

DRAINAGE ORDINANCE

Ordinance 2009060201

An Ordinance amending Ordinance 2001-01 (revised 2007-04, 2003-03)

Be it ordained by Moody County, South Dakota:

SECTION 101. GENERAL PROVISIONS

1. **TITLE.** These regulations shall be referred to as the Drainage Ordinance of Moody County.
2. **AUTHORITY.** The authority for this Ordinance is promulgated under SDCL 46A-10A and SDCL 46A-11.
3. **PURPOSE.** These regulations shall govern the drainage of water within the unincorporated area of Moody County and are designed to enhance and promote the physical, economic and environmental management of the county; protect the tax base; encourage land utilization that will facilitate economical and adequate productivity of all types of land; lessen government expenditure; conserve and develop natural resources; and preserve the important benefits provided by wetlands.
4. **INTERPRETATION, ABROGATION, AND SEVERABILITY.** In interpreting and applying the provisions of these regulations, they shall be held to be the minimum requirements for the promotion of public safety, health, convenience, comfort, morals, prosperity, and general welfare. It is not the intent to repeal, abrogate or impair any existing easements, covenants or deed restrictions. However, where these regulations and other regulations, easements, covenants or deed restrictions conflict or overlap, whichever imposes the more stringent restrictions shall prevail. All other county regulations inconsistent with these regulations are hereby repealed to the extent of this inconsistency only. If any section, clause, provision or portion of these regulations is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of these regulations shall not be affected thereby.
5. **PURPOSE OF CATCH HEADS.** The catch heads appearing with the sections of this Ordinance are inserted simply for convenience to serve the purpose of an index. The catch heads shall be wholly disregarded by any person, office, court or other tribunal in construing the terms and provisions of this Ordinance.
6. **SAVING CLAUSE.** These regulations shall in no manner affect pending actions either civil or criminal, founded on or growing out of any regulations hereby repealed. These regulations shall in no manner affect rights or causes of action, either civil or criminal, that may have already accrued or grown out of any regulations repealed.
7. **DISCLAIMER OF LIABILITY.** The degree of public and environmental protection offered by this Ordinance is considered reasonable for regulatory purposes and is based on the best available scientific and engineering considerations. The application of this Ordinance shall not create liability on the part of Moody County, or any officer or employee thereof.
8. **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.
 - 8.01 **Board.** The Board of Moody County Commissioners.
 - 8.02 **County Drainage Official.** The representative duly appointed by the Board who is responsible for the administration and enforcement of this Ordinance.

8.03 **Drain** may include the following:

- a. **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.
- b. **Lateral drain.** For the purpose of regulating the drainage of water, lateral drain means a drain constructed after the establishment and construction of the original drain or drainage system (for which a permit was obtained if required) and which flows into such original drain or drainage system.
- c. **Natural drain.** A drainage system which operates as part of a natural watercourse, as defined in subdivision (8.21 b.) of this section.

8.04 **Engineer.** A professional, registered engineer.

8.05 **Estate** may include the following:

- a. **Dominant estate.** Any parcel of real property, usually at a higher elevation, which holds a common law or statutory legal right to drain water onto other real property.
- b. **Servient estate.** Any parcel of real property, usually at a lower elevation, which is subject to a legal right allowing a dominant estate or drain water onto it.

8.06 **Hydric Soil.** Soil types which are formed under saturated conditions.

8.07 **Hydrophitic Vegetation.** Vegetative types typically adapted for life in saturated soil conditions.

8.08 **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 classifies lakes as type five wetlands or **inland open freshwater**.

8.09 **Landowner or owner.** Any individual, firm or corporation, public or private, or public agency, 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.

8.10 **Meandered lake** means any pond, slough, or lake which has had its boundaries established by ordinary high and ordinary low water marks based on SDCL Chapter 43-17.

8.11 **Municipality.** A city or town, however organized.

8.12 **One-half Mile (OHM) Below the Proposed Outlet.** The distance is to be measured in a straight line.

8.13 **Person** means a person, firm, partnership, association, corporation, or any other type of private legal relationship, and any 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.

8.14 **Permanent and Intermittent Stream.** Indicated as a blue line on the most recently published USGS 7.5 map and/or indicated as an identified tributary/creek/stream/river on the most recently published FEMA Flood Insurance Rate Maps.

- 8.15 **Pond** means a land depression where the soil is covered with six inches to three feet or more of water throughout the growing season. This definition classifies ponds as type four wetland or inland deep marshes.
- 8.16 **Recorded Drainage.** Drainage systems that are recorded by the land owner at the Office of the Register of Deeds as a result of:
- a. A drainage system for which a permit has been granted either prior to or after the adoption of this Ordinance provided that it may not be recorded until after installation of the drainage system.
 - b. A drainage system installed prior to the permitting process whether or not vested as provided for by State Law.
- 8.17 **Routine Maintenance.** Any maintenance performed on a vested drainage right or recorded drainage provided:
- a. The repair or replacement of a closed or lateral drain does not substantially increase the size, capacity or length of the existing drain and does not significantly change the original location of the drain.
- 8.18 **Rural or rural area.** Any territory outside a municipality.
- 8.19 **Slough** includes three types:
- a. Type one sloughs are seasonally flooded basin or flats which includes land depressions where the soil is covered with water, or is waterlogged, 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.
 - 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 or more of water.
- 8.20 **Vested Drainage Right.** A right to drain water from one property to another which has been established on the basis of SDCL 46A-10A. Any natural right acquired before July 1, 1985 is deemed vested. Drainage with man-made origins or improvements acquired prior to July 1, 1985 is deemed vested if recorded at the Register of Deeds Office before July 1, 1992. Drainage districts are exempt from the recording requirements.
- 8.21 **Watercourse** may include the following:
- a. **Established watercourse.** A fixed and determinant route, either natural, or man-made, by which water has flowed from one parcel of real property to another and by which water has been discharged upon a servient estate for a period of time, on such a regular basis and in such quantities as to make it predictably continuous activity.
 - b. **Natural water course.** A fixed and determinant route by which water naturally flows from one parcel of 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.

8.22 **Watershed** means the area that drains, directly or indirectly, into a slough, pond, lake or waterway.

8.23 **Wetland.** Those areas, which have a predominance of hydric soil, are inundated or saturated by water for at least 15 days during a growing season, and under normal circumstances support hydrophitic vegetation.

SECTION 102. PERMIT REQUIRED. It shall be unlawful to commence the excavation for or the construction or installation of a drainage project until a Drainage Permit has been issued by the County for such project. The following project shall require a Permit:

1. A Permit is required before any person may install a closed drain serving any watershed area.
2. A permit is required before any person may drain by pumping a slough, pond, or lake or connected series of sloughs, pond, or lakes having a watershed of twenty acres or more.
3. A permit is required for a drainage project constructed pursuant to South Dakota County Drainage Law Chapters 46A-10A and 46A-11.
4. 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 103 of this article.
5. A permit is required before any person may modify the drainage authorized in the original permit. Modification of drainage shall include deepening and widening or enlarging of a drain, or the extension of any drain.
6. A permit is required before any person may repair, replace, or improve any drain that serves a watershed of twenty acres or more beyond vested drainage rights.
7. A permit is required for those Drainage Plans which are presented as a prerequisite necessary for any plat approval under local Subdivision Regulations.

SECTION 103. PERMITS FOR DRAINAGE PROJECT. The permit for a “drainage project: constructed pursuant to South Dakota Codified Laws Chapter 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 drainage project must be designed to accommodate, as determined by the 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 104. EXCEPTIONS TO PERMITS REQUIRED.

1. The provisions of Section 102 shall not apply to any drain constructed under the direct and comprehensive supervision of the federal, state, or local agencies specified in this section. The only agencies deemed capable of such comprehensive supervision are the Army Corps of Engineers, the, Natural Resources Conservation Service, Moody County, and the various organized townships of

Moody County. However, these agencies shall notify the Board of any proposed drainage projects under their direct supervision during the planning stages.

2. This Ordinance shall not apply within the boundary of any lawfully established municipality, unless the Ordinance has first been jointly adopted by that municipality provided however that any municipality which drains or authorizes the drainage of water onto rural lands lying outside its boundaries shall, to that extent, be subject to the provisions of this Ordinance.

SECTION 105. 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 or more:

1. The watershed area may be estimated from the most accurate or reliable maps or surveys available. Published seven and one-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 on-site 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.
4. Findings of a certified engineer may also be used.

SECTION 106. APPLICATION FOR A DRAINAGE PERMIT.

1. Any person required to obtain a drainage permit under this Ordinance shall file an application with the designated County Drainage Official on a County Drainage Permit Application Form. The applicant, if requested by the Board or County Drainage Official, shall provide a detailed drawing or analysis, as appropriate, showing both the elevation and profile of the proposed construction as well as the impact to other property owners of the proposed drainage. The analysis shall include 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. The Board or County Drainage Official shall have the right to request any such information to be prepared by an engineer or other professional person selected by the Board at the expense of the applicant.
2. If the application is incomplete or if the information contained therein is insufficient to enable the County Drainage Official to make an informed decision on the application, the application shall be returned to the applicant within fifteen (15) working days from the date the application is filed for completion and/or correction. The returned application shall have all areas of incompleteness and insufficient information noted.
3. The cost for filing all drainage applications shall be up to \$100, non-refundable, as set annually by the Board. If the drainage application is approved and a drainage permit is ultimately issued, then this application filing fee shall be construed to cover any County fee for the issuance of the permit.
4. The County Drainage Official may take the following actions on applications determined to not be of statewide or intercounty significance:
 - 4.01 If the application otherwise complies with this Ordinance, and after consideration of the matters referred to below in Section 114, the County Drainage Official may either grant or deny a permit for the following projects:

- a. A proposed drainage project which outlets directly into the Big Sioux River, Bachelor Creek, Battle Creek, Brookfield Creek, Flandreau Creek, Medary Creek, Mud Creek, Pipestone Creek, Skunk Creek, Spring Creek, Jack Moore Creek (formerly Squaw Creek) or West Pipestone Creek as delineated on the most recently published USGS 7.5-minute topographic maps and/or indicated as an identified tributary/creek/stream/river on the most recently published FEMA Flood Insurance Rate Maps.
 - b. A proposed drainage project which does not outlet directly into the streams listed in paragraph a. above provided all downstream landowners for at least one-half mile below the proposed outlet of the drain or more as may be determined by the Board through its designated official to be necessary to reach a watercourse have signed a waiver stating that they have no objection to the construction of the proposed drainage project. Exception: The waiver requirement to downstream landowners shall not apply to lands adjacent to or within one-half mile from the proposed outlet of the drain if such lands are located within the State of Minnesota. If the proposed drainage project ties into an existing closed drain, for purposes of giving notice to downstream landowners, the outlet shall be considered the outlet of the existing closed drain.
 - c. Routine Maintenance.
- 4.02 Conditions may be attached to a drainage permit to ensure that the proposed drainage is accomplished in accordance with the purposes of this Ordinance. _
- 4.03 Any decision of the County Drainage Official may be appealed to the Board. The applicant or any person aggrieved by a decision shall file a written appeal with the County Drainage Official within ten (10) working days of the Official's decision. Upon such filing, the County Drainage Official shall forward the appeal to the Board.
- 4.04 Upon receipt of notice of an appeal, the Board shall conduct a public hearing and shall provide notice of the hearing as provided for in Sections 111 and 112. Pending appeal, if the permit had been granted, the permit shall be suspended pending final resolution of the appeal.

5. WAIVERS

- 5.01 A waiver form shall be developed by the County and utilized by the applicant.
- 5.02 Applicant may obtain signed waivers directly from landowner(s).
- 5.03 Where a request for waiver has been denied by a landowner, and for that reason an Application has been denied, upon request of the Applicant, the Board shall schedule a hearing and take comments before consideration of the application and proceed to give notice as provided for in Section 111.

SECTION 107. REFERRAL OF APPLICATIONS. The Board, acting through its designated official, shall determine whether the application involves drainage of statewide or intercounty significance. The 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 may 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, as may be determined by an agreement between the counties involved. If the appropriate county does not have a permit system, the Board will consult with such county and reach a joint agreement under SDC 46A-10A-9 or 46A-10A-10, if appropriate.

SECTION 108. CRITERIA FOR DETERMINING WHETHER DRAINAGE IS OF STATEWIDE OR INTERCOUNTY SIGNIFICANCE. In determining whether the proposed drainage is of statewide or intercounty significance, the Board shall be guided by the following criteria:

1. Drainage which would affect property owned by the state or its political subdivisions.
2. Drainage of 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--4% chance) into permanently contributing areas.
6. Assessment drains shall be considered of statewide or intercounty significance.

For good cause, the Board may classify any proposed drainage as having statewide or intercounty significance, or the Board may determine that certain proposed drainage is not of statewide or intercounty significance.

SECTION 109. HEARING ON APPLICATIONS OF STATEWIDE OR INTERCOUNTY SIGNIFICANCE. Upon determination of an application of statewide or intercounty significance, the 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. 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 110. 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 111. NOTICE OF PERMIT HEARING.

1. For all hearings required pursuant to this article, the Board shall, 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.
2. The County shall also, give notice by postage prepaid, first class mail, not more than thirty days nor less than ten days from the date set for hearing to:
 - 2.01 All downstream landowners adjacent to the watercourse into which water will be drained, within an area of at least one-half mile from the outlet of the drain or more as may be

determined by the Board through its designated official to be necessary to reach a watercourse. If the proposed drainage project ties into an existing closed drain, for purposes of giving notice to downstream landowners, the outlet shall be considered the outlet of the existing closed drain. Exception: The notification requirement to downstream landowners shall not apply to lands adjacent to or within one-half mile from the outlet of the drain if such lands are located within the State of Minnesota.

2.02 Any county which would be directly affected by the water to be drained.

2.03 The South Dakota Department of Environment and Natural Resources, if affected.

2.04 The State Highway Department, County Highway Department, Board of Township Supervisors, for any proposed drainage which will affect the right-of-way of any highway or roadway.

2.05 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 112. 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 confluence of drain and watercourse into which the water will be drained;
3. The time, date, and location of the hearing; and
4. Other pertinent information.

SECTION 113. 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 Board shall make a determination on the application. For complex or unique applications this time limit may be extended by the Board. However, if an extension is taken by the Board, the Board shall notify the applicant of the reasons for the extension and shall set a definite time period within which the Board's determination shall be made.

SECTION 114. CONSIDERATION BY BOARD/COUNTY DRAINAGE OFFICIAL. In evaluating a drainage permit application, the Board or County Drainage Official shall consider, but not be limited to, the provisions of S.D.C.L. 46A-10A-20 and the project's impact on servient landowners. Considerations of potential adverse effect on servient landowners 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 flows.

SECTION 115. APPROVAL OF DRAINAGE PERMIT APPLICATIONS.

1. **Approved Drainage Permit Applications Not Involving Drainage of Statewide or Intercounty Significance:** The applicable Drainage Official may consult with any other Drainage Official or the entire Board before taking action on the application. The approval shall be noted thereon and it shall be a permit to drain. The permit shall be forwarded to the applicant.
2. **Approved Drainage Permit Applications Involving Drainage of Statewide or Intercounty Significance:** The 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 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. Department of Water & Natural Resources. Notice of the action of the Board shall be forwarded to the applicant.

SECTION 116. DENIAL OF APPLICATION. A denied application shall be returned to the applicant within five (5) working days from the date of the denial along with a copy of the final determination. The final determination shall include reasons for the denial of the application.

SECTION 117. TIME FOR DETERMINATION BY THE BOARD AND STATE. Within thirty days of the public hearing on a drainage application having statewide or intercounty significance, the Boards and SD Department of Water & Natural Resources shall render the determination on 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 is based and the notice is deemed given as of the date of certification.

SECTION 118. CONDITIONS TO PERMITS. The Board or County Drainage Official 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 such condition has attached will be perfected upon receipt of the survey. The Board or County Drainage Official may attach any other conditions to an approved permit deemed necessary by the Board or County Drainage Official according to the circumstances of each application. No person shall be authorized to use a drain which has been improperly constructed in accordance with permit requirements or conditions.

If any drainage permit is granted with conditions attached, the permit shall be reviewable by the Board after one year. The Board shall consider the applicant's past performance in meeting the conditions imposed and the effectiveness of the conditions in protecting the public interest. Notification of any review shall be given in the same manner as provided by Section 111. After a review hearing, the Board may approve continuation of the permitted drainage work, approve the continuation with modifications, or revoke the permit. Any party unsatisfied by a decision made at the conclusion of a review hearing may seek further relief in Circuit Court.

SECTION 119. PENALTY FOR FAILURE TO SECURE PERMIT FOR DRAINAGE WORK. Any person or his contractor draining water without a permit, as required under the provisions of this regulation, may be subject to a maximum penalty of \$1,000.00 per day, and any other penalty presented by SDCL 46A-10A-30.

SECTION 120. PRESERVATION OF LANDOWNERS RIGHTS AND SOVEREIGN IMMUNITY.

The issuance, denial, or waiver of a drainage permit shall in no way affect the legal rights which may otherwise exist between a landowner and any other property (dominant or servient estate). The County, in considering permit applications, shall be protected by the Doctrine of Sovereign Immunity and shall not be subject to any cause of action or claim brought by any person alleging an impact caused by the water which is the subject of the permit application.

SECTION 121. EXPIRATION OF DRAINAGE PERMITS. A drainage permit shall expire and become null and void if the authorized construction is not completed within 2 years of the effective date of the permit. The Board may allow an extension of time on request of applicant.

SECTION 122. COMPLIANCE WITH LAWS OR REGULATIONS NOT AFFECTED BY PERMIT APPROVAL. A permit approved under the provisions of this ordinance shall in no way remove any responsibility on the part of any landowner, tenant or contractor to comply with all applicable local, state or federal laws or regulations.

Date this 21st of July, 2009

First Reading: July 7th, 2009
Second Reading & Adoption: July 21st, 2009
Publication Date: July 29th, 2009
Effective Date: August 19th, 2009

APPROVED:
BY THE COMMISSION:

ATTEST:

County Auditor