



Flathead Conservation District
133 Interstate Lane, Kalispell, MT 59901
www.flatheadcd.org 406-752-4220

CALL TO ORDER & ATTENDANCE: Chair Ronald Buentemeier called the November 28, 2018, 310 Work Session meeting to order at 9:00 A.M. in the conference room.

Board members present:

Ronald Buentemeier, Chair; Pete Woll, Vice Chair; Dean Sirucek, Secretary/Treasurer; John Ellis, Supervisor; Mark Siderius, Supervisor; Verdell Jackson, Supervisor, being a quorum of the Board.

Board members absent: Absence is excused: Lori Curtis.

Also in attendance were: Valerie Kurth and Hailey Graf, FCD Staff; Leo Rosenthal and Kenny Breidinger, FWP.

PUBLIC COMMENT:

No public comments were made.

310 Work Session:

Ronald Buentemeier opened the meeting and described a summary, put together by Valerie Kurth, regarding previous conversations and issues that warrant discussion.

Kenny Breidinger began the discussion by asking for clarification on determining immediate bank and mean highwater mark. Ronald described how he determines mean highwater mark by using a change in the vegetation, as described in the Adopted Rules. Once that is found, immediate bank and the area of the District's jurisdiction is often approximately twenty feet farther inland, except in areas with steep banks. The group discussed the pros and cons to and the confusion over using twenty feet as a guideline for determining immediate bank. Ronald reminded the board that, according to Don MacIntyre's recommendations, we cannot include a specific distance in the Adopted Rules.

Lori Curtis was unable to attend the meeting but provided written recommendations that included more clarity on determining immediate bank and jurisdiction.

Verdell Jackson described a recently permitted project approximately twenty-three feet from the mean highwater mark as an example.

Kenny expressed that, in his experience, twenty feet can sometimes work as a guideline, but there are numerous situations that are more challenging. He provided examples of past

projects where it was difficult to determine the immediate bank and jurisdiction due to topography, river morphology, or vegetation. He expressed interest in having a written document to help make decisions during onsite inspections.

Mark Siderius suggested that, while we can't specify a distance in the Adopted Rules, we could develop some best management practices, similar to what the FWP game wardens use. This could include using the change in vegetation as Ronald suggested, but would provide more guidance for challenging situations, such as areas with cattails or reed canary grass or areas within the floodplain.

John Ellis expressed concern over the public's understanding of the Adopted Rules and where the District's jurisdiction is.

Leo Rosenthal showed a diagram from the Montana DNRC Stream Permitting Book. The diagram shows the different areas of a river and floodplain to provide guidance on these issues. As a guiding document for Conservation District Supervisors, Leo suggested the diagram be used to help determine immediate bank and jurisdiction. He described that the District has the authority to take jurisdiction of any project with the stream channel, as shown in the diagram. John agreed and indicated he liked the diagram.

The board discussed challenging situations where, due to river morphology, there are multiple river channels or relic channels present. Dean described examples on the North Fork of the Flathead River. Leo provided additional examples of situations where a change in vegetation may not be indicative of the immediate bank.

Dean suggest possible future changes to the stream should also be considered, however, Verdell expressed concern over the difficulty in predicting changes.

Mark described different types of projects as being more challenging. He provided examples from past projects and expressed concern that if the permitting process is made too difficult, the public may avoid the process altogether.

Going back to the diagram in the DNRC Stream Permitting Book, Ronald question if the District would have jurisdiction to the extent indicated by the diagram. Leo agreed that not every situation would warrant jurisdiction of the area depicted in the diagram but reiterated the immediate bank can be either closer or farther away than twenty feet from the mean highwater mark. Kenny provided several examples where the District has taken jurisdiction at distances greater than twenty feet from the mean highwater mark.

Kenny expressed concern over the quality and quantity of habitat that is protected by only twenty feet of riparian area. Ron asked for clarification and Dean responded by referencing sections of the 310 Law and by drawing a diagram. He explained that, in his experience, riparian areas along a waterway can vary in depth from 15 to 150 feet. He emphasized that the board needs the discretion to make decision based on this variation. Ronald asked Dean for his interpretation Ninemile Creek, as an example. Dean responded that, depending on your location, the conditions vary.

Using a recently permitted project as an example, Kenny described the challenges in determining immediate bank when there is evidence the channel has moved over time and

there are benches in the topography. Mark described challenges in assessing projects with steep banks. He expressed that the Adopted Rules provide guidance for the majority of projects but provide little guidance for these more challenging projects. He emphasized, however, his doubt that adding to or modifying the Adopted Rules at this time would be beneficial. There was general agreement from the board, and Leo suggested the diagram could, instead, be useful. Dean suggested the diagram could also be useful with public education.

The board discussed the possible risks and complications with taking jurisdiction of projects that are farther out. Mark reiterated taking jurisdiction of these types of projects will not be used as a means to deny permits. Rather, the District will follow the established Adopted Rules for determining permitting. Pete Woll suggested that when the District takes jurisdiction over larger areas, we should include additional information and justification in the Team Member Report. There was general agreement among the board. Valerie Kurth added that, based on communications with Don MacIntyre, the board has discretionary power under the 310 law to make decisions.

Pete and John described another purpose of the Adopted Rules as providing information to the public and suggested the diagram be used to supplement that information. Hailey Graf suggested the diagram be added to the District's website and brochures. Mark also suggested it be used with advertisements. The board further discussed the diagram and suggested additional language be used with the diagram to provide explanation.

The board discussed the value of conducting pre-application site visits to help landowners determine whether or not they need a permit. There was general agreement that these site visits can be beneficial. Ron reminded everyone there is specific form that can be used for pre-application site visits.

The group discussed communication strategies between the team members and the rest of the board. Mark suggested that during challenging determinations, District Supervisors and FWP can have an additional or separate meeting to discuss jurisdiction and find common ground. Pete also suggested that Supervisors avoid using jargon when communicating with the public.

Hailey provided a summary of what the group had discussed so far. There was general agreement that the District move forward with creating additional education and outreach materials using the diagram. Hailey agreed to present some materials at the next 310 meeting in December.

After a short break, Ron moved the discussion on to the next item. Dean suggested there are several changes that could be acted on and applied without modifying the Adopted Rules. The group discussed minimum culvert depth as described in the Adopted Rules and agreed that deeper depths could be appropriate in certain circumstances. Dean also asked for clarification on docks attached to decks that overhang the waterway. Kenny described that he interoperates decks that hang over the water as docks. Mark agreed and provided the example that if a deck hangs 4 feet over the river then any additional dock can only be 16 feet, for a total of 20 dock feet. Pete and Ronald agreed and suggested that past decisions and the information in those Team Member Reports can be used as references for decision-

making. Pete asked for clarification about the Adopted Rules address floating docks vs. pier-type docks. Ron responded that the Adopted Rules only encourage floating docks.

Pete reiterated that the District needs to document justification when making decisions. Leo agreed that documenting the justification would help prevent a reliance on past permits being used as precedent. Mark added that modifications to the Adopted Rules negate precedent of projects done under previous versions of the Adopted Rules. Hailey provided an example from another conservation district where they granted some permits at first but declined other permits later. That conservation district was sued but won the case when the court determined precedent shouldn't be used to make decisions. Leo added that the District shouldn't let the fear of litigation determine their decisions.

Dean moved the conversation on to the definition of natural perennial-flowing streams, as described in the Adopted Rules. He described that we don't currently have any language in the rules that deal with when a perennial stream goes underground due to the glacial substrate. John provided language from definition forty-two in the Adopted Rules. There was general agreement that this language covers this type of situation.

Mark moved the discussion on to rip rap. He described a past project that used rip rap farther from the stream than normal to avoid damaging vegetation and to protect infrastructure from floods. He described that in these situations the District should take jurisdiction of the project, even though it is farther from the stream, but provide additional information in the Team Member Report. Ron added that in some situations they didn't take jurisdiction but still provided more information in the Team Member Report. Kenny suggested that not all pre-rip rap should be allowed but agreed that in some situations it can be useful, such as preventing the loss of vegetation in Mark's example. He also expressed concern that there have been several situations where pre-rip rap has accelerated erosion and he fears these projects are being done to avoid permits or the mitigation required by Army Corps of Engineers.

Moving the conversation on, John asked if the rules cover concrete pads for launching kayaks along the rivers. The board stated that yes, it is the same as boat launches. He also asked if the Adopted Rules cover both large and small trails. The board affirmed that, yes, they do. Mark suggested that we could do more outreach about the need to get a permit for walkways, stairs, and trails.

The board discussed several past projects conducted in Whitefish and agreed that additional education and outreach is necessary. The group discussed options including additional communication with the City of Whitefish, reaching out to engineers and contractors, and providing information to area realtors and the Flathead County Builders Association. District Staff agreed to develop additional, updated outreach materials.

Kenny asked for the boards input regarding stream gauge maintenance necessitated by beaver activity. He asked for clarification about beaver trapping requirements under the Adopted Rules. Mark responded that a permit would be necessary for the work and that if the maintenance continued for the duration of the permit, the beavers would likely leave.

Dean asked if the county attorney has looked into fining a contractor as well as the landowner. Ron described that it is only the landowner that gets fined. Dean provided

examples where contractors that have been the one that did the work and only the landowner was fined.

Leo provided a suggestion that the District consider inviting the county attorney to 310 meetings to provide input on jurisdiction and legal issues. There was general agreement from the board that having an attorney present for certain meetings could be helpful but isn't necessary for every meeting.

The next 310-meeting is scheduled for Monday, December 10, 2018, 7:00 P.M. in the conference room of the USDA building at 133 Interstate Lane, Kalispell, MT.

Adjournment: Mark motioned "to adjourn." John seconded. Motion carried unanimously. As there was no further business, the meeting was adjourned at 11:45 A.M.

Submitted By:

Hailey Graf,
Assistant Conservationist

Valerie Kurth,
Resource Conservationist

Minutes approved by FCD Board motion made on:

<u>1/14/2019</u>	<u>Ronald Buentemeier</u>	<u>Chair</u>
(Date)	(Signature)	(Title - Chair etc.)