

# COUNTY OF RAVALLI



Ravalli County Commissioners  
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October 14, 2014

Dear Community Partner;

The BOARD OF RAVALLI COUNTY COMMISSIONERS have calendared a public meeting on Tuesday, October 21, 2014, at 6:00 p.m. in the Commissioners' Conference Room at 215 S. 4<sup>th</sup> Street, Hamilton (third floor). The purpose of this public meeting is to take public comment on sending a letter to the EPA and U.S. Army Corps of Engineers on the proposed rule on the "Definition of Waters of the U.S. under the Clean Water Act – Docket No. EPA – HQ – OW-2011 – 0880".

To help explain the issue, attached is a sample letter being sent from Ravalli County to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers. The Commissioners met in session on Friday, October 10<sup>th</sup>, to consider sending a letter of comment to these entities. However, we would like your input so we can make sure we have included the necessary information that is important to in Ravalli County.

If you have any questions on this issue, please feel free to contact the Commissioners' Office at the above number. If you are unable to attend and would like to make comment, please send comments to the above email address.

Sincerely,  
BOARD OF RAVALLI COUNTY COMMISSIONERS



Greg Chilcott, Chairman

cc: Town of Darby; City of Hamilton; City of Pinesdale; Town of Stevensville; Bitterroot Conservation District; Irrigation Districts; Bitterrooters for Planning; Farm Bureau; Right to Ranch and Farm and State Legislators

October 1, 2014

Donna Downing  
Jurisdiction Team Leader, Wetlands Division  
U.S. Environmental Protection Agency  
Water Docket, Room 2822T  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

Stacey Jensen  
Regulatory Community of Practice  
U.S. Army Corps of Engineers  
441 G Street N.W.  
Washington, DC 20314

**RE: Proposed Rule on "Definition of "Waters of the United States Under the Clean Water Act," Docket No. EPA-HQ-OW-2011-0880**

Dear Ms. Downing and Ms. Jensen:

On behalf of the Montana Association of Counties I am writing to submit comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule regarding Definition of Waters of the U.S. Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880.

Counties are tasked with the heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. This includes protecting of valuable water resources, whether as a regulated entity or regulator, to ensure that the nation's waters remain clean.

Montana is comprised of 56 counties covering over 147,000 square miles, fourth largest in the US. Montana is rural in nature with a total population of slightly over 1 million residents. Montana's economy is driven by agriculture and natural resource utilization, both dependent on our waters. If implemented as written, the proposed rules will have serious consequences for our major industries and in turn, all of Montana's economy and people.

Unlike mineral lands, neither the Organic Act of 1864, nor the Enabling Act of 1889, reserved water resources to the federal government:

- <http://courts.mt.gov/content/library/docs/organic.pdf>
- <http://courts.mt.gov/content/library/docs/enablingact.pdf>

## **In fact the Montana Constitution of 1889 established ownership of Montana's waters.**

### Article XI - Montana Constitution

**Section 3. Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

**(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.**

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

The Montana Legislature has charged the Montana Department of Natural Resources and Conservation with implementing and administering the exercise of the state's sovereign power and specifically directs that attempts to gain control of large quantities of water be resisted:

**85-1-101. Policy considerations.** It is hereby declared as follows:

(1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.

(2) The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.

(3) The state, **in the exercise of its sovereign power**, acting through the department of natural resources and conservation, shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources.

(4) The development and utilization of water resources and the efficient, economic distribution thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural, and other beneficial uses.

(5) The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

(6) The public interest requires the construction, operation, and maintenance of a system of works for the conservation, development, storage, distribution, and utilization of water, which construction, operation, and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state.

(7) It is necessary to coordinate local, state, and federal water resource development and utilization plans and projects through a single agency of state government, the department of natural resources and conservation.

(8) The greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state.

**(9) Any attempt to gain control of or speculate on large quantities of ground water of the state of Montana is not in the interest of the people and is to be restricted.**

(10) To achieve these objectives and to protect the waters of Montana from diversion to other areas of the nation, it is essential that a comprehensive, coordinated multiple-use water resource plan be progressively formulated, to be known as the "state water plan".

Furthermore, the Montana Legislature, exercising its sovereign power, has defined "public ways" and "navigable waters." Navigable waters must be navigable "in fact," not in theory or any other artificial determination:

**85-1-111. Public ways.** Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation. This section shall not be construed so as to affect or impair, in any manner, any rights acquired prior to July 1, 1901, by any person, association of persons, or corporation. The right of any person, association of persons, or corporation to take and use any water, as now provided by law, from any stream or streams for the purpose of irrigation or any beneficial or industrial pursuit shall not be abridged.

**85-1-112. Navigable waters.** (1) All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters.

(2) All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams which are navigable in fact are hereby declared navigable.

The EPA lacks authority to expand jurisdiction over water in the State of Montana.

**Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards.**

### **Concerns about Agency Consultation with State and Local Partners**

We appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, we have concerns with the process used to create this proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process.

- **Proposed rule raises federalism concerns and could impose direct and indirect costs.** Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism

considerations. However, the agencies' cost-benefits analysis—Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2014)—contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (page 2). Since states, local governments and their agencies implement and enforce CWA programs, we believe the “waters of the U.S.” definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA “programs may subsequently impose direct or indirect costs as a result of implementation...” (page 2).

- **Compliance with NEPA**

I find it ironic that the EPA has made little, if any, effort to cooperate with state and local governments in this rule making process in spite of the mandate in 42 U.S.C. §4321 et seq. (1969), the National Environmental Protection Act (NEPA), Section 101, Title I states that Congress.....

“declares that it is the continuing policy of the Federal Government, **in cooperation with State and local governments**, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

- **Proposed rule should follow, not precede, draft science report**

In addition to the aforementioned issues, we are also concerned with the sequence and timing of the draft science report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, and how it fits into the proposed “waters of the U.S.” rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

- **Comment period insufficient for review of complex CWA issues**

Because of the complexity of the proposed rule, we are further concerned that it only allows 90 days for review and comment. In order to fully understand what the rule does (and does not do), we recommend that the agencies adopt a multi-step consideration process. The Administration should, at the very least, reopen the comment period for 90 days after EPA’s Connectivity report is released and updates are made to the proposed rule based on the final report.

- **Agency’s cost-benefit analysis assumptions and methodologies are flawed**

As previously mentioned, while the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may be flawed. Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agencies have indicated that 2.7 percent of new waters will be considered jurisdictional under the Section 404 program. However, the data used to compute costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The

economic analysis does not acknowledge or recognize that, under the proposal, additional waters, currently not jurisdictional (and thus, no permits have been submitted), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs or benefits.

- **Proposed definitions are unclear**

Key terms used by the “waters of the U.S.” definition—tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed—are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays.

**We respectfully request that the agencies consider suspending the current public comment period and re-releasing the proposal, with the updated economic analysis (based on the comments received), after the science-based connectivity report is issued.** This approach would be welcomed by local governments.

**Tributaries i.e. Ditches (See page 22201-F.Tributaries)**

Counties own and operate a number of public infrastructure ditches—roadside, flood control channels, drainage conveyances and stormwater; these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. **The proposed “waters of the U.S.” regulation from EPA and the Corps could have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction.**

Additionally, the EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definitions are unclear. The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a “water of the U.S.,” regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a “water of the U.S.” However, **key terms like “uplands” and “contribute flow” are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.”**

A public infrastructure ditch system—roadside, flood or stormwater— is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

Please consider the following:

- Montana’s 56 counties maintain over 64,000 miles of county roads, along with thousands of culverts and bridges to convey water under road beds.
- The proposed rule states that some ditches would not be considered “waters of the U.S.” if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow OR ditches that do not contribute flow either directly or through another water. How can a county prove its ditches do not “contribute to flow”? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.”?
- Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal?

- How can a county determine if the county road borrow pit is an exempt ditch or a jurisdictional ditch?



### **Section 404 Permits**

In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. **The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined.**

Additionally, ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. We are concerned that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. **While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted.** Whether or not a ditch is regulated under Section 404 has significant financial implications for our counties.

The Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. Permitting processes that used to take a matter of hours or days not takes months. This puts our states and counties and their relevant agencies in a precarious position—especially those who are balancing small budgets against public health and safety needs.

### **Stormwater**

Since stormwater management activities are not explicitly exempt under the proposed rule, we are concerned that man-made conveyances and facilities for stormwater management could now be classified as a “water of the U.S.” Some counties and cities own Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes and gutters that flow into a “water of the U.S.” and are therefore regulated under the CWA Section 402 stormwater permit program. **There is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a “water of the U.S.” Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well.** Even if the agencies do not initially

plan to regulate an MS4 as a "water of the U.S.," they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

Further, stormwater management is not funded as a water utility, but rather through a county general fund or road fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other mandated government services. Montana's counties' property tax revenues are capped, therefore they have no capacity to derive additional revenue to meet any added costs so funding would be diverted from other essential services such as public safety.

We are concerned the proposed rule does not provide certainty for Montana's counties. I urge the Administration to remand the rule until our concerns are addressed and re-release a revised proposed rule based on the concerns raised by state and local government stakeholders. Finally, I recommend the agencies reopen the comment period after the connectivity report is finalized and updates are made to the "waters of the U.S." proposed rule based on the report.

Thank you for considering these important issues. If you have any questions, please do not hesitate to contact me at the contact information below.

Sincerely,

Ravalli County Board of County Commissioners

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Greg Chilcott, Chairman

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Jeff Burrows, Member

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Ron Stoltz, Member

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Suzy Foss, Member

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J.R. Iman, Member

cc:

The Honorable U.S. Senator, Jon Tester

The Honorable U.S. Senator, John Walsh

The Honorable U.S. Congressman, Steve Daines

The Honorable Montana Governor, Steve Bullock

Julie Ufner, Associate Legislative Director, National Association of Counties (NACo)