

# COUNTY OF RAVALLI



October 30, 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 Ravalli County, Montana, we are submitting comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the proposed rule regarding Definition of Waters of the U.S. Under the Clean Water Act, Docket No. EPA-HQ- OW-2011-0880.

Ravalli County is responsible to provide for the health, welfare, and safety of our citizens, as well as maintain and improve their quality of life. This includes the protection of our valuable water resources, whether as a regulated entity or regulator, to ensure that the waters remain clean.

The Montana State Legislature represents the broad expanse of our state, its abundant resources and meets bi-annually for 90 days. The 64<sup>th</sup> Legislature will convene January 5, 2015 and is scheduled to conclude April 27, 2015. We respectfully request that the comment period be extended through May 1, 2015 to allow Montana's legislature an opportunity to provide its comment on the Proposed Rule.

The State of Montana is comprised of 56 counties covering over 147,000 square miles, the fourth largest state 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 proposed, the amended rules will have serious consequences for state and local governments, agricultural producers, landowners, developers and entrepreneurs, small and large businesses, essentially all contributors to Montana's economy.

The federal government never reserved to itself the ownership of water as it did the rights to certain minerals. This distinction was recognized at the time the western states (such as Montana) were authorized, and continues to be true today.

### **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.

Historically, federal jurisdiction over surface water has been limited to navigable rivers. Other waters are regulated under state law. Navigable rivers were those used or susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Ball, 77 U.S. 557, 563 (1870).

The Bitterroot River has traditionally been considered navigable, but not its tributaries.

The proposed new definition of waters of the U.S. includes: rivers useable for interstate commerce, tributaries to such rivers, and waters adjacent to such rivers or their tributaries. Adjacent waters include those that are bordering, contiguous or neighboring, with neighboring being given a broad interpretation to include those within the same riparian area or floodplain, and those with a shallow subsurface hydrologic connection.

There are recognized exceptions under the rule, such as: waste treatment plants, ditches (provided they meet the definition of a ditch—many irrigation ditches do not), irrigated areas, artificial lakes, swimming pools, and ornamental waters.

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.** The effect of this proposed new rule would be to expand EPA jurisdiction under the Clean Water Act to much of the surface water in Ravalli County. The Bitterroot River would come under the act directly or as a tributary to a river useable for interstate commerce (the Clark Fork, which is in turn a tributary to the Columbia). The mountain streams in the valley would also come under the jurisdiction of this act as tributaries to the Bitterroot River, as well as the major ditches supplying irrigation water to agricultural producers. Although the proposed definition purports to exclude ditches, only those ditches that: (1) drain only uplands and have less than perennial flow, or (2) do not contribute flow, directly or indirectly, to waters of the U.S. are excluded. Most of the major canals and ditches in the County probably fail to qualify for those exclusions because they are for the purpose of transporting irrigation water rather than draining wetlands, have some perennial flow, or contribute flow, directly or indirectly, to the Bitterroot River or its tributaries.

### **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**

We 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.

### **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.

### **Hydrologic connectivity between surface waters and subsurface aquifers**

If surface waters in the County are not captured by the proposed new definition in any other way, they may be captured by being deemed "adjacent" to the Bitterroot River or its tributaries. As mentioned, adjacent includes any waters connected by a shallow subsurface hydrologic connection such as an aquifer. Some hydrologists suggest that all of the significant surface waters in the Bitterroot Valley connect hydrologically to the Bitterroot River via subsurface aquifers. Thus, arguably, they are waters of the U.S. under the Clean Water Act.

### **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.** We believe 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 now take 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 Local Governments 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 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

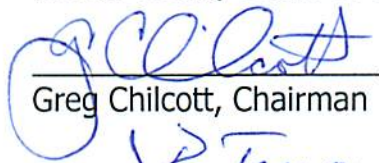
have no capacity to derive additional revenue to meet any added costs so funding would be diverted from other essential services such as public safety.

We are concerned the proposed rule does not provide certainty for Montana's counties. We 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, we 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 any member of our board at 406-375-6500, or by email at [commissioners@rc.mt.gov](mailto:commissioners@rc.mt.gov)

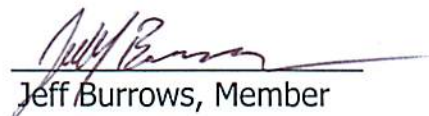
Sincerely,

Ravalli County Board of County Commissioners

  
Greg Chilcott, Chairman

  
J.R. Iman, Member

  
Ron Stoltz, Member

  
Jeff Burrows, Member

  
Suzy Foss, 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  
The Honorable Montana Attorney General Tim Fox  
The Honorable Montana State Senator, Fred Thomas  
The Honorable Montana State Senator Scott Boulanger  
The Honorable Montana State Representative Ed Greef  
The Honorable Montana State Representative Nancy Ballance  
The Honorable Montana State Representative Ron Ehli  
The Honorable Montana State Representative Pat Connell  
Julie Ufner, Associate Legislative Director, National Association of Counties (NACo)  
Harold Blattie, Executive Director, Montana Association of Counties