



East Dakota Water Development District
 132B Airport Drive
 Brookings, SD 57006
 605-688-6741 605-688-6744 Fax

MEMORANDUM

TO: Regional Watershed Advisory Task Force

FROM: Jay Gilbertson, Manager 

DATE: April 18, 2013

TOPIC: Potential Amendments to County Drainage Law, SDCL 46A-10A

The following are a preliminary set of suggested changes to South Dakota Codified Law (SDCL) Chapter 46A-10A (County Drainage) that I will be presenting to the Regional Watershed Advisory Task Force at your meeting in Mitchell on April 22nd. As I noted in my presentation* to the Task Force in July 2012, changes to existing code are but one part of the effort that will be needed to address the difficulties being experienced by county drainage authorities. These are preliminary suggestions only, and I would hope that they would serve as a point of further discussion in advance of the development of Task Force-sponsored legislation for the 2014 Legislative Session.

(* - <http://legis.state.sd.us/interim/2012/documents/WTF7-23-12DrainageSouthDakotaXIV.pdf>)

Several of the proposed changes are my variations on concepts brought forward previously as part of either House Bill 1001, **An Act to provide for the establishment of waters management districts, to revise certain drainage policies and responsibilities, and to dissolve or convert certain water-related special purpose districts**, proposed in 1998, or Senate Bill 179, **An Act to provide for a uniform county drainage permit application form and to remove the maximum limit for drainage permit fees**, from the 2013 legislative session.

I have attempted to follow the format typically used in DRAFT legislation for each proposed change. Altered text is in **bold**, with proposed deletions ~~struck out~~ and proposed additions underlined. An explanation/basis for the change is given for each proposed action, presented in *italics*.

Item 1. That § 46A-10A-16 be amended to read as follows:

46A-10A-16. County drainage plan--Preparation--Adjuncts--Considerations. A board or a county drainage commission, if established, **may shall** prepare, or cause to be prepared, a drainage plan for the county, including those municipalities within the county which have requested by resolution of the governing board of such municipality to be included. Any drainage ordinances, any official drainage map, and other official controls as deemed necessary shall be included as adjuncts to a drainage plan. The board or commission shall consider any drainage right described in § 46A-10A-31, any drainage district described in §

46A-10A-43, the drainage plans or projects of a unit of local government and existing coordinated drainage areas formed pursuant to § 46A-10A-47 in preparation of a county drainage plan.

Explanation: At present, development of a drainage plan is optional. In that this plan is the foundation on which any subsequent drainage controls (ordinances, regulations, etc..) are to be based, this really cannot be an option. The changes I propose would make plan development and adoption mandatory for any county that opts to regulate drainage activities under the authority of SDCL Chapter 46A-10A. A similar requirement was proposed in HB 1001.

Item 2. That § 46A-10A-17 be amended to read as follows:

46A-10A-17. Purposes of drainage plan. A drainage plan shall be for the purpose of enhancing and promoting physical, economic, and environmental management of the county; protecting the tax base; encouraging land utilization that will facilitate economical and adequate productivity of all types of land; lessening governmental expenditure; and conserving and developing natural resources. **A drainage plan shall, at a minimum, include the following:**

- (1) Maps delineating watersheds and subwatersheds greater than nine square miles in area;**
- (2) Maps delineating all closed basins and the outlet for each;**
- (3) Maps delineating one hundred and five hundred year flood plains for trunk rivers and major tributaries;**
- (4) Maps delineating all known drainage activities, including field tiles, drained wetlands, and ditches;**
- (5) Maps delineating all diversions of water for consumptive use (water rights);**
- (6) Maps delineating all routing alterations caused by man-made structures;**
- (7) A determination of the capacity of all trunk rivers and major tributaries, based on various rainfall events;**
- (8) A determination of the capacity of all man-made crossings, such as bridges and culverts, based on various rainfall events;**
- (9) A determination of discharge amounts and timing from all subwatersheds based on various rainfall events; and**
- (10) Process for the permitting, if any, of future drainage actions, in accordance with § 46A-10A-30, including:**
 - (a) A determination of the impact of current man-made drainage actions on subwatershed drainage capacity, discharge, and timing;**
 - (b) Methods by which the impact of additional drainage action can be evaluated;**
 - (c) Appeals process and method for obtaining waivers; and**
 - (d) Requirements for mediation before court action.**

The plan may incorporate appropriate contingencies for the protection of private cropland and pasture.

Explanation: If a county chooses to develop and adopt a plan as suggested by SDCL 46A-10A-16, there is no guidance provided in law as to what such a plan should contain. The changes listed here were derived from Section 53 of HB 1001. Given the breadth of factors that must be considered to actually meet the application assessment requirements found in code (SDCL 46A-10A-20), I believe this list is a good start. It will not be an easy thing to put together, but I think it would go a long way to address the concerns that have led several counties to abandon the task. I would envision the

initial development of these plans, along with the necessary data collection, to be something that is done in concert with other entities, such as the South Dakota Department of Environment and Natural Resources and the East Dakota Water Development District.

Item 3. That § 46A-10A-19 be amended to read as follows:

46A-10A-19. Maps authorized. Official controls instituted by a board or commission **may shall** include maps of drains, **county** highways and roads, culverts, wetlands, sloughs, and other natural and man-made features relating to drainage showing their alignments, gradients, dimensions, and other pertinent features.

Explanation: The change would require the permitting authority (counties) to include the maps described as part of their process, and consider all roads within it's jurisdiction, not just county roads. A similar change was originally proposed in HB 1001.

Item 4. That § 46A-10A-20 be amended to read as follows:

46A-10A-20. Legal controls for drainage management--Right to continue existing drainage. 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 drainage management. Any such ordinances, resolutions, regulations, or controls shall embody the basic principle that any rural land which drains onto other rural land has a right to continue 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; **and**
- (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.

Explanation: The language to be stricken effectively stipulates that the financial interests of the upstream (dominant) land owner trump those of the downstream (serviant) landowner. While I am unaware of any instance where this has been actually applied, it is clearly bad public policy. This change was originally proposed in HB 1001.

Item 5. That § 46A-10A-30 be amended to read as follows:

46A-10A-30. Permit system for drainage--Fee--Modification of drain or use of unrecorded right--Drainage without permit as misdemeanor--Civil penalty. Any board or commission under the provisions of this chapter and chapter 46A-11 may adopt a permit system for drainage. The permit system shall be prospective in nature. Permits shall be granted consistent with the principles outlined in § 46A-10A-20. The fee for a permit shall be established by the permitting authority, based on the administrative costs of regulating drainage activities, ~~may not exceed one hundred dollars, and shall be paid only once.~~ However, permitted drainage that is enlarged, rerouted, or otherwise modified requires a new permit. Any vested drainage right not recorded under the provisions of § 46A-10A-31 requires a permit for its use if a permit system has been established in the county where it exists. Any person or the person's 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 a civil penalty not to exceed one thousand dollars per each day of violation. A permit system is an official control.

Explanation: Under the current language, a drainage permit fee "shall be established by the permitting authority, based on the administrative costs of regulating drainage activities,..." However, the law then limits the fee to no more than a one-time, \$100 maximum charge. The change would remove both limitations. Without such changes to code, a county is left to either cease their efforts when the fee is expended (effectively do nothing) or underwrite the actual costs with county general funds. Neither is an acceptable option. This change was originally proposed in SB 179.

Item 6. That chapter 46A-10A be amended by adding thereto a NEW SECTION to read as follows:

Any application for a drainage permit submitted to a county pursuant to § 46A-10A-30 shall include:

- (1) General description of the proposed drainage project, including whether it involves new drain or tile or the repair of existing drain or tile;**
- (2) Name, address, and contact information for:**
 - a) primary applicant;**
 - b) the owner of the land to be drained or tiled; and**
 - c) owner of the land where system outlet(s) is(are) located;**
- (3) Legal description of land to be drained or tiled, including the number acres involved;**
- (4) Legal description or location of outlet, including a physical description of the outlet and whether the outlet is gated;**
- (5) Description of area where the drainage or tile system will discharge;**
- (6) Detailed map or drawing showing the site plan and the location and size of all facilities;**
- (7) Design capacity of the drainage or tile system and outlet flow capacity;**
- (8) Name and address of drainage contractor who will construct the project;**
- (9) Estimated construction start and completion dates; and**
- (10) Other information required by the county.**

Explanation: The NEW SECTION proposed here would create a set of standard elements to be found in

any drainage permit application. I have reviewed the drainage permit application forms of all of the counties that currently permit drainage, and the elements are common to most applications already. If being able to identify all of the drainage activities within a given watershed, which likely crosses county boundaries, a standardized application format will be absolutely necessary. A variation on this change was originally proposed in SB 179.

Item 7. That chapter 46A-10A be amended by adding thereto a NEW SECTION to read as follows:

Any drainage activity undertaken prior to July 1, 1985, that is not registered in accordance with the time line presented in § 46A-10A-30 shall be treated as new drainage by the drainage authority.

Explanation: Under § 46A-10A-31, the process is defined by which any drainage right, lawfully acquired prior to July 1, 1985, arising from drainage which is natural with man-made modifications or entirely man-made, was to be recorded, and therefore deemed vested. I use the past tense because the deadline for recording such activities was July 1, 1992. A recurring question is what to do with old drainage activities that were not recorded within the time line presented in this law. The firm deadline presented in § 46A-10A-31 suggests that the legislative intent was to limit the ability of landowners to obtain vested status for such drainage projects. However, permitting authorities are frequently presented with requests to retroactively grant vested status, now decades after the legal deadline. The proposed NEW SECTION would expressly prohibit such actions.

Item 8. That § 46A-10A-48 be amended to read as follows:

46A-10A-48. Any person making application for establishment of a coordinated drainage area shall first obtain an accurate **survey description** and map of the territory intended to be embraced within the limits of such area, showing the boundaries and area thereof. The accuracy thereof shall be verified by affidavit of ~~a licensed surveyor~~ **the auditor of the county within which the coordinated drainage area is proposed.** The **survey description** and map, when completed and verified, shall be left at a convenient public office, to be designated by the county auditor of the county in which the application is filed, within the area for a period of not less than twenty days for examination by those having an interest in the application.

Explanation: There have been differing interpretation as to what is actually required with the language referring to “..an accurate survey and map of the territory to be embraced..” As a practical matter, the boundaries of any coordinated drainage area established under this chapter are going to conform to established and formally recognized land tract boundaries. To require that a licensed land surveyor be hired to verify (presumably by actually surveying the boundaries) that the boundaries are correct is both redundant and costly.

