

General Manual
Title 450 - Science and Technology

Part 405 - Federal, State, and Local Laws and Regulations
Subpart A - Compliance with Laws and Regulations

KS405.3 Natural Resources Conservation Service (NRCS) Guidance Material

(a) General Requirements of the Laws and Regulations

The following material deals with some of the laws and regulations important to our dealing with the public. There are other important laws and regulations that are closely related to our work. Contact your supervisor when questions arise on existing or new laws or regulations not covered herein.

(1) Federal Permits

Two congressional acts are designed to protect navigation on the nation's waters and to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Most NRCS-assisted projects will not be subject to permits required by the acts but some may. Obtaining a federal or state permit does not eliminate the need for the other permit. A federal permit will not be issued if a state permit is denied.

(i) River and Harbor Act of 1899

Sections 9 and 10 of the River and Harbor Act of 1899 require permits from the U.S. Army Corps of Engineers (USACE) for work on structures affecting the navigable waters of the United States. The only navigable waters in Kansas, as determined by the USACE, are the Missouri River and the Kansas River from its mouth to river mile 170.4 near Junction City, Kansas. Any work in these waters such as a dam, dike, pier, breakwater, bulkhead, revetment, power transmission line, or aid to navigation may be subject to a permit. Contact a USACE field office for guidance.

(ii) The Federal Water Pollution Control Acts Amendments

Section 404 of the Federal Water Pollution Control Acts Amendments establishes a permit program administered by the USACE to regulate the discharge of dredged or fill material riverward or lakeward of the ordinary high water mark of a water of the United States or into any adjacent wetland. The definitions, rules, and regulations connected with Section 404 are many and exacting. The USACE will be contacted to determine if a permit is needed for any work in or along a stream or an adjacent wetland. If a client has requested a wetland determination on an area where there is a bed and bank, NRCS will contact the USACE for a "Waters of the United States" (WUS) determination. The WUS determination will be included in manipulation to the WUS or adjacent wetland. The client will be informed of the need for a permit from the USACE under Section 404.

(2) State and Local Permits

(i) State and local permits that may be required for conservation practices will normally fall within the following categories:

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- a) Permits for wells, pumping plants, or other diversion works - These permits are to appropriate water for beneficial use and are issued by the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources, (DWR) at Topeka.
- b) Permits for the construction of dams or changing of the course, current, or cross section of a stream - These permits are issued by DWR.
- c) Permits for the construction of levees - These permits are issued by DWR.
- d) Permits for outletting drains upon a public road - Permission is usually granted by the board of county commissioners and county engineer, the county surveyor, or railroad or public road officials.
- e) Permits for installation of pollution control facilities for agriculture-related pollutants - Registration and permits for these facilities are issued by the Kansas Department of Health and Environment (KDHE), Agricultural Waste Unit, at Topeka.

(ii) Appropriation of Water for Beneficial Use

a) Dedication of Use of Water - All water within the state of Kansas is dedicated to the use of the people of the state, subject to the control and regulation of the state. The Chief Engineer of DWR is authorized and empowered to control, conserve, regulate, allot, and aid in the distribution of the water resources of the state for the beneficial use of all the inhabitants in accordance with the rights of priority of appropriation.

b) Permit to Appropriate Water

1) A person, partnership, organization, corporation, municipality, or any agency of the state or federal government may apply for a permit with DWR to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of all prior rights that relate to such supply.

2) An approval of the application by the Chief Engineer of DWR constitutes a permit to proceed with the construction of authorized diversion works and the diversion and use of water. Upon determination that the diversion works have been completed and an appropriation right perfected in accordance with the terms, conditions, and limitations set forth in the approval, a certificate of appropriation is issued by the Chief Engineer of DWR. This certificate is a legal notice that the water right is perfected, and it must be filed in the office of the register of deeds in the county wherein the point of diversion is located.

c) Water Right

1) The water right is a vested or appropriation right under which a person may legally divert and use water. It is a real property right appurtenant to and severable from the land on or in connection with which the water is used; and unless withheld, such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal or by inheritance.

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2) The water right may be reserved by the seller in the conveyance. The appropriator may sell the water right to one person and his interest in the land to another person. He may sell the land and keep the water right. The water right may be transferred to other land by following the procedure set forth in the Water Appropriation Act. Under such a transfer, the right ceases to be appurtenant to the original tract and becomes appurtenant to the new tract of land.

d) Rules and Regulations, Water Appropriation Act - The definitions and procedures for obtaining an appropriation right are set forth in the "Rules and Regulations, Water Appropriation Act, Division of Water Resources." There is a definite procedure of interaction between the appropriator DWR. Questions concerning the rules and regulations should be directed to the Chief Engineer of DWR or the water commissioner at the local field office of DWR. (Refer to DWR's web site at <http://www.ksda.gov/> for a listing of field offices.)

(iii) Water Well Construction and Abandonment

The Kansas Ground Water Exploration and Protection Act provides for the exploration and protection of ground water through licensing and regulation of water well contractors in Kansas to protect the health and general welfare of the citizens of the state; to protect ground water resources from waste and potential pollution by requiring proper description of the location, drilling, and well construction and proper plugging of abandoned holes; and to provide data on potential water supplies through well logs, well pumping tests, and water quality tests which will permit the economic and efficient utilization and management of the water resources of the state.

a) KDHE is authorized by the Kansas Ground Water Exploration and Protection Act to license water well contractors and to require anyone who repairs, constructs, reconstructs, or treats any water well in the state of Kansas to comply with the rules and regulations and any departmental policy statements.

b) Article 30, "Water Well Contractor's License, Water Well Construction and Abandonment" contains the rules and regulations for carrying out the objectives of the Kansas Ground Water Exploration and Protection Act. Any interpretation or other information concerning the rules and regulations should be directed to the appropriate district office of KDHE. Refer to KDHE's web site at <http://www.kdheks.gov/index.html> for a listing of district offices and the geology section.

(iv) Dams and Changes to Watercourses

a) Without the prior written consent or permit of the Chief Engineer of DWR, it is unlawful for any person, partnership, association, corporation or agency, or political subdivision of state government to (1) construct any dam or other water obstruction; (2) make, construct, or permit to be made or constructed any change in any dam or other water

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obstruction; (3) make or permit to be made any change in or addition to any existing water obstruction; or (4) change or diminish the course, current, or cross section of any stream in Kansas.

b) Structures in the channel of a stream where the primary purpose is not water impoundment (including intake structures, outfall structures, ramps, causeways, low water crossings, jetties, pipeline crossings, changes in the alignment of a channel, and changes in the cross section of a channel) are considered as obstructions and require a permit.

c) Exceptions - Dams which impound 50 acre-feet of water or less at the elevation of the lowest point in the top of dam and jetties or revetments for the purpose of stabilizing a caving bank which are properly placed are not construed as obstructions and do not need a permit from the Chief Engineer of DWR; however, dams for which tax exemption is claimed must have a permit from the Chief Engineer of DWR. Tax exemption is possible if the height is 10 feet or more (measured from the lowest point in the natural bed of the watercourse at the axis of the dam); the storage capacity at auxiliary spillway elevation (including the volume of any excavation in the reservoir area below such level) is 5 acre-feet or more; the drainage area does not exceed 10 square miles; and the dam collects and stores surface water or has flood detention storage.

d) Application for Permit - The application for permit or consent shall be made in writing on the form entitled "Application" furnished to DWR. The application form for the dam or other water obstruction or for the changes or additions proposed to be made to a dam or other water obstruction must be accompanied by complete maps, plans, profiles, specifications, and such other data and information as the Chief Engineer of DWR may require. Questions concerning rules, criteria, or procedures should be directed to the Chief Engineer's office. Refer to DWR's web site at <http://www.ksda.gov/> for more information and an application form.

(v) Levees

a) Surface Flow - It is unlawful to construct or maintain a levee on lands used for agricultural purposes, which has the effect of obstructing or collecting and discharging with increased force and volume the flow of surface water causing damage to the adjacent owner or proprietor. Where such surface water is the overflow of a watercourse on the premises of an upper landowner and such upper landowner has not constructed or maintained a levee along the bank of such watercourse to prevent the overflow, any landowner may make application to the Chief Engineer of DWR stating in such application that an upper landowner or landowners (if more than one) whose name(s) and address(es) are given in the petition has not constructed a levee on his/her land to prevent the overflow from the stream. The downstream landowner can then request permission to build a levee on his/her own land to repel such floodwater.

b) Stream Flow - It is unlawful for any person, corporation, drainage or levee district, county, city, town, or township to construct, cause to be constructed, maintain, or cause to be maintained any levee or other such improvement on, along, or near any stream in Kansas

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that is subject to floods, freshets, or overflows so as to control, regulate, or otherwise change the floodwaters of such stream without first obtaining approval of plans by the Chief Engineer of DWR.

c) Application for Permit - The application or request to construct a levee should be in the form of a letter or petition. Each application shall be accompanied by maps, profiles, cross sections, and such other data and information as the Chief Engineer of DWR may require. Questions concerning levees should be directed to the office of Chief Engineer of DWR. Refer to DWR's web site at <http://www.ksda.gov/> for more information and an application form.

(vi) Drains

a) Outlets

1) Owners of land may drain the same in the general course of natural drainage (by constructing open or covered drains) into any natural depression, draw, or ravine on his/her own land whereby the water will be carried by said depression, draw, or ravine into some natural watercourse or into any drain upon a public highway for the purpose of securing proper drainage to such land. The owner shall not be liable in damages therefore to any person, persons, or corporation.

2) The owners of land constructing an outlet to a drain upon any public road shall leave the road in as good a condition as it was before the drain was constructed. The question as to such condition is to be determined by the board of county commissioners and the county engineer (in counties having a county engineer) and, in other counties, the county surveyor.

b) Permission - Roadside ditches or railroad borrow ditches may be used as outlets only when written permission from responsible officials of the roads and railroads for such use of rights-of-way is obtained by the landowner(s) involved. In such cases, the use permits shall provide the right of the landowner to enter upon such property for the purpose of construction and maintenance of designed grades and cross sections.

c) Any questions concerning drainage laws or regulations should be directed to DWR.

(vii) Pollution Control Facilities for Agriculture-Related Pollutants - KDHE, Division of Environment, is charged by Kansas statutes with investigation, evaluation, and authority to order abatement of water pollution incidents. Specific regulations are in effect for registration of livestock operations that have a water pollution potential and a permit program for water pollution control facilities serving livestock operations.

a) The operator of a proposed animal feeding operation (AFO) must register with the KDHE, Division of Environment, prior to construction of a lot, pen, building, or pond--if any one of the following conditions exists:

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1) The AFO confines 300 or more animal units (AUs) of cattle, swine, sheep, or horses at any one time (as defined by KDHE),

2) The AFO confines less than 300 AUs but uses a pond or lagoon,

3) The AFO confines less than 300 AUs but has a significant water pollution potential, or

4) The AFO operator elects to come under the regulations.

b) The application for registration shall be made on a form supplied by KDHE. Application forms and information on rules and regulations may be obtained from the environmental technician at a KDHE district office. Refer to KDHE's web site at <http://www.kdheks.gov/index.html>.

c) The application will be accompanied by supplemental information regarding general features of topography, drainage course, and identification of ultimate primary receiving streams.

d) The application will be judged for a potential water pollution problem because of location, topography, or other reasons. A water pollution control facility constructed in accordance with plans and specifications approved by KDHE may be required.

e) KDHE, Division of Environment, will assist and direct the orderly planning and development of proposed livestock feeding facilities by evaluating proposed sites and discussing proposed operational practices.

f) Water pollution control facilities are not to be placed in use until a permit has been issued by KDHE after the satisfactory completion of construction in accordance with approved plans.

(b) Information and Assistance NRCS Can Furnish

(1) Information

(i) Conservation Districts - Designated NRCS personnel will assist the governing bodies of conservation districts to become familiar with (1) the federal and state laws relating to approval of plans of dams proposed for construction and (2) the general water supply and water right situations in the drainage basins in which the districts are located. They will encourage and assist the districts to establish policies that will facilitate the maximum development of the available water resources in their area, consistent with the basic conditions, and the established water rights in the basin.

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(ii) Water Users

a) Water Storage and Utilization Facilities - NRCS may furnish information to landowners and operators concerning the proposed use and operation of water storage and utilization facilities. Information may include suggested water volume needs, acres that might be irrigated or redeveloped, irrigation water requirements, water storage requirements for adequate livestock water supply, or other information related to water storage and use in the planning and installation of conservation practices.

b) Regulations for Water Appropriation Act - When assistance is requested, NRCS personnel should inform a landowner or operator of the regulations for the Water Appropriation Act; of steps necessary to acquire or perfect a right to use water or the state agency administering water rights; and how the obtainment of a water right relates to water supply facilities, rehabilitation of diversions, clearing of ditches, etc.

c) Legal Status of Water Rights - Such information shall not include any interpretations or determinations regarding the legal status of water rights in any specific case. It cannot be too strongly emphasized that a complex body of law has been built up concerning water rights and many questions belong in the legal field. NRCS personnel will advise landowners and operators that doubtful points should be referred to the Chief Engineer of DWR.

d) Landowner Responsibilities - NRCS personnel shall inform the landowner or operator, before giving any technical assistance, that they are responsible for: (1) acquiring or perfecting water rights; (2) obtaining approval of construction plans and related permits; (3) notifying adjoining landowners affected by the work; (4) obtaining any required property rights; (5) making inspections and carrying out required maintenance; and (6) operating conservation practices in accordance with applicable laws, rules, and regulations. Where the water user is a cooperator with the conservation district, a good way to assure this understanding would be the insertion of a statement to that effect in the agreement between the district and the cooperator.

(2) Assistance

(i) Water Utilization Facilities - NRCS may furnish technical assistance to landowners and operators in planning and constructing water storage and utilization facilities including field surveys and irrigation field maps, preparation of plans, and inspection of construction.

a) Surveys for Obtaining a Water Right

1) NRCS personnel should not undertake extra surveys or drafting work in the preparation for information required by the state in connection with the obtainment of a water right, except in the following two cases: (1) when a registered engineer in private practice cannot be secured locally or (2) the agriculture of a locality is of such a subsistence character that such an engineer could not be retained.

2) In the furnishing of assistance of this nature, NRCS personnel should keep in mind that the making of surveys and preparation of maps are not justified merely to

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record data concerning old water rights which were established by beneficial use prior to June 28, 1945, and which are recognized by the state. NRCS assistance is justified only when the work results in establishing conservation practices, measures, and facilities on the land.

b) Withholding Assistance - Before agreeing to assist a cooperator in a practice requiring the appropriation of water not covered by existing rights, NRCS should assure itself that the cooperator will proceed to obtain a valid water right in accordance with state regulations. NRCS will require the cooperator to furnish documentary proof except where it is commonly known that the water right was established by beneficial use prior to June 28, 1945, and is recognized as a valid right by the state. When a water right or use of water is in litigation, regardless of documentary evidence of a vested right, NRCS will avoid being drawn into the controversy and will withhold assistance until the doubtful point is cleared up legally. If the cooperator does not desire to obtain a water right, he or she should be notified that no assistance can be given. NRCS personnel cannot give assistance under conditions where the cooperator declines to obtain a water right.

c) Assistance for Stockwater Dams - The policies relating to furnishing assistance to district cooperators in building dams for the purpose of providing stockwater should be declared by the conservation district after a thorough review of pertinent federal and state laws and an analysis of the personnel available to the district has been made. NRCS will render assistance on such requests in accordance with the policies established by the district supervisors. The district-cooperator agreement should contain a statement to the effect that "The district recommends that the cooperator submit the plans to the Chief Engineer of DWR for approval unless it is clearly evident that the height of the dam and the capacity of the reservoir are such that the owner is exempt from securing such approval."

(ii) Dams

a) Compliance with DWR Regulations

1) Compliance with the regulations issued by DWR is required when NRCS technical assistance is given in the planning, design, and/or construction of any dam in Kansas subject to DWR approval. (Refer to DWR's web site at <http://www.ksda.gov/> for these regulations.)

2) NRCS personnel will advise landowners and operators in writing (KS405.4) that they are to apply for and have in hand a "permit to construct" from DWR before starting construction on dams impounding more than 50 acre-feet at the lowest point in the top of dam.

3) The application for a "permit to construct" contains a request wherein downstream landowners state their dependence upon the watercourse as a source of water for domestic use or any infringement upon established water rights. Where there is dependence upon the watercourse, the dam should contain a minimum 4-inch pipe to be able to pass streamflow through the dam at or near streambed elevation. NRCS personnel should require this supplement to be completed before commencing the design of the dam since this may control the type of principal spillway used.

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b) Permit to Construct

1) Permit applicants are to furnish NRCS a copy of the "permit to construct" issued by DWR before construction begins. No technical assistance on installation is to be provided without a copy of the permit attached to the NRCS design file.

2) Before agreeing to assist a cooperator in developing plans for a dam for which a permit is required, NRCS must be assured that the cooperator will submit plans to the Chief Engineer of DWR, for approval in accordance with provisions of state statutes and regulations. If the cooperator signifies that he or she does not intend to comply with the laws relating to approval of plans required for dam construction, NRCS will notify the cooperator that no assistance can be given. It is the policy of NRCS not to extend assistance under such circumstances.

(iii) Dikes and Levees

a) It is unlawful to construct a dike or levee without first obtaining approval of plans and specifications by the Chief Engineer of DWR.

b) Any dike or levee planned and/or designed by NRCS must meet all requirements of state law and, in addition, must be approved by the State Conservation Engineer. Therefore, plans for dike or levee must be duly approved by both the Chief Engineer of DWR and the NRCS State Conservation Engineer before NRCS personnel may give any technical assistance for construction.

(iv) Surface Drainage

a) Kansas statutes permit landowners to use drainage outlets into the drain of a public highway for the purpose of land drainage, provided such drainage outlet is approved by officials responsible for said highway.

b) Roadside ditches or railroad borrow ditches may be used as drainageways only when written permission for such use of rights-of-way is obtained by the landowner(s) involved from responsible officials of the roads and railroads. In such cases, the use permits shall provide the right of the landowner to enter upon such property for the purpose of construction and maintenance of designed flowline grades and drain ditch cross sections. NRCS personnel shall not give any technical assistance for construction until written permission for use of rights-of-way is obtained.

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KS405.4 Sample of Form KS-ENG-33, Instruction Letter to Landowner on Obtaining DWR
Permit to Construct

United States Department of Agriculture

KS-ENG-33
Rev. 10/06



Natural Resources Conservation Service
900 W. 6th
Anywhere, Kansas 66666

Phone: 555-555-0000
FAX: 555-555-0001
www.ks.nrcs.usda.gov

December 7, 2006

Mr. John Doe
1200 W. Maple
New Town, Kansas 55555

Dear Mr. Doe:

The proposed dam to be constructed in the Northeast Quarter, Section 23, Township 19 South, Range 3 West is subject to the provisions of Section 82a-301 to 305a (as amended) of the Kansas General Statutes of 1949 (as amended).

It is your responsibility to submit construction plans, specifications, and an application for a Permit to Construct to the Chief Engineer, Kansas Department of Agriculture, Division of Water Resources, 109 SW Ninth Street, Topeka, Kansas 66612-1283.

Upon request, the Natural Resources Conservation Service can assist you with information available at our office that may be needed for you to obtain the necessary rights, permits, or approvals required to construct, operate, and maintain your structure.

Sincerely,

JAMES R. PUBLIC
District Conservationist

(Form KS-ENG-33 is to be used for each dam requiring a permit to construct from DWR. Complete your office address, the current date, landowner's or operator's name and address, the legal description, and the district conservationist's name; mail the original to the landowner or operator; and retain a copy in the NRCS files with other information relating to the dam.)

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