

FINAL POLICY – MADISON CONSERVATION DISTRICT

ENFORCEMENT ACTIONS UNDER THE NATURAL STREAMBED AND LAND PRESERVATION ACT OF 1975

I. SCOPE

This document establishes the basis for guidelines for the procedures and for facilitating the resolution of complaints of alleged 310 violations and the process the conservation district should follow to seek judicial enforcement under Mont. Code Ann. §§ 75-7-122 and -123. The Conservation district will first attempt to negotiate a resolution of a violation. If this is unsuccessful and the violation continues, judicial enforcement may be required. When the violator refuses to comply with a notice and Order from the conservation district and the conservation district decides to seek judicial enforcement of its order, seek a temporary restraining order, injunctive relief, or to collect a civil penalty, the conservation district will request legal services from the county attorney or a legal service provider for the conservation district to petition the district court.

II. AUTHORITY

Under Mont. Code Ann. §§ 75-7-122 and –123 the conservation district may impose a penalty and may seek judicial relief upon finding that a person has:

1. engaged in a project without prior approval;
2. engaged in an activity outside the scope of the written consent of the supervisors;
3. violated the emergency procedures provided for in § 75-7-113; or
4. placed a junked motor vehicle or the body portion of a junked motor vehicles between the channel banks of any stream or has reinforced the banks of a stream with junked motor vehicles or the body portion of junked motor vehicles.

Further, the conservation district may assess a civil penalty on the violator under Mont. Code Ann. § 75-7–123. The civil penalty may not exceed \$500.00 a day for each day of the violation. The conservation district may also request the county attorney to review the matter for prosecution as a misdemeanor subject to a criminal (misdemeanor) penalty not to exceed \$500.00. The conservation district must elect between a criminal (misdemeanor) penalty or a civil penalty.

The conservation district may seek judicial relief to declare a public nuisance and subject the violator to proceedings for immediate abatement and/or petition the court to enforce and collect the civil penalty established by the board of supervisors.

III. VIOLATIONS FOR ENFORCEMENT

When determining which violations will be pursued, the conservation district will consider the magnitude and significance of the violation, its effect on the public health or the impact of pursuing enforcement. Other considerations include the availability of staff and the existence of a written complaint. A written complaint is always preferred. However, there may be a compelling reason for initiating enforcement without one.

IV. CIVIL PENALTY

The conservation district has the authority to assess a civil penalty of up to \$500.00 a day for violations to the Natural Streambed and Land Preservation Act. When going into court the conservation district must justify the amount of the civil penalty. Therefore, where the conservation district assesses a civil penalty, all conservation district costs shall be identified and maintained to establish justification in the event judicial proceedings are initiated. All staff associated with the investigation and determination on enforcement shall keep a record of their time and costs. This must include correspondence, other communication costs, field investigation costs, and staff time. When deemed appropriate the conservation district will also consider the economic value of the violation to the violator. If the violator's continued violation will probably net the violator more benefit than the cost of the civil penalty, the conservation district must adjust the civil penalty to take this into consideration.

V. RESOLUTION

When a conservation district receives a complaint alleging a violation, the conservation district will follow the steps below.

Step 1. Written Complaint

Request that the complainant submit a written complaint on Form 274 **Exhibit A**. The complaint should specify the nature of the alleged violation, who is involved, where it is taking place, and when it occurred.

Step 2. Advice to Complainant

Advise the complainant that enforcement action by the conservation district may depend on the complaining party's willingness to provide testimony. Further, enforcement will depend on the facts of the case and the availability of resources.

Step 3. Telephone Contact

Upon receipt of the written complaint, the district should seek to contact the alleged violator by telephone and advise the person of the complaint.

Step 4. Letter 1 - Notice of Alleged Violation

If unsuccessful in resolving the problem by direct telephone contact, send Letter 1 (**Exhibit B**) as soon as possible to the alleged violator. The letter will advise the alleged violator that the conservation district has received a written complaint specifically addressing his/her alleged violation. Although not meant to assert any conclusion regarding wrongdoing, the letter will notify the alleged violator that a field investigation will be conducted and that if a violation is occurring it must cease immediately. If a violation is documented upon investigation, the conservation district may assess a civil penalty up to \$ 500 per day for each day the violation takes place. It will further explain that the conservation district may seek judicial relief to abate the alleged violation if the violator does not voluntarily agree to a mitigation plan with the conservation district. The letter will encourage the alleged violator to contact the conservation district about trying to resolve the issue immediately. This letter should be sent by certified mail.

Step 5. Field Investigation

Conduct a field investigation as soon as possible if the complaint remains unresolved. Never use more than two supervisors on a field investigation to avoid any issue related to a public meeting. A "team" is not required to conduct an investigation, but the district can invite the alleged violator and a member of the Department of Fish, Wildlife and Parks to be present at the field investigation. The alleged violator is not an investigator and may not file any findings with the Board of Supervisors. At the invitation of the Board, the representative of the Department of Fish, Wildlife and Parks may be an investigator and may file findings. If possible, obtain the permission of the landowner to conduct the investigation; otherwise conduct the investigation from a location that does not require the landowner's permission. Document such matters as the time, date, location, nature of violation, and person(s) allegedly causing the violation. Photographs, videos, flow records, and observations by witnesses are good sources for documentation. In the course of conducting the investigation, it is essential to acquire convincing documentation affirming that (a) the alleged violation prompted a valid complaint, and (b) there is a violation of the Montana Natural Streambed and Land Preservation Act. Prepare a report

of each investigator's findings. Begin documenting the time and costs associated with enforcement.

Step 6. No Violation

If the field investigation does not verify a violation, send a second letter to both the alleged violator and the complainant advising them of the conservation district's findings.

Step 7. Violation Verified

Whenever a field investigation affirms a violation, the board of supervisors must decide whether to issue an Order assessing a civil penalty.

If the violator acknowledges a violation of the Natural Streambed and Land Preservation Act and is willing to work with the conservation district to correct the violation, issuing an Order may be postponed. However, to provide documentation, send Letter #2 (**Exhibit C**) setting forth the results of the investigation, the course of action required to rectify the violation, and a deadline date for taking the corrective action. Further, notice shall be included where necessary that the conservation district will follow up this notice with an investigation within 10 days to confirm whether the violator has corrected the violation. Letter #2 must be sent certified with return-receipt requested.

If the violator was not responsive to Letter #1 and is not cooperative in correcting the violation, the board of supervisors must decide whether to issue an Order for assessing a civil penalty. The investigator should send the investigation report and a recommendation to the board of supervisors. The board of supervisors should consult with the investigator and with the legal service provider. If the decision is to issue an order, then proceed as outlined in section VI.

VI. ORDER FOR CIVIL PENALTY AND NOTICE OF CONSERVATION DISTRICT PETITION FOR JUDICIAL ENFORCEMENT

If the board of supervisors determines that issuance of an Order is appropriate and will be enforced, the board of supervisors shall send Letter #3 (**Exhibit D**). Enclose the Order of the Conservation District (**Exhibit E**) assessing a civil penalty not to exceed \$500.00 per violation per day. The letter shall identify the specific violation, the required corrective action, the conservation district finding on noncompliance, the date the civil penalty commences, and notice of the conservation district's intent to seek judicial enforcement of the civil penalty. Further, advise the violator that an inspection of the violation will be conducted within ten days of receipt of the Order. If the violator takes corrective action before that time he or she should contact the conservation district immediately so they can confirm it. Letter #3 must be mailed certified with return-receipt requested.

VII. PETITION TO COURT

When the violator does not respond to the Order or take the corrective action the conservation district will seek judicial enforcement. The conservation district must prepare a report documenting the follow-up investigation and the noncompliance. Enforcement action will be initiated with legal service provider preparing the necessary legal documents. The conservation district shall provide the legal service provider with the following affidavits:

- 1) Affidavit of the Conservation District Field Investigator (**Exhibit F**) (prepared by the field investigator identifying what steps have been taken to obtain voluntary compliance with the Natural Streambed and Land Preservation Act, including a copy of the field investigation report),

Affidavit Regarding Enforcement Costs (**Exhibit G**), and, if this action against a violator was initiated by a complaint. The legal service provider must keep the conservation district advised of any court actions. Any additional information requested of the conservation district by the legal service provider or the court shall be gathered or prepared by the conservation district.

310 VIOLATION COMPLAINT SUMMARY

CONSERVATION DISTRICT:		NUMBER:	
NAME OF ALLEGED VIOLATOR:			
COMPLAINANT NAME:			
PHONE CALL RECEIVED?	Yes	No	Date: _____
WRITTEN COMPLAINT RECEIVED?	Yes	No	Date: _____
FIELD INVESTIGATION NEEDED?	Yes	No	Date: _____
RESOLVED?		Yes	No Date: _____
SOURCE			

NATURE OF COMPLAINT

RESOLUTION SUMMARY

EXHIBIT A

Date Received _____

CONSERVATION DISTRICT COMPLAINT FORM 310 VIOLATION

<p><u>Name of Party Filing Complaint:</u></p> <p>_____</p> <p>Address:</p> <p>_____</p> <p>City _____, State _____ Phone _____</p>
<p><u>Name of Party Causing the Alleged Violation:</u></p> <p>_____</p> <p>Address:</p> <p>_____</p> <p>City _____, State _____ Phone _____</p> <p>_____</p>

1. **Stream name:**

(USGS named stream, unnamed tributary to a USGS named stream)

2. **Location of alleged violation:** (Attach a scaled map or aerial photo showing the location of your diversion and use and the other appropriator's diversion and use.)

___¹/₄___¹/₄___¹/₄ Sec. _____ Twp. _____ N/S Rge. _____ E/W County _____

3. **Describe the nature of the suspected violation: (Please provide photos.)**

4. **Describe when the violation was observed and, if known, when it first occurred.**

5. **Signature of Complainant:** _____ **Date** _____

EXHIBIT B

LETTER 1

Date

Dear _____:

As indicated to you by telephone on _____, 20__, the Madison Conservation District has received a complaint from _____ alleging that you are [*facts of alleged violation - the specific dates and locations of where the alleged violation is occurring.*]

Since this matter remains unresolved we need to learn more on the facts of the situation. The Conservation District hereby gives you notice that the Conservation District will be conducting an on-site investigation of the complaint in the next 10 days. [Note: this letter may be used to invite the alleged violator to be present at the investigation. If the alleged violator is the landowner, this letter may be used to request permission to go on to the land to conduct the investigation].

If you are found to be in violation of the Natural Streambed and Land Preservation Act, you are subject to a civil penalty in an amount not to exceed \$500 per violation, and each day of violation constitutes a separate violation. Mont. Code Ann. § 75-7-123. In addition, this Conservation District has the authority under Mont. Code Ann. §§ 75-7-122 and -123 to take you to court to collect the civil penalties imposed against you and to require mitigation or abatement.

Therefore, if the alleged activities are occurring they must cease immediately.

Please contact this office immediately if you have any information that can help resolve this matter prior to the investigation being conducted.

Sincerely,

District Administrator

cc: [Board of Supervisors]
[Legal Service Provider]

bcc: [complainant]

EXHIBIT C

LETTER 2

Date

Dear _____:

The Madison Conservation District has completed its investigation of the complaint from _____ and finds that you are *[specify violation - e.g. initiating a project without written consent of the supervisors]*. This activity is a violation of the Natural Streambed and Land Preservation Act. Enclosed is a copy of our report.

You must cease this activity immediately and *[specify any other requirements - e.g. restore the damaged stream pursuant to a mitigation plan approved by the board of supervisors]*. Within the next ten days we will be out again to confirm whether you continue to be in violation of the law. *[In addition, a mitigation plan must be filed on or before _____, 20__ (20 days from date)]*.

If the Conservation District finds you remain in violation of the law, the Conservation District will assess you a \$500 civil penalty for each day there is a violation. In addition, this Conservation District has the authority under Mont. Code Ann. §§ 75-7-122 and -123 to take you to court to collect the civil penalties imposed against you and ultimately to require the stream be restored and your action abated.

Sincerely,

District Administrator

cc: [Board of Supervisors]
[Legal Service Provider]

bcc: [complainant]

EXHIBIT D

LETTER 3 (encloses Order)

Date

Dear _____:

This letter concerns [*specify violation - e.g initiating a project without written consent of the supervisors*].

As you know, the Madison Conservation District by letter of _____, 20__, demanded that you cease the activity immediately. You were also informed of the civil penalty that could be assessed under Mont. Code Ann. § 75-7-122 and -123 for noncompliance.

On _____, 20__, the Conservation District investigated the allegations made against you. The investigation established that [*specify what investigation showed - e.g., you initiated a project without written consent of the supervisors. This activity is in violation of the Natural Streambed and Land Preservation Act which requires written consent of the board of supervisors before any physical alteration or modification of a stream is made that results in a change of the state of the stream.*]

Pursuant to Mont. Code Ann. § 75-7-122 and the enclosed Order you are hereby assessed a civil penalty of \$ _____ per day for each day your activity continues commencing on [*date*]. Each day of violation constitutes a separate offense. Nonpayment of the assessed civil penalty to the Conservation District will be enforced for collection in the appropriate court.

Contact this office immediately to resolve this matter. This situation will be monitored closely. A further inspection will be conducted after your receipt of this Order to confirm your compliance with the Order. Your failure to contact this office prior to _____, 20__, to resolve this matter will result in judicial enforcement of the Order.

Sincerely,

District Administrator

cc: [Board of Supervisors]
[Legal Service Provider]

bcc: [complainant]

**ORDER
OF THE
MADISON CONSERVATION DISTRICT**

TO:

Under authority vested in the Madison Conservation District, you were notified pursuant to Mont. Code Ann. §§ 75-7-122 and –123 that:

Montana law provides that any person who:

is subject to a civil penalty not to exceed \$500 per violation (and that each day of violation constitutes a separate violation). The Madison Conservation District hereby assesses you a \$_____ a day civil penalty for each day of the violation described above commencing _____.

The Madison Conservation District will seek judicial enforcement of this Order and seek such other relief as may be necessary and appropriate pursuant to Mont. Code Ann. §§ 75-7-122 and –123.

DONE AND DATED THIS _____ DAY OF _____ 20____.

Chair, Board of Supervisors

**Legal Service Provider
Name
Address
Phone Number**

**COUNSEL FOR MADISON
CONSERVATION DISTRICT**

**IN THE JUSTICE COURT
IN AND FOR THE COUNTY OF MADISON**

STATE OF MONTANA ex rel.)	
MADISON)	
CONSERVATION DISTRICT)	Civil No.
Petitioner,)	
)	
)	CONSERVATION DISTRICT
)	AFFIDAVIT
v.)	REGARDING
)	ENFORCEMENT
)	COSTS
)	
Respondent.)	

_____, being duly sworn, swears the following to be true:

1. I am _____ [position and Conservation District address].
2. My duties at the MADISON CONSERVATION DISTRICT include collecting and verifying information regarding the amount of time spent by MADISON CONSERVATION DISTRICT employees in enforcement actions.
3. For the above-entitled case, I requested from each MADISON CONSERVATION DISTRICT employee and supervisor an accounting of the time they spent pursuing the enforcement of the Natural Streambed and Land Preservation Act. I then took the amount of time spent by each respective

employee and supervisor times the amount of their hourly wage on file with the MADISON CONSERVATION DISTRICT payroll technician. Finally, I figured the total amount expended by the MADISON CONSERVATION DISTRICT by adding the dollar amounts determined for each employee and conservation district supervisor as set out below:

**MADISON CONSERVATION DISTRICT TIMESHEET ON ENFORCEMENT
ACTIVITIES**

Date	Case	Employee or Supervisor	Time Expended	\$/hour

Subtotal _____
Admin. costs @ x % _____
TOTAL _____

The enforcement of the Natural Streambed and Land Preservation Act in

this case cost _____. The MADISON CONSERVATION DISTRICT seeks a civil penalty pursuant to Mont. Code Ann. § 75-7-123. FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS ____ DAY OF ____ 20 ____.

[Name & Signature of MADISON CONSERVATION DISTRICT employee]

Subscribed and sworn to me this ____ day of _____, 20__, by the above-named _____, known by me to be the person named as the affiant in the above affidavit.

NOTARY SEAL

Print Name:
NOTARY PUBLIC for the State of Montana
Residing at Ennis, Montana
My Commission Expires _____

EXHIBIT G

Legal Service Provider
Name
Address
Phone Number

**COUNSEL FOR MADISON
CONSERVATION DISTRICT**

**IN THE JUSTICE COURT
IN AND FOR THE COUNTY OF MADISON

STATE OF MONTANA ex rel.)	
)	
_____)	Civil No.
CONSERVATION DISTRICT)	
Petitioner,)	
)	
)	AFFIDAVIT OF
)	INVESTIGATOR
v.)	
)	
)	
Respondent.)	

_____, being duly sworn, swears the following to be true:

1. I am _____ [position and MADISON DISTRICT address].
2. I [background, education & training].
3. My duties at the MADISON CONSERVATION DISTRICT include investigating complaints of violations of the Natural Streambed and Land Preservation Act. I have been in this position for ____ years.
4. [Set out facts of alleged violation, the MADISON CONSERVATION DISTRICT investigation and the investigator's conclusion. Attach a copy of the field investigation report. (Do not discuss here what happened as far as

noncompliance after the letter and order were sent out - that is being covered in the succeeding paragraph.) Remember that the Judge is busy, knows nothing about the case, and wants to come up to speed on the facts as quickly as possible, so write what happened in the clearest, most concise manner possible.]

5. The MADISON CONSERVATION DISTRICT attempted to obtain voluntary compliance by [set out what was done. Attach a copy of any letters sent to the violator. Describe what the violator did or did not do after their receipt of the MADISON CONSERVATION DISTRICT warning letter].

6. Since voluntary compliance was not successful, the MADISON CONSERVATION DISTRICT presented [the violator] with a _____ CONSERVATION DISTRICT Order dated ordering them to [describe it]. [Attach a copy of the MADISON CONSERVATION DISTRICT Order].

7. Compliance is not taking place, and the Montana Natural Streambed and Land Preservation Act continues to be violated.

8. The MADISON CONSERVATION DISTRICT seeks to obtain a civil penalty for the violation of the Natural Streambed and Land Preservation Act described above. Mont. Code Ann. § 75-7-123 provides:

Penalties -- restoration. (1) A person who initiates a project without written consent of the supervisors, performs activities outside the scope of written consent of the supervisors, violates emergency procedures provided for in 75-7-113, or violates 75-7-106 is:

...

(b) subject to a civil penalty not to exceed \$500 for each day that person continues to be in violation.

(2) Each day of a continuing violation constitutes a separate violation.

...

(3) In addition to a fine or a civil penalty under subsection (1), the person:

(a) shall restore, at the discretion of the court, the damaged stream, as recommended by the supervisors, to as near its prior condition as possible; or

(b) is civilly liable for the amount necessary to restore the stream.

In addition, Mont. Code Ann. § 75-7-122 provides:

Except for emergency action, a project engaged in by any person without prior approval or activities performed outside the scope of written consent of the supervisors, as prescribed in this chapter, is declared a public nuisance and subject to proceedings for immediate abatement.

9. The MADISON CONSERVATION DISTRICT as of the date of this affidavit seeks a civil penalty of \$ _____ dollars (\$ _____), and seeks an additional \$500 a day for each additional day's violation between today and the date of hearing or decision in this matter.

10. The MADISON CONSERVATION DISTRICT seeks that the activity be declared a nuisance and be immediately abated and the damaged stream be restored pursuant to the recommendation of the board of supervisors attached hereto as Exhibit A.

11. This enforcement and penalty action was brought against [violation] only after careful investigation and bona fide attempts to obtain voluntary compliance.

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS ____ DAY OF ____ 20 ____.

[Name & Signature of MADISON CONSERVATION DISTRICT employee]

Subscribed and sworn to me this _____ day of _____, 20____, by the above-named _____, known by me to be the person named as the affiant in the above affidavit.

NOTARY SEAL

Print Name:
NOTARY PUBLIC for the State of Montana
Residing at Ennis, Montana
My Commission Expires_____

[IF THE MADISON CONSERVATION DISTRICT FIELD INVESTIGATOR IS NOT THE SAME PERSON BOTH DOING THE INVESTIGATION AND THE LETTER WRITING, AN ALTERNATIVE TO THE ABOVE AFFIDAVIT WOULD BE TO HAVE:

**1) an affidavit of the investigator concerning his or her investigation, and
2) an affidavit of whoever sent out the MADISON CONSERVATION DISTRICT enforcement letter and Order.**

A DRAFT OF THIS SHOULD ALWAYS BE FAXED OR SENT E-MAIL TO THE MADISON CONSERVATION DISTRICT LEGAL SERVICE PROVIDER BEFORE BEING FINALIZED.]