

McCOOK COUNTY, S.F. ORDINANCE 90-01

ORDINANCE REGULATING THE DRAINAGE OF PONDS,
SLOUGHS, AND LAKES OR ANY SERIES THEREOF

ARTICLE 1
PREFACE

SECTION 101

These rules are promulgated under the specific statutory authority of Chapter 46A-10A of the South Dakota Codified Laws.

Section 46A-10A-15 states: If a county is conducting or in good faith intends to conduct drainage activity within a reasonable time, or has held or is holding a hearing for the purpose of considering a drainage project, coordinated drainage area, drainage plan or other official controls, the board, in order to protect the public general welfare, may adopt as an ordinance or other temporary official controls, the purpose of which shall be to regulate drainage and related matters as constitutes the emergency. Within fourteen days of adoption or renewal of any emergency measure, the board shall hold at least one public hearing with notice of the time and place of the hearing published at least ten days in advance in a newspaper having general circulation in the county. An emergency measure is limited to six months from the date it becomes effective and may be renewed for six months, but may not be in effect for more than one year.

Section 46A-10A-20 states: Official controls instituted by a board may include specific ordinances, resolutions, orders, regulations or other such legal controls pertaining to other elements incorporated in a drainage plan, project or area or establishing standards and procedures to be employed toward regulations or controls shall embody the basic principle that any rural land which drains onto other rural land has a right to continue to such drainage if:

- (1) The land receiving the drainage remains rural in character;
- (2) The land being drained is used in a reasonable manner;
- (3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;
- (4) The drainage is natural and occurs by means of a natural water course or established water course;
- (5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow or the time of flow from that which would occur; and
- (6) No other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained.

Such provisions do not necessarily apply within municipalities, but if a municipality drains water onto rural lands lying outside the boundaries of the municipality, the municipality is subject to the above provisions, if adopted by the board.

Section 46A-10A-30 states: Any board or commission under the provisions of this Act may adopt a permit system for drainage. Such permit system shall be prospective in nature. Permits shall be granted consistent with the principles outlined in Section 46A-10A-20 of this Act. The fee for a permit may not exceed twenty-five (\$25.00) dollars and shall be paid only once. However, permitted drainage which is enlarged, rerouted or otherwise modified shall require a new permit. Any vested 10A-31 of this Act shall require a permit for its use if a permit system has been established in the county where it exists. Any person or his contractor draining water without a permit, if a permit is required under the provisions of this section, is guilty of a Class 1 misdemeanor. In addition to or in lieu of any criminal penalty, a court may assess against any person violating the provisions of this section or ordinance a civil penalty not to exceed \$1,000.00 per each day of violation. A permit system shall be considered an official control.

ARTICLE II DEFINITIONS

SECTION 201

For the purpose of this Ordinance, certain terms and words are hereby defined, unless the context otherwise requires. The word "shall" is mandatory and not discretionary.

- (1) "Board," a board of county commissioners.
- (2) "Closed drain" or "blind drain," a man-made drain or drainage scheme utilizing pipes, tiles or other materials and constructed in such a way that flow of water is not visible.
- (3) "Coordinated drainage area," a defined geographic area containing one or more parcels of real property and established by a board to provide a planned network or method or natural or man-made drainage, or both, to benefit all parcels of real property involved.
- (4) "Drainage scheme," a plan or system by which water is drained from one or more parcels of real property onto one or more parcels of real property.
- (5) "Drainage Board," shall mean the Drainage Commission.
- (6) "Dominant estate," any parcel of real property, usually at a higher elevation, which holds a common law law or statutory legal right to drain water onto other real property.
- (7) "Engineer," a professional, registered engineer.
- (8) "Established water course," a fixed and determinate route, either natural or man-made, by which water has flowed from one parcel or real property to another and by which water has been discharged upon a servient estate for period of time, on such a regular basis and in such quantities as to make it a predictably continuous activity.
- (9) "Governing body," a board of county commissioners, a city council or a city commission.
- (10) "Landowner" or "owner," any individual, firm or corporation, public or private, or public agency, who who has legal title to real property as shown by the records of the register of deeds of the county in

which the real property is situated. If the real property is sold under a contract for deed and the contract is of record in the office of the register of deeds for the respective county, both the recorded owner of the real property and the purchaser as named in the contract for deed are deemed owners of the real property.

- (11) "Legal drain," a drain or drainage scheme that:
 - a. Is vested under the provisions of SDCL 46A-10 and SDCL 46A-11;
 - b. Has been constructed by a person or by a unit of government under the provisions of past or present law: or
 - c. Has been granted a drainage permit.
- (12) "Municipality," a city or town, however organized.
- (13) "Natural drain," a drainage system which operates as part of a natural water course, as defined in subdivision (13) of this section.
- (14) "Natural water course," a fixed and determinate route by which water naturally flows from one parcel or real property to another due to the conformation of the land and by which water is discharged upon the land receiving the water. It is not necessary that the force of the flow of water be sufficient to form a channel having a well-defined bed or banks.
- (15) "Private drain," a drainage system or scheme designed, constructed and maintained by a person primarily for his own benefit or a natural drain, whether or not actively maintained, that provides a benefit primarily to one person.
- (16) "Rural" or "rural area," any territory outside a municipality.
- (17) "Servient estate," any parcel or real property, usually at a lower elevation, which is subject to a legal right allowing a dominant estate to drain water into it.
- (18) "Unit of local government," a municipality, an irrigation district, a school district, a water project district, a water user district, a township, a sanitary district, a conservation district or other special district.
- (19) "Vested right," a right of way drainage from one parcel of property to another which is settled or accrued to the property on the basis of state law.
- (20) "Water management board," the state board created in SDCL 1-40-15.
- (21) "Lake," means a land depression having a greater depth of water and having more permanent standing water than either a slough or pond. This definition classified lakes as type five wetlands or "inland open freshwater".
- (22) "Lateral drain," for the purpose of regulating the drainage of water means a drain constructed after the

the establishment and construction of the original drain or drainage system (for which a permit was obtained) and which flows into such original drain or drainage system.

- (23) "Meandered lake," means any pond, slough, or lake which has had its boundaries established by metes and bounds in the survey of public lands by the government of the United States.
- (24) "Party of record" means any person who submits oral or written testimony and evidence for the record of the state engineer's public hearing.
- (25) "Person," means a person, firm, partnership, association, corporation, or any other type of private legal relationship, and governmental organization, which includes, but is not limited to, any agency of the United States, a state agency, and any political subdivision of the state.
- (26) "Pond," means a land depression where the soil is covered with six inches (15 centimeters) to three feet (0.91 meters) or more of water throughout the growing season. This definition classifies ponds as type four wetland or "inland deep marshes".
- (27) "Slough," includes three types:
- a. Type one sloughs are "seasonally flooded basins or flats" which includes land depressions where the soil is covered with water, or is water logged, during variable seasonal periods but is usually well drained during much of the growing season.
 - b. Type two sloughs are "inland fresh meadows" which includes land depressions where the soil is usually without standing water during most of the growing season but is waterlogged within at least a few inches (centimeters) of its surface.
 - c. Type three sloughs are "inland shallow fresh marshes" which includes land depressions where the soil is usually waterlogged throughout the growing season and is often covered with as much as six inches (15 centimeters) or more of water.
- (28) "Watershed," means the area which drains into a slough, pond, or lake.

ARTICLE III DRAINAGE PERMITS

SECTION 301 PERMIT REQUIRED

It shall be unlawful to commence the excavation for the construction or installation of drainage works until a Permit to Drain has been issued by the County for such work. The following work shall require a permit:

- (1) A permit is required before any person may construct a drain, including any blind or closed drain, for the purpose of draining waters from a slough, pond, or lake, or any series thereof, having a watershed of twenty acres (8 hectares) or more.
- (2) A permit is required before any person may drain by pumping a slough, pond, or lake or connected series of sloughs, ponds, or lakes having a watershed of twenty acres (8 hectares) or more.

- (3) A permit is required before any person may drain or cause to be drained, or who shall attempt to drain any meandered lake.
- (4) A permit is required for a drainage project constructed pursuant to South Dakota County Drainage Law Chapters 46A-10A and 46A-11.
- (5) A permit is required for the construction of any lateral drain, as defined herein, unless it is within the assessed area of a drainage project which has been permitted for the entire assessed area, in accordance with Section 302 of this article.
- (6) A permit is required before any person may modify the drainage authorized in the original permit. Modification of drainage shall include deepening and widening of a drain, or the extension of any drain.
- (7) A permit is required before any person may fill a pond, slough, or lake, for the purpose of causing the pond, slough, or lake having a watershed of twenty acres (8 hectares) or more to be drained by elimination of the existing storage.
- (8) A permit is required before any person may repair or improve any drain that serves a drainage area of twenty acres (8 hectares) or more.

SECTION 302 PERMITS FOR DRAINAGE PROJECT

The permit for a "drainage project" constructed pursuant to South Dakota Codified Laws Chapters 46A-10A and 46A-11 may encompass the entire assessed or benefited area. In order for a drainage project must be designed to accommodate, as determined by the Board, Drainage Board, or its designated official, the drainage of the entire assessed area, and must be so stated on the application. However, a drainage project approved in accordance with this section may still require the approval of the Board prior to construction of lateral drains, as defined herein, within the assessed area.

SECTION 303 EXCEPTIONS TO PERMITS REQUIRED

The provisions of Section 301, except subsection 3, shall not apply to any drain constructed under the direct and comprehensive supervision of the federal or state agencies specified in this section. The only agencies deemed capable of such comprehensive supervision are the army corps of engineers, the soil conservation service, and the bureau of reclamation. However, these agencies shall notify the Board of any proposed drainage projects under their direct supervision during the planning states.

SECTION 304 METHODS FOR DETERMINING AREA OF WATERSHED

The following methods may be utilized in determining whether the area of a watershed for a slough, pond, or lake, or any series thereof, comprises twenty acres (8 hectares) or more.

- (1) The watershed area may be estimated from the most accurate or reliable maps or surveys available. Published seven and on-half minute topographic maps or a survey conducted under the supervision of a registered land surveyor are preferred.

- (2) Aerial photographs of the watershed may also be used to define the drainage area.
- (3) An onsite investigation of the drainage area by the Board or their designated official without the assistance of other data may be sufficient to determine drainage area.

SECTION 305 FILING APPLICATION

Any person desiring a drainage permit shall file an application with the Drainage Board on County form DP-1. The person desiring the drainage permit shall also file a copy of the application, the copy of the County Form DP-1, with the U.S. Fish and Wildlife Service, Wetlands Management Office, P.O. Box 48, Madison, South Dakota 57042 or any designated office, a copy with the Department of Game, Fish and Parks at their designated office in Pierre, South Dakota and a copy with the Department of Water and Natural Resources at their designated office, all by certified mail, return receipt requested, copies of which receipts shall be attached to the application filed and submitted to the Drainage Board of McCook County. The applicant if requested by the Drainage Board, shall provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis, at the discretion of the Drainage Board, may include a determination of the capacity of the drain and the receiving watercourse and a comparison of volume and timing of predrainage and post drainage flows. If the application is incomplete, or if the information contained therein is insufficient to enable the Drainage Board or its designated official to make an informed decision on the application, the application shall be returned to the applicant for correction. The cost for filing all drainage permits shall be \$10.00

SECTION 306 HEARING ON APPLICATIONS WITHIN McCOOK COUNTY

A hearing shall not be required for a drainage project which is not of statewide or intercounty significance. However, the Board may hold hearings on such applications at its discretion.

SECTION 307 REFERRAL OF APPLICATIONS

The Drainage Board or its designated official shall determine whether the application involves drainage of statewide or intercounty significance. The Drainage Board shall attach to the application any comments, recommendations, and engineering data which may assist the appropriate county in making a determination on the application. The application shall then be referred to the appropriate county within which is found a majority of the watershed or drainage area of the pond, slough, or lake, or any series thereof. If the appropriate county does not have a permit system, the Board will consult with such county and reach a joint agreement under SD 46A-10A-9 or 46A-10A-10, if appropriate.

SECTION 308 CRITERIA FOR DETERMINING WHETHER DRAINAGE IS OF STATEWIDE OR INTERCOUNTY SIGNIFICANCE.

In determining whether the proposed drainage is of statewide or intercounty significance, the Drainage Board shall be guided by the following criteria:

1. Drainage which would affect property owned by the state or its political subdivisions.
2. Drainage or sloughs, ponds, or lakes having recognized fish and wildlife values.

3. Drainage or partial drainage of a meandered lake.
4. Drainage which would have a substantial effect on another county.
5. Drainage which would convert previously noncontributing areas (based on twenty-five year event – four percent chance) into permanently contributing areas.
6. Assessment drains shall be considered of statewide or intercounty significance.

For good cause, the Drainage Board may classify any proposed draining statewide or intercounty significance, or the Board may determine that certain proposed drainage is not if statewide or intercounty significance.

SECTION 309 HEARING ON APPLICATIONS OR STATEWIDE OR INTERCOUNTY SIGNIFICANCE

Upon determination of an application of statewide or intercounty significance, the Drainage Board shall set the date, time and place for a public hearing on the application. The purpose of the hearing is to establish a record on which to base a decision as to whether the application to drain shall be granted, and if so, under what conditions the water is to be drained.

SECTION 310 EMERGENCY DRAINAGE

The requirement for a hearing and notice thereon may be waived by the Board in order to process applications for temporary emergency drainage. However, a hearing shall be conducted at the earliest opportunity if the emergency drainage is to be permanent and has been determined to be of statewide or intercounty significance.

SECTION 311 NOTICE OF PERMIT HEARING

For all hearings required pursuant to this article, the Drainage Board shall, at the applicant's expense, publish notice in a newspaper of general circulation in the area of the proposed drainage once a week for two consecutive weeks. The final published notice shall be published not more than fifteen days, nor less than five days, before the date set for the hearing. The drainage Board shall also, at the applicant's expense, give notice by certified mail not more than thirty days nor less than ten days from the date set for hearing, to:

1. All downstream landowners riparian to the watercourse into which water will be drained, within two miles (3 kilometers) from the outlet of the drain as determined by the Board.
2. Any county which would be directly affected by the water to be drained.
3. The South Dakota Department of Water and Natural Resources.
4. The state highway department, county highway department, board of township supervisors, for any proposed drainage which will affect the right of way any highway or roadway.
5. Any person who has notified the Board in writing of the person's objection to the drainage project proposed, and who has requested in writing notification of such hearing on the drainage project proposed.

SECTION 312 CONTENT OF NOTICE OF HEARING

The notice shall give all essential facts concerning the proposed drainage, including, but not limited to:

- (1) name and address of applicant;
- (2) legal description of the area to be drained;
- (3) purpose of drainage;
- (4) watercourse into which the water will be drained;
- (5) legal description of confluence of drain watercourse into which
- (6) estimated dates drainage construction will commence;
- (7) the time, date, and location of the hearing;
- (8) and other pertinent information.

SECTION 313 TIME FOR DETERMINATION BY BOARD

Within thirty days after a hearing required pursuant to this article, or at the earliest opportunity in emergency situations, the Drainage Board shall make a determination on the application. For complex or unique applications this time limit may be extended by the Board.

SECTION 314 CONSIDERATION BY BOARD COMMISSIONERS

In evaluating a drainage permit application the Drainage Board or their designated official shall consider the following criteria:

- (1) Whether the flow or quantity of water to be drained will overburden the water course into which the water will be drained.
- (2) Whether the drainage will flood or adversely affect the lands of lower proprietors.
- (3) Whether easements are required.
- (4) Whether consideration was given to sound water resource management policy, including the following:
 - a. Whether it is shown that there will be a significant decrease in water quality resulting from the proposed drainage project.
 - b. Whether, in evaluating the entire watershed, the resultant drainage will significantly increase flooding problems in the watershed.

- c. Whether the permanent storage of water on parcels in the application area is beneficial.
 - d. Whether the area's erosion potential will be increased significantly due to the drainage of the water and the subsequent lack of wetlands to retard erosion.
 - e. Whether type four and five wetlands as determined by the Board from evidence in the record exist in the application area, and if so, those wetlands shall not be drained unless overriding circumstances exist.
 - f. Whether the agricultural productivity was considered.
 - g. Whether the drainage project will decrease local flooding problems.
 - h. Whether fish and wildlife values were considered.
5. Whether the land receiving the drainage is to remain rural in character.
6. Any other factors deemed important.

SECTION 315 APPROVAL OF DRAINAGE PERMIT APPLICATIONS BY BOARD OR ITS DESIGNATED OFFICIAL

1. Approval Drainage Permit Applications not involving Drainage of Statewide or Intercounty Significance. The Drainage Board's approval shall be noted thereon and it shall be a permit to drain. The permit shall be forwarded to the applicant a notice of the action of the Drainage Board recorded with the Drainage Board's designated official.
2. Approved Drainage Permit Applications Involving Drainage of Statewide or Intercounty Significance. The Drainage Board of each county affected by proposed drainage work having intercounty significance shall make a determination whether the permit shall be granted, utilizing information from the record compiled at the public hearing. Approval by all counties involved is required for permit approval. The Drainage Board's approval shall be noted thereon, and the application, along with the determination, copies of all applicable easements, copies of the publication of notice, and minutes of the public hearing shall be forwarded immediately to the S.D. Dept of Water and Natural Resources. Notice of the action of the Board shall be forwarded to the applicant.

SECTION 316 DENIAL OF APPLICATION BY THE BOARD

A detailed application shall be returned to the applicant along with a copy of the Drainage Board's determination.

SECTION 317 TIME FOR DETERMINATION ON APPROVAL OF STATEWIDE BOARD AND STATEWIDE OR INTERCOUNTY DRAINAGE APPLICATIONS BY THE BOARD, SOUTH DAKOTA DEPARTMENT OF WATER AND NATURAL RESOURCES, THE HIGHWAY DEPARTMENT, OR ANY OTHER BOARD, DEPARTMENTS OR PERSONS NOTIFIED.

Within thirty days of the public hearing on a drainage application the Boards and S.D. Department of Water and Natural Resources shall render the determination of the application. For complex or unique applications this time limit may be extended. Following the determination, the Board of the county in which the application to drain was filed shall notify the parties of record, either personally or by mail (with affidavit), of the determination. This notice must be accompanied by the findings of fact and conclusions on which the determination was based and the notice is deemed given as of a date of certification.

SECTION 318 CRITERIA TO DETERMINE WHETHER DRAINAGE WILL ADVERSELY AFFECT LANDS OF LOWER LANDOWNERS

The Drainage Board or its designated official shall be guided by the following criteria:

1. Uncontrolled drainage into receiving watercourses which do not have sufficient capacity to handle the additional flow and quantity of water shall be considered to have an adverse effect.
2. Whether drainage is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or in the absence of a practical natural drain, a reasonable artificial drain system is adopted.
3. The amount of water proposed to be drained.
4. The design and other physical aspects of the drain.
5. The impact of sustained flow.

SECTION 319 CONDITIONS TO PERMITS

The Drainage Board may require as a condition to the approval of any drainage permit application a post construction survey of the permitted drain. Any permit to which the Drainage Board has attached such condition will be perfected upon receipt of the survey. The Drainage Board may attach any other conditions to an approved permit deemed necessary by the Drainage Board according to the circumstances of each application.

ARTICLE IV

SECTION 401 BOARD OF RESOLUTION

The drainage board or commission shall constitute a board of resolution.

SECTION 402 SPECIAL EXCEPTIONS

The board of resolution shall consider special exceptions to the drainage plan consistent with 46A-10A-20.

SECTION 403 SPECIAL VARIANCES

The board of resolution shall hear all special variances consistent with SDCL 46A-10A-20.

SECTION 404 DISPUTES

The board of resolution shall consider disputes between individuals resulting from any permits granted or any other actions taken pursuant to this ordinance and make decisions on the disputes consistent with SDCL 46A-10A-20. The commission shall not act as a board of resolution on any old disputes or disputes arising from any drainage prior to the adoption of this ordinance.

Dated this 6th day of March, 1990.

McCOOK COUNTY

BY: Lyle Eichacker
Chairman, McCook County

Votes in favor of this ordinance: 5

Votes opposing this ordinance: 0