strengthened to better protect the river and its riparian resources. Meetings anticipated in the fall 2009 will bring involved parties together to determine what next steps need to be taken to increase protection for the Big Hole River.

The Importance of Evaluating Regulations

Although it is relatively easy to collect information about what regulations have been adopted in Montana to protect stream and wetland resources, no one has systematically looked at how local government regulations are working: what looks acceptable on paper may have problems when applied on-the-ground. Such an assessment is challenging because many of Montana's stream protection regulations are less than five years old. A comprehensive evaluation of which regulations are protecting resources, which ones need to be strengthened, and how each regulation seems to be functioning for local governments would be useful for everyone interested in resource protection. By understanding which parts of regulations work and which do not work, resource protection can be improved. As more local governments experience new challenges with their stream protection measures, these challenges should