

TITLE 9 DRAINAGE PERMIT ORDINANCE

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9.01 **PURPOSE.** This Ordinance is promulgated under specific statutory authority of Chapter 46A-10A of the South Dakota Codified Laws. It is the intent of this ordinance to monitor by regulation, the drainage activity or obstruction of drainage within Brown County and to provide an impartial forum for the resolution of landowner drainage disputes.

The permit requirements of this ordinance are prospective in nature and are intended to facilitate communication prior to the construction or installation of drainage works. This Ordinance shall only be applicable and enforced in the unincorporated areas of Brown County, South Dakota.

Determination or awarding damages associated with permitted drainage works is outside the scope of this Ordinance. Any permit to drain issued under this Ordinance constitutes permission to drain with respect to this Ordinance only. Any other State or Federal Conservation or water rights program or requirements must be met in addition to the requirements of this Ordinance.

9.02 **DEFINITIONS.** 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. Terms defined in SDCL 46A-10A-1 shall have the same meaning when used in this Ordinance.

1. Natural Wetland. A natural depression or low area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The term includes low areas, which are normally farmed or farmable and which, if improved by draining or filling, would permanently contribute to the natural watercourse.

9.03 **ADMINISTRATION AND ENFORCEMENT.** An administrative official who shall be known as the Drainage Administrator and who shall be designated by the Board of County Commissioner's, shall administer the Drainage Ordinance of Brown County. He may be provided with the assistance of such other persons as the Board of County Commissioners may decide.

If the Drainage Administrator shall find that any of the provisions of the Drainage Ordinance of Brown County, South Dakota are being violated, he shall notify in writing the person(s) responsible for such violations, indicating the nature of the violation and indicating the action necessary to correct it.

9.04 **PERMIT REQUIRED.** It shall be unlawful to commence the excavation for or begin the construction or installation of drainage works until a permit has been issued by the Drainage Commission or the Drainage Administrator. The following work shall require a permit:

1. A permit is required before any individual or landowner may construct any type of drain for the purpose of draining water from a natural wetland or any artificially impounded water, or any series or combination thereof, having any possible or potentially substantial effect on the property of adjacent landowners, the environment, or the public as a whole.
2. A permit is required before any individual or landowner may drain by pumping any natural wetland or artificially impounded water, or any series or combination thereof having any possible or potentially substantial effect on the property of adjacent landowners, the environment, or the public as a whole.
3. A permit is required for a drainage project constructed pursuant to South Dakota Drainage Law Chapters 46A-10A and 46A-11.
4. A permit is required before any individual or landowner may modify or obstruct the drainage of any legal or natural drain (see definitions). Modification includes, but is not limited to, deepening, widening, obstruction, rerouting, or the extension of a drain. Obstruction includes, but is not limited to man-made crossings.
5. A permit is required before any individual or landowner may fill any natural wetland, having any possible or potentially substantial effect on the property of adjacent landowners, the environment, or the public as a whole, for the purpose of causing the drainage of the wetland by elimination of the existing storage.
6. Any vested drainage right not recorded under the provisions of SDCL 46A-10A-31 shall require a permit.
7. A permit is required for the process of pumping, the construction, modification, repair, or improvement of any drainage work, or ditch, that results in water flowing into or across any public highway right-of-way.

9.05 **EXCEPTIONS TO PERMITS REQUIRED.** The provisions of 9.04 shall not apply to any drain constructed or to be constructed under the direct and comprehensive supervision of the Army Corps of Engineers or the Bureau of Reclamation. Individuals shall notify the Drainage Commission or the Drainage Administrator of any exempt project being undertaken.

- 9.06 **FILING APPLICATION.** Any individual or landowner desiring a drainage permit shall complete and file an application with the Drainage Administrator or the Drainage Commission on a form approved by the Drainage Commission. The applicant, if requested, shall provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis may include, but not be limited to, a determination of the capacity of the drain and the receiving watercourse and a comparison of volume and timing of pre-drainage and post-drainage flows. If the application is incomplete, or if the information contained therein is insufficient to enable the Drainage Commission or the Drainage Administrator to make an informed decision on the application, the application will be returned to the applicant for completion. The costs for filing all drainage permit applications shall be twenty-five dollars (\$25.00), which amount shall be paid at the time of application and shall be non-refundable.

The permit for a drainage project constructed pursuant to SDCL Chapters 46A-10A and 46A-11 may encompass the entire assessed or benefited area. In order for a permit to encompass the entire assessed or benefited area, the project must be designed to accommodate the drainage of the entire assessed area and must be so stated in the application. An engineering analysis of the entire area to be drained is required.

9.07 **DRAINAGE COMMISSION ESTABLISHED.** The Drainage Commission is hereby established and designated as the Board of Resolution in accordance with SDCL 46A-10A-34. The Board of Resolution is hereby designated to be the Board of County Commissioners. The Board of Resolution shall adopt rules necessary for the conduct of its affairs and in keeping with the drainage ordinance of Brown County, South Dakota. The Board of Resolution shall retain a record of all proceedings and shall meet a minimum of once every six months. All meetings shall be open to the public. A notice of each meeting shall be published in the newspaper in general circulation. The Board of Resolution shall maintain minutes of its proceedings showing the vote of each member upon each question, or if absent or failure to vote, indicating such actions, all of which shall be of public record and filed with the Drainage Administrator. A majority attendance of the full membership is required to have a quorum and a majority vote of the quorum is required to decide in favor of any application or other matter before the Board. Any Board of Resolution member with a personal conflict of interest concerning any drainage dispute or permit application must abstain from voting on the decision of such a dispute or permit. Disputes, because of the placement, replacement, or modification of township road culverts or township roads, shall not be heard by the Board of Resolution and said disputes shall be taken directly to Circuit Court.

9.08 **HEARINGS REQUIRED.** A hearing is required for applications involving a Drainage Project outlined in 9.04, #3 of this Ordinance and all applications of statewide or inter-county significance.

A hearing is also required to decide on drainage complaints and disputes between landowners. A hearing and Board of Resolution approval is necessary for permit applications that cannot be approved by the Drainage Administrator because the applicant has failed to obtain the consensus of all affected persons or entities.

Any decision made by the Board of Resolution in order to settle a drainage dispute between landowners may be appealed to the Circuit Court.

The Board of Resolution may hold hearings on other such applications at its discretion. The purpose of a hearing is to establish a record on which to make a decision as to whether the application to drain shall be granted, and if so, under what conditions, if any.

The Board of Resolution shall hold a meeting upon the request of the Drainage Administrator. Such meetings shall take place whenever it is necessary to carry out the purposes of this chapter.

Drainage permit applications may be approved by the Drainage Administrator for the construction of private drains (see definitions) or any other drainage works with no hearing required, subject to the provisions of 9.08 of this Ordinance and subject to the written approval of all individuals involved in 9.10, 1-3. Any drainage permit approved or disapproved by the Drainage Administrator may be appealed to the Board of Resolution.

9.09 **EMERGENCY DRAINAGE.** The requirements for a permit, hearings and notice thereon may be waived by a unanimous vote of the quorum of the Board of Resolution in order to facilitate emergency drainage. However, a permit shall be obtained and all hearings shall be conducted at the earliest opportunity if the drainage so created is to be permanent.

9.10 **NOTICE OF HEARING, CONTENT.** For all drainage permit hearings required pursuant to this ordinance, the Board of Resolution shall at the applicant's expense, publish notice in a newspaper in general circulation in the area of the proposed drainage, once a week for two (2) consecutive weeks. The final notice shall be published not more than thirty (30) days, nor less than one (1) day before the date set for the hearing. The Board of Resolution shall also give, at the applicants expense, notice by first class mail not more than thirty (30) days, nor less than ten (10) days from the date set for the hearing to;

1. All downstream landowners riparian to the watercourse into which water will be drained within a reasonable distance from the outlet of the drain as determined by the Board of Resolution or the Drainage Administrator.
2. Any county which would be affected by the water to be drained.
3. The state highway department, county highway department, municipal government, water district, and township board of supervisors for any proposed drainage which will affect the right-of-way of any highway or roadway.
4. Any person who has notified the Board of Resolution 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.

The notice shall give the name and address of the applicant, the legal description of the land to be drained, the date, the time, and the location where the hearing will take place. No hearing is required if all affected individuals above approve of the project in writing. Evidence that notice has been completed by the filing of a certificate setting forth the names and addresses of those receiving notice by mail.

- 9.11 **TIME FOR DETERMINATION.** Within thirty (30) days after a hearing required pursuant to this Ordinance, or at the earliest opportunity, the Board of Resolution shall make a determination on the application. For complex or unique applications, this time limit may be extended by the Board of Resolution. Following the determination, the Board of Resolution shall notify by mail the applicant and all individuals or landowners making appearances with respect to the application, of the determination. This notice must be accompanied by the basis on which the determination was made.

9.12 **APPLICATIONS OF STATEWIDE OR INTER-COUNTY SIGNIFICANCE.** In determining whether the proposed drainage is of statewide or inter-county significance, the Board of Resolution or the Drainage Administrator shall be guided by the following criteria;

1. Drainage which affects property owned by the United States, the state of South Dakota, or any of their political subdivisions.
2. Drainage of natural wetlands having recognized fish and wildlife values.
3. Drainage which would have a substantial effect on another county.

For good cause, the Board of Resolution or its designated official may classify any proposed drainage as having statewide or inter-county significance. Upon receipt of an application of statewide or inter-county significance, the Board of Resolution shall set the date, time, and place for a public hearing on the application. Notice shall be given pursuant to 9.10 of this Ordinance and, additionally, the South Dakota Department of Water and Natural Resources shall be notified.

- 9.13 **REFERRAL OF APPLICATIONS.** Upon receipt of an application of statewide or inter-county significance, the Board of Resolution shall attach to the application any comments, recommendations, and engineering data which may assist the appropriate county(ies). If the appropriate county(ies) do(es) not have a permit system, the Board of Resolution will consult with such county(ies) and reach a joint agreement under SDCL 46A-10A-9 to 46A-10A-10, if appropriate. The Board of Resolution or Drainage Commission of each county affected by a proposed drainage or inter-county significance shall make a determination whether the permit should be granted. Approval by all counties involved is required for permit approval. If no agreement is reached between counties, the Board of Resolution may petition to have the state Water Management Board resolve the dispute pursuant to SDCL 46A-10A-9.1.

9.14 **CONSIDERATIONS.** In evaluating a drainage permit application, the Board of Resolution and the Drainage Administrator shall consider the projects impact on the following:

1. Flood hazards, floodplain concerns,
2. Erosion potential,
3. Water supply quality and quantity,
4. Agricultural concerns,
5. Conservation concerns,
6. General environmental concerns,
7. Aesthetics,
8. Fish and wildlife concerns,
9. Potential adverse effects on adjacent landowners,
10. Any other factors deemed important.

In accordance with SDCL 46A-10A-20, any rural land that drains onto other rural land has a right to continue that 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 watercourse or established watercourse,
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.

9.15 **BOARD ACTION.** All permits acted upon by the Board of Resolution, unless appealed shall be recorded within two (2) weeks of the action with the County Register of Deeds at the applicant's expense. The Board of Resolution or its designated official shall have the following options available with respect to the disposition of the permit application.

1. Approve the application,
2. Conditionally approve the application,
3. Deny the application,
4. Defer the application.

The Board of Resolution 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 Board of Resolution has attached such a condition will be perfected upon receipt and favorable review of the survey. The Board of Resolution may attach conditions to an approved permit application deemed necessary by the Board of Resolution according to the circumstances of each application.

Violations of the conditions of a permit is a Class 2 misdemeanor.

- 9.16 **PENALTY FOR FAILURE TO SECURE PERMIT FOR DRAINAGE WORK.** Any individual or landowner or his contractor draining water without a permit or a recorded vested right as required under the provisions of this Ordinance and SDCL 46A-10A may be subject to a Class 1 misdemeanor. Further, the court may assess a civil penalty of one thousand dollars (\$1,000.00) per day for each day of violation.

9.17 **DRAINAGE COMPLAINTS AND DISPUTES.** Any party wishing to raise a question of a violation of this Drainage Ordinance shall file with the Drainage Administrator a statement in accordance with 9.18. The Drainage Administrator shall promptly investigate the complaint and if it is substantiated, notice shall be issued to the party in violation of this Ordinance advising them of the violation. The notice shall advise the party in violation of the corrective action necessary and of the party's right to have a hearing before the Board of Resolution to contest the notice of violation. If a hearing is needed, notice shall be given in accordance with 9.10, and shall be conducted pursuant to 9.18 through 9.22, both inclusive.

9.18 **CONTENTS OF NOTICE IN CONTESTED CASES.** The notice shall include:

1. A statement of the time, place, and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
3. A reference to the particular sections of the statutes and rules involved;
4. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished;
5. A statement of any action authorized by law, which may affect the parties, as a result of any decision made at the hearing, whether it be the revocation of a license, the assessment of a fine or other effect;
6. A statement that the hearing is an adversary proceeding and that a party has the right at the hearing, to be present, to be represented by a lawyer, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
7. A statement that the decision based on the hearing may be appealed to the circuit court and the state Supreme Court as provided by law.

- 9.19 **RIGHTS OF PARTIES AT HEARINGS ON CONTESTED CASES.** Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of his interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in his behalf.

9.19 **RULES OF EVIDENCE IN CONTESTED CASES.** In contested cases:

1. Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.
2. A party may conduct cross-examinations required for a full and true disclosure of the facts;
2. Notice may be taken of judicially cognizant facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

9.21 **TRANSCRIPT IN CONTESTED CASES - MINUTES IN LIEU OF TRANSCRIPT.**

Whenever a party requests in writing that oral proceedings be transcribed, a verbatim record of all proceedings and testimony shall be kept by the agency, at the applicant's expense. Unless otherwise provided by law the agency shall not be required to transcribe the record unless the requesting party tenders and pays the reasonable cost thereof. If transcribed, a copy of the record shall be furnished to any other party to the hearing at the request and expense of such other party. If no verbatim record is transcribed, the agency shall prepare minutes of the hearing. The minutes shall consist of a written summary of the evidence and proceedings.

9.22 **EXPERTS.** In contested cases, it shall be the responsibility of the litigants to supply expert opinion when necessary to record their respective burden of proof. The Board of Resolution may also appoint a special master, who's finding and recommendations may or may not be adopted by the Board; and may also appoint an attorney to act as a hearing officer to preside over the hearing; and, may assess the costs of both against the litigants.