

# Buffer Ordinance

## Hubbard County

County Ordinance No. 43

Adopted: \_\_, 2018

Effective: \_\_, 2018

DRAFT

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An ordinance providing for the protection and enhancement of natural resources in Hubbard County through the establishment of vegetation buffers along public waters and public drainage ditches with particular attention to locations where agricultural uses are occurring.

The County Board of Commissioners does hereby ordain:

## 1.0 Statutory Authorization and Policy

- 1.1 **Statutory Authorization.** This buffer ordinance is adopted pursuant to the authorization and policies contained in Minn. Stat. §103F.48, the Buffer Law, and the County planning and zoning enabling legislation in Minn. Stat. chapter 394.
- 1.2 **Purpose and Intent.** It is the purpose and intent of the County to:
  - (a) Provide for riparian vegetated buffers and water quality practices to achieve the following purposes:
    - (1) Protect state water resources from erosion and runoff pollution;
    - (2) Stabilize soils, shores and banks; and
    - (3) Protect or provide riparian corridors.
  - (b) Coordinate the implementation and enforcement of the water resources riparian protection requirements of Minn. Stat. §103F.48 with the shoreland management rules and ordinances adopted under the authority of Minn. Stat. §103F.201 to 103F.227 and the management of public drainage systems established under Minn. Stat. chapter 103E where applicable; and
  - (c) Provide efficient and effective direction to landowners and protection of surface water quality and related land resources.

## 2.0 Definitions and General Provisions

- 2.1 **Definitions.** Unless specifically defined below, words or phrases used in this ordinance shall be interpreted to give them the same meaning they have in common usage and to give this ordinance its most reasonable application. For the purpose of this ordinance, the words “must” and “shall” are mandatory and not permissive. All distances, unless otherwise specified, are measured horizontally.
  - 2.1.1 **APO** - means the administrative penalty order issued pursuant to Minn. Stat. §103F.48, subd. 7 and Minn. Stat. §103B.101, subd. 12a.
  - 2.1.2 **Buffer** - has the meaning provided in Minn. Stat. §103F.48, subd. 1(c).
  - 2.1.3 **Buffer Protection Map** - has the meaning provided in Minn. Stat. §103F.48, subd. 1(d) and which are available on the Department of Natural Resources website.
  - 2.1.4 **BWSR** - means the Board of Water and Soil Resources.
  - 2.1.5 **County** – means Hubbard County, Minnesota.
  - 2.1.6 **Cultivation Farming** - means farming practices that disturb root or soil structure or that impair the viability of perennial vegetation due to cutting or harvesting near the soil surface.
  - 2.1.7 **Drainage Authority** - has the meaning provided in Minn. Stat. §103E.005, subd. 9.
  - 2.1.8 **Landowner** - means the holder of the fee title, the holder’s agents or assigns, any lessee, licensee, or operator of the real property and includes all land occupiers as defined by Minn. Stat. §103F.401, subd. 7 or any other party conducting farming activities on or exercising control over the real property.

- 2.1.9 **Parcel** - means a unit of real property that has been given a tax identification number maintained by the County.
- 2.1.10 **Public Drainage System** - has the meaning given to “drainage system” in Minn. Stat. §103E.005, subd. 12.
- 2.1.11 **Local Water Management Authority** - has the meaning provided in Minn. Stat. §103F.48, Subd. 1(g).
- 2.1.12 **Normal Water Level** - means the level evidenced by the long-term presence of surface water as indicated directly by hydrophytic plants or hydric soils or indirectly determined via hydrological models or analysis.
- 2.1.13 **SWCD** - means Hubbard County Soil and Water Conservation District.
- 2.1.14 **Validation of Compliance** – a form completed by the SWCD at the request of the landowner that certifies to the landowner and other responsible government units that the land required to be buffered meets the standards of this ordinance.
- 2.2 **Severability.** If any section, clause, provision, or portion of this ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby.
- 2.3 **Interpretation.** In their interpretation and application, the provisions of this ordinance shall be held to be minimum requirements and shall be liberally construed in favor of the governing body and shall not be deemed a limitation or repeal of any other powers granted by State Statutes.

### 3.0 Jurisdiction

- 3.1 **Jurisdiction.** The provisions of this ordinance apply to all waters, shown on the buffer protection map, excluding public drainage systems for which the County is not the drainage authority under Minn. Stat. chapter 103E.

### 4.0 Buffer Requirements

- 4.1 **Buffer Width.** Except as provided in subsection 4.4 and 4.5, a landowner owning property adjacent to a water body identified on the buffer protection map must establish and maintain a buffer area as follows:
- (a) For waters shown on the buffer protection map requiring a fifty (50) foot width buffer, the buffer width will be fifty (50) foot average and thirty (30) foot minimum width as provided in Minn. Stat. §103F.48, subd. 3, unless a greater width is required in Sections 901 and 906 of the Hubbard County Shoreland Management Ordinance, as measured according to subsection 4.2; and
- (b) For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer, the buffer width will be sixteen and a half (16.5) feet as provided in Minn. Stat. §103F.48, subd. 3, unless a greater width is required in Sections 901 and 906 of the Hubbard County Shoreland Management Ordinance, as measured according to subsection 4.2.
- 4.2 **Measurement.**
- (a) The width of any required buffer on land adjacent to a water requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer or a greater width per Section 901 and 906 of the Hubbard County Shoreland Management Ordinance shall be measured from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level as provided in Minn. Stat. §103F.48, subd. 3(c).

(b) The width of any required buffer on land adjacent to a public drainage system shall be measured in the same manner as for measuring the vegetated grass strip under Minn. Stat. §103E.021, subd. 1 as provided in Minn. Stat. §103F.48, subd. 3(c).

- 4.3 **Use of Buffer Area.** Except as provided in Sections 4.4 and 4.5, a buffer as defined in this ordinance may not be put to any use, included but not limited to cultivation farming, which would remove or prevent the permanent growth of perennial vegetation.
- 4.4 **Exemptions.** The requirement of Section 4.1 does not apply to land that is exempted from the water resources riparian protection requirements under Minn. Stat. §103F.48, subd. 5.
- 4.5. **Alternative Practices.** As provided in Minn. Stat. §103F.48, subd. 3(b) an owner of land that is used for cultivation farming may demonstrate compliance with subsection 4.1 by establishing and maintaining an alternative riparian water quality practice(s), or combination of structural, vegetative, and management practice(s) which provide water quality protection comparable to the water quality protection provided by a required buffer as defined in Sections 4.1 to 4.3. The adequacy of any alternative practice allowed under this section shall be based on:
- (a) the Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG);
  - (b) common alternative practices adopted and published by BWSR;
  - (c) practices based on local conditions approved by the SWCD that are consistent with the Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG); or
  - (d) other practices adopted by BWSR.
- 4.6 **Nonconformity.** Where the provisions of any statute, other ordinance or regulation imposes greater restrictions than this ordinance, the provisions of such shall be controlling. The continuation of nonconformities provided for by Minn. Stat. §394 and §462 shall not apply to compliance with this ordinance and Minn. Stat. §103F.48.

## 5.0 Compliance Determinations

- 5.1 **Compliance Determinations.** Compliance with the buffer requirements set forth in Section 4 will be determined by the SWCD on a parcel by parcel basis. The compliance status of each bank, or edge of a waterbody on an individual parcel will be determined independently.

At any time during the compliance determination process, the landowner may provide documentation of compliance to the SWCD and County.

If the SWCD determines a landowner's parcel is not in compliance with this ordinance, the SWCD must provide written notification of such to the landowner, the County, and BWSR. The SWCD may also issue a Validation of Compliance if applicable or requested by the landowner.

- 5.2 **Corrective Action Notice.** On receipt of an SWCD Notification of Noncompliance, the County will issue the landowner and/or any other party deemed responsible as having control over that part of the property subject to Section 4.0 a Corrective Action Notice that will:

- (a) include a list of corrective actions needed to come into compliance with the requirements of Minn. Stat. §103F.48;
- (b) provide a timeline for complying with the corrective action notice;

The County may send the landowner a combined Corrective Action Notice and APO as provided in section 6.2 so long as the combined Notice/APO includes all the required elements of both.

The County may deliver or transmit the corrective action notice by any means reasonably determined to reach the landowner and any other noticed party. Failure of actual receipt of a corrective action notice

by a noticed party shall not be deemed a defense in an enforcement proceeding under Section 6.0. The County shall also send a copy of the Notice to the BWSR.

- 5.2.1 At any time after receipt of a corrective action notice, the landowner may provide documentation of compliance to the County and SWCD. In addition, the landowner may supply information to the County and SWCD in support of a request to modify a corrective action or the timeline for compliance. On the basis of any such submittal or at its own discretion, the County may make a written modification to the Corrective Action Notice. Any such modification of a compliance determination will be served on the landowner and any other noticed party in the manner provided for in Section 5.2 and provided to the BWSR.
- 5.2.2 The SWCD shall monitor the parcel and determine if the noncompliance has been fully corrected, and shall notify the County, landowner, and any other noticed party of the determination. The SWCD may, after an evaluation of the evidence documenting compliance submitted by the landowner or upon request by a landowner or landowner's authorized agent, issue a written Validation of Compliance. Upon receipt by the County of a written Validation of Compliance determination issued by the SWCD, the Corrective Action Notice will be deemed satisfied for the purpose of Section 6.0, and the subject property will not be subject to enforcement under that Section.
- 5.2.3 A Notice of Noncompliance is not considered a final decision subject to appeal to the BWSR.

## 6.0 Enforcement

- 6.1 **Failure to Comply with a Corrective Action Notice Issued Under Section 5.** The County may, at its own discretion, elect to pursue the failure to comply with a corrective action notice either criminally or through an administrative penalty order (APO) as set forth herein.
  - (a) Failure to comply with a corrective action notice issued under Section 5 constitutes a misdemeanor and shall be punishable as defined by law.
  - (b) The County may issue an APO as provided for in Minn. Stat. §§103F.48, subd. 7(b) and (c) and 103B.101, subdivision 12a to a landowner who has failed to take the corrective action set forth in the corrective action notice. For the APO to be effective, it must be served on the landowner together with a copy of the corrective action notice or alternatively the County may serve the landowner with a combined Corrective Action Notice and APO so long as the combined Notice/APO includes all the elements of both. Service is effective either by personal service or by depositing the documents set forth herein in the U.S. Mail. Any penalty assessed in the APO shall continue to accrue until the violation is corrected as provided in the Corrective Action Notice and APO.
- 6.2 **Administrative Penalty Order (APO).**
  - (a) **Initial Violation.** The penalty for a landowner on a single parcel that has not previously been the subject of an APO issued by the County shall be:
    - i. \$0 for 11 months after issuance of the Corrective Action Notice;
    - ii. \$50 - \$200 per parcel per month for the first six (6) months (180 days) following the time period in i; and
    - iii. \$200 - \$500 per parcel per month after six (6) months (180 days) following the time period in ii.
  - (b) **Repeat Violation.** The penalty for a landowner on a single parcel that has previously been the subject of an APO issued by the County shall be:
    - i. \$50 - \$200 per parcel per day for 180 days after issuance of the Corrective Action Notice; and
    - ii. \$200 - \$500 per parcel per day for after 180 days following the time period in i.

(c) **Ongoing Penalty Assessment.** Any penalty assessed under this section shall continue until the corrective action notice has been satisfied.

6.2.1 **APO.** To be valid the APO shall include, at a minimum:

- i. The facts constituting the violation of the riparian protection and water quality practices requirements set forth in this Section 4.0 of this ordinance or Minn. Stat. §103F.48 ;
- ii. The specific statute and/or ordinance section(s) that has/have been violated;
- iii. A written description of prior efforts to work with the landowner to resolve the violation;
- iv. The amount of the penalty to be imposed;
- v. The date the penalty will begin to accrue;
- vi. The date that payment of the penalty is due;
- vii. The date by which all or part of the penalty may be forgiven if the landowner has/have complied with the Corrective Action Notice; and
- viii. A statement of the landowner's right to appeal the APO.

6.2.2 All or part of the penalty may be forgiven based on the correction of the noncompliance by the date specified in the APO by the landowner as provided in Minn. Stat. §103F.48, subd. 7(d).

6.2.3 A copy of the APO will be sent to the SWCD and BWSR.

6.2.4 An APO issued under this section may be appealed to the BWSR within 30 days of receipt by the landowner in accordance with the requirements set for the in Minn. Stat. §103F.48, subd. 9. Any APO that is not appealed within the 30 day period shall be deemed final.

### 6.3 Administrative Penalty Order Procedures

**6.3.1 Statute of Limitations.** Any criminal enforcement action undertaken pursuant to Section 6.1 of this ordinance must be undertaken within two years after the alleged violation was discovered or reasonably should have been discovered by the County. According to Minn. Stat. §541.07, the County has two years in which to commence an APO action after the date the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations for which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the landowner involved.

**6.3.2 Compliance Verification.** Once a landowner has submitted written evidence of correction of the violation set forth in the notice of compliance, compliance must be verified. The County will:

- i. Review and evaluate all information related to the APO to determine if the violation has been corrected;
- ii. Verify compliance by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- iii. Document compliance verification.

The County may consult with the SWCD when conducting a compliance verification.

**6.3.3 Right to Appeal.** Within 30 days after receipt of the APO, a landowner may appeal the terms and conditions of an APO issued by a County to BWSR as provided in Minn. Stat. §103F.48, subd. 9. The appeal must be in writing and must include a copy of the APO that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted personally, by U.S. mail, or electronically, to the Executive Director of BWSR.

**6.3.4 Penalty Due.** Unless the landowner appeals the APO as provided in Section 6.3.3, the penalty specified in the APO becomes immediately due and payable to the County as set forth in the APO. If, however, the landowner submits written documentation that the violation has been corrected prior to the time the penalty becomes due and payable, the County will verify compliance and adjust the penalty to an amount the landowner would have owed had the penalty been paid on the date the landowner submitted written documentation of compliance. Written documentation of compliance may include a written validation of compliance issued by the SWCD.

However, if the County determines the violation was not fully corrected, the County will notify the landowner by issuing a written letter of determination and depositing it in the U.S. Mail. Any determination sent by U.S. Mail shall be deemed received three business days after the letter of determination has been deposited in the U.S. Mail. The landowner shall have an additional 20 days after receipt of the letter of determination to pay the penalty or the time period specified in the APO as issued, whichever is later. The penalty will continue to accrue until the violation is corrected as provided in the Corrective Action Notice and APO.

**6.3.5 Referral for Collection of Penalty.** All penalties and interest assessed under an APO must be paid by the landowner within the time specified in this section. All payments shall be made payable to the County. Any penalty or interest not received in the specified time may be collected by the County using any lawful means.

**6.4 Interference with County Access or Administration/Enforcement Prohibited.**

All employees of the Hubbard County Environmental Services Department, members of the County Board of Commissioners, and employees of the Hubbard County SWCD in the performance of their duties shall have free access to all land included within the jurisdiction of this Ordinance. Access to the land shall be during normal business hours unless an emergency exists.

Pursuant to Minn. Stat. 103F.421, Subd. 2(b), no person shall hinder or otherwise interfere with the County's and SWCD's employees in the performance of their duties and responsibilities pursuant to this Ordinance. Refusal to allow reasonable access to the property by the County and SWCD shall be deemed a separate and distinct offense under this Ordinance. A violation under this subsection constitutes a misdemeanor and shall be punishable as defined by law.

**7.0 Effective Date**

This Ordinance shall be in full force and effect on \_\_\_\_\_, 2018 after its passage and publication according to law.

Adopted by the Hubbard County Board of Commissioners this \_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
Chairperson, Hubbard County Board of Commissioners

Attest:

\_\_\_\_\_  
Deb Thompson, County Coordinator

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