

**Madison Audubon Society, Inc.**  
**Conservation Easement Enforcement Policy**

**I. PURPOSE**

Madison Audubon Society, Inc. is responsible for enforcing all of its conservation easements through identification and rectification of violations. Regular communication with landowners and diligent annual monitoring can result in minimizing violations and help to resolve enforcement issues in a timely manner.

MAS will seek to address each violation and develop a strategy to remedy the situation in accordance with the following general objectives:

- Preserve the conservation values protected and uphold the integrity of each individual conservation easement held by MAS.
- Maintain public confidence in MAS' ability to enforce easement restrictions generally and in part as a deterrent to other potential violators.
- Maintain MAS' tax-exempt status and ability to accept tax-deductible easement gift donations.
- Protect MAS' legal rights and economic investment in the conservation easement.
- Build and maintain public and landowner confidence and trust in MAS and its conservation easement programs.
- Where consistent with the foregoing objectives, balance the harm caused by the violation with the cost/benefit of the selected enforcement response.
- Maintain consistent responses to similar conservation easement violations.
- Enter into litigation only as a last resort and only when there is a meritorious legal basis for judicial action.

**II. POLICY**

Except for compliance issues and technical violations (see below) that are quickly resolved by staff and the landowner, the board of directors shall be notified so that it may authorize actions that are appropriate to protect MAS' rights and the interests of the public. The propriety of MAS' actions in response to a violation depend on many contextual facts, including, but not limited to, the certainty that a violation has occurred, the quality of the evidence of violation, the extent and willfulness of the violation and the willingness of the landowner to resolve the matter amicably and quickly.

MAS generally seeks voluntary easement compliance with landowners, giving them the opportunity to remedy violations unless particular conservation values protected by MAS' conservation easements are facing imminent harm or destruction. Some violations, depending on their severity, may be addressed by staff through discussion of the violation with the landowner, documentation of relevant facts and decisions and implementation of remedies

that will be presented to the board for its review, approval or modification, as appropriate. Significant or recurrent violations shall require thorough documentation, response and enforcement, in accordance with the guidelines below.

The express terms of MAS' conservation easements frame the specific rights and remedies available to MAS if one of its conservation easements has been violated. When there has been a breach or violation, the terms and conditions of the conservation easement will govern MAS' options. As such, MAS' discussions, recommendations and board resolutions of all breaches and violations must be evaluated in light of the specific language in each easement at issue.

MAS staff and board are mindful that conservation easement violations may result in legal challenges that are initiated either by MAS or by landowners. Litigation costs represent potentially substantial burdens to the organization. MAS shall therefore seek resolutions to violations that are fiscally prudent, practical and reasonable, provided MAS does not compromise its fiduciary responsibilities to the public to protect and preserve and, in some cases, to restore conservation values that are harmed by violations.

### **III. PROCEDURES**

**A. Violation Prevention.** Drafting clear, enforceable conservation easement language and maintaining strong relationships with landowners, lessees and other users of conservation easement property, may prevent enforcement issues.

- a. *Easement drafting.* MAS will not impose restrictions that it has no interest in upholding. Poorly conceived, poorly written and vague restrictions may lead to future violations. In drafting conservation easement restrictions, MAS shall consider organizational goals, conservation values being considered, need for expertise in assessment and monitoring, and future costs of easement monitoring and enforcement.
- b. *Annual monitoring.* Easement monitoring will be conducted annually to ensure consistent and accurate interpretation of the easement restrictions and help steer landowners away from activities that may become enforcement issues. Consecutive monitoring inspections will occur in each calendar year, but no less than 9 months apart.
- c. *Landowner communication.* MAS will have regular and open communications with landowners to build rapport and trust with property owners, enhance land stewardship practices, and deflect potential enforcement issues.
- d. *Easement amending.* In accordance with its Conservation Easement Amendment Policy, MAS shall also offer alternative solutions to landowners when MAS determines (after staff, board and legal review) that terms and provisions in its existing conservation easements are not enforceable, either legally or because the conservation easement provisions do not serve the conservation purposes of the conservation easement.

**B. Enforcement.** All suspected and actual violations shall be evaluated in the context of furthering MAS' mission, fulfilling MAS' legal obligations, upholding the easement's expressed conservation terms and stated purposes and maintaining MAS' reputation,

integrity, positive public image and community relationships. If an activity is discovered that is or may become an enforcement issue, it shall be handled in accordance with the procedures set forth below. Types of situations that may require enforcement include:

- a. *Compliance issues.* These types of enforcement actions include activities that are not yet violations, but require MAS intervention in order to prevent them from becoming a violation. Response procedure to compliance issues are identical to those listed for technical violations below.
- b. *Technical violations.* These issues violate the terms of the easement but do not result in significant physical or resource damage to the conservation values and/or are not inconsistent with the overall protection of the conservation values identified in the easement. Examples include allowing occasional noncommercial firewood collection from the property for use off the property, extending a garden just outside of a building envelope, and misinterpretations of where temporary structures may be placed on the property. MAS response procedures include:
  - i. Staff report the technical violations to the executive director.
  - ii. Staff and executive director review the conservation easement document and interpret relevant sections. Legal counsel is consulted, if necessary, to help with interpretation.
  - iii. Staff investigate and document the issues in accordance with procedures below.
  - iv. The landowner is notified by phone and letter of how to resolve the technical violation to keep it from becoming a material violation.
  - v. Staff negotiate a solution, ensure remediation and document the outcome.
  - vi. The board of directors is regularly updated.
- c. *Material violations.* Depending on the language in a particular easement, a material violation is an activity that is not specifically authorized under the permitted uses and impairs, harms, damages or destroys a protected conservation value or confers significant private benefit to the landowner or third parties and jeopardizes MAS' 501(c)(3) status. Compliance and technical violations, as described above, may become material violations if MAS and landowners are unable to reach a negotiated solution. MAS response procedures include, but are not limited to:
  - i. Staff report and describe violations to the executive director.
  - ii. Staff and the executive director will review the conservation easement document, baselines, and monitoring reports and interpret relevant sections of the easement agreement. Legal counsel will be consulted, if necessary, to help with interpretation.
  - iii. If possible, and if the purported violation is not so egregious that it must be halted immediately, staff or board member shall visit the site and physically inspect and document the violation with a written narrative, photographs and GPS locations. Quantitative measurements of the violation should be noted

when appropriate (e.g. land area impacted, number of trees damaged or removed, size of structures involved).

- iv. Field notes should be signed and dated by the person conducting the field inspection. If the landowner does not grant the staff member permission to enter the property, the general counsel will be consulted on how to proceed.
- v. After the violation has been interpreted and classified, staff will explore the required corrections, seeking counsel from the sanctuary committee(s), board, or legal counsel. A range of alternative actions and remedies will be considered, including, for example, litigation, cooperative restoration, discretionary approval, amendment or no action. All actions, correspondence and meetings will be documented.
- vi. In cases when staff determines that the violation must be stopped immediately, the executive director shall consult with legal counsel and convene an emergency board or executive committee meeting to review legal options to obtain injunctive relief and thereby to protect the conservation values that are in immediate threat of destruction or impairment.
- vii. If approved by legal counsel, staff will contact the violating landowner by phone or in person onsite to listen to the landowner's explanation and explain the problem and MAS policy including details such as the impact to conservation values, locations and extent of the violation and whether or not, with prior notification, this action would have been permissible under the terms of the easement.
- viii. Staff will follow up with a registered letter to the landowner/violator. The letter describes the compliance action required for complete remediation of the material violation, requests a meeting in person to discuss the implications of the violation and answer questions, and establishes a deadline for complete remediation. A copy will be sent to legal counsel.
- ix. Staff will conduct an inspection at the deadline. If there is noncompliance, a second registered notice/letter will be sent establishing a shorter deadline. Legal counsel is copied. When compliance is complete, a thank-you letter will be sent.
- x. If there is still noncompliance, a new response will be determined with the help of the executive director, sanctuary committee, board and legal counsel. Staff will send a third registered letter and give notice of impending legal action if immediate compliance is not achieved. Legal counsel is copied.
- xi. Legal action will be discussed with an attorney. The attorney will send a letter requesting compliance.
- xii. If the landowner still does not comply, the board shall meet to discuss legal remedies available and to develop and authorize a strategy to ensure enforcement of the easement's terms and thereby protect the public interest.

#### **IV. STAFF AND BOARD RESPONSIBILITIES**

- A. The board of directors is ultimately responsible for ensuring that MAS defends and enforces all conservation easements that it holds. The board must ensure that MAS secures and

maintains adequate financial resources to cover future anticipated enforcement and defense costs.

- B. As a general matter, MAS staff shall document, in writing, every step in the investigation, assessment and resolution process, including all communications with the landowner. Staff shall follow violation notification procedures as provided in the conservation easement.
- C. The land steward or staff who is responsible for monitoring the conservation easement shall gather as much background information as possible about the circumstances of the purported violation and shall document any changes and damage to the protected conservation values. Documentation should include date-stamped photographs and contemporaneously transcribed and dated notes and summaries of the findings.
- D. Investigating staff shall not give the landowner an on-the-spot opinion about whether or not a violation exists, recognizing that any statements made could have a direct bearing on future discussions or the outcome of a conservation easement enforcement action, including legal action if necessary.
- E. As soon as possible after investigating the purported violation, staff shall contact the executive director who will work with staff to evaluate the situation and circumstances and potential courses of action. If the executive director is unavailable, staff shall confer with the board president or sanctuary committees chair to determine the appropriate level of response.
- F. Staff and board of directors will determine whether the violation is material and poses an imminent and/or irreversible harm to protected conservation values, requiring an immediate response from MAS, or whether the violation may be addressed over time through direct negotiation and resolution between the staff and the landowner.
- G. If a material violation or threatened material violation involving imminent or irreversible harm to conservation values has occurred or is likely to occur, the executive director and legal counsel shall consider all relevant facts and circumstances and make recommendations to the board (or to the executive committee of the board if immediate action is warranted). Such recommendations shall be designed to resolve the violation expeditiously, including, if necessary, the filing of a lawsuit to enjoin any ongoing actions by the landowner or third-parties that are irrevocably destroying critical protected resources under the terms of the conservation easement.
- H. If staff and the executive director conclude that a violation has occurred but that it does not pose an imminent threat of harm or destruction to protected conservation values, or that it may be cured through restoration or other remedial action, staff will develop a proposed course of action and meet as soon as possible with the landowner in a team of at least two, if logistically possible, to add clarity to the circumstances and determine responsibility for the violation.

- I. Following landowner meetings, staff shall reevaluate the course of action and make recommendations to the board to resolve the violation, including a target date for completion.
- J. The board will review, modify and approve staff recommendations for resolution of the violation.
- K. The executive director should formally notify the landowner in writing of the board's approved resolution of the violation.
- L. The executive director shall verify landowners' receipt of, and understanding of, the requirements of the board resolution, shall ensure that the resolution is enforced, and shall monitor and document implementation of the violation resolution.
- M. A volunteer may assist a MAS staff member during the monitoring of a conservation easement or may be assigned the independent responsibility for monitoring a property. When a volunteer suspects that a violation of an easement has occurred or is likely to occur in the future, the volunteer is responsible for reporting the situation to the supervising staff member or to the executive director.
- N. Individuals with other nongovernmental organizations and government agencies, neighbors, new property owners or other members of the general public may encounter possible violations of MAS' conservation easements. These partners are encouraged to report suspected violations to the executive director for investigation and action.

## **V. INVESTIGATORY PROCESS**

During the course of investigating and following up on any suspected conservation easement enforcement actions, MAS staff will:

- A. At all times maintain professionalism and integrity and maintain the most constructive working relationship possible with the landowner.
- B. Maintain, to the extent possible, consistent responses to similar conservation easement violations with the understanding that MAS' response may potentially be perceived as establishing precedent for interpretation and enforcement of other easements.
- C. Recommend litigation to enforce a conservation easement only after a determination that a negotiated solution is not feasible or that the conservation values face irremediable destruction or imminent harm. Under most circumstances, MAS will attempt to reach an amicable agreement with the violator while striving for the best possible negotiated outcome without compromising MAS' obligations to the general public to protect and preserve the conservation values in perpetuity.

- D. Remember that time is of the essence for all suspected violations. Responses and enforcement should be as expeditious as possible and practical.

## **VI. THIRD-PARTY VIOLATIONS**

MAS views its relationship with owners of conserved land as a partnership. This relationship is based on the belief that we share a common interest in good stewardship of the conserved land. When third parties cause a violation of a conservation easement, MAS will seek the cooperation of the landowner to address the actions of the third party and to fix any damage caused to the property. MAS reviews each third-party violation of a conservation easement on a case-by-case basis when deciding what responses and remedies are necessary. If the third party is unwilling to cooperate with the property owner and MAS, then the board of directors may explore judicial or other legal remedies.

*Approved by Board of Directors August 10, 2015*