



# Handling Increased Water from Upstream

Options for dealing with increased water flows coming onto your property



## NRCS Authority

The Natural Resources Conservation Service (NRCS) does not have authority over drainage law or provide any legal interpretations of drainage law in Nebraska. NRCS is not a regulatory agency and does not issue permits for the installation of tile. NRCS' role in tile drainage placement only involves situations where tile may be placed too close to a wetland and thus cause eligibility issues due to potential wetland conversions. NRCS does not direct where tile water outlets or where systems are installed UNLESS it converts a wetland due to such placement. A producer may want to review Nebraska drainage law at <http://nebraskalegislature.gov/laws/statutes.php?statute=31-201> and/or consult an attorney.

## NRCS Assistance

The first thing you need to know is if there are wetlands near the area where the tile would be installed. Tiles are designed to draw water horizontally through the soil, which means they could convert wetlands 100, 200, or more feet away and cause Farm Program eligibility issues.

To determine if there are wetlands that might be impacted, a landowner or operator needs to have a certified wetland determination completed by the Natural Resources Conservation Service (NRCS). To do this, the person needs to go to their local Farm Service Agency (FSA) office and sign an AD-1026 form, indicating where they want to install the tile drainage. The FSA office will forward this request to NRCS to see if there is a certified wetland determination already completed or if

one needs to be conducted. A certified wetland determination will confirm if wetlands are present and label them to indicated authorized uses. This information is then used to determine areas where tile drainage should not be installed due to proximity to a wetland.

## Potential Options

- The first step should be to discuss and resolve the excess water issue with the neighboring landowner. This may involve moving the tile outlet or different land management.
- If you think the neighbor drained a wetland, then you can file an anonymous whistle blower complaint by contacting your local Farm Service Agency (FSA) office. NRCS will follow up and review the situation for Wetland Conservation Compliance.
- If you have an existing drainage system (tile, waterway, ditches, etc.) on your property, you may be able to provide some maintenance to your system without affecting your USDA Farm Program benefits. Contact your local NRCS office to ensure your maintenance actions do not jeopardize your own Farm Programs eligibility.
- If you want to improve or increase drainage through your property (enlarged surface drainage way, subsurface drains, etc.) then the first step would be to obtain a certified wetland determination on your property. If you don't already have a certified wetland determination, you need to go to the local FSA office and sign an AD-1026 form.

## Understanding Nebraska's Drainage Law

Drainage can increase agricultural productivity. It can also lead to additional nutrient runoff and increased soil erosion downstream, which commonly leads to disputes between neighbors. Therefore, it's important that Nebraska landowners and operators understand the law and know their rights when it comes to draining water on their property.

While the USDA's Natural Resources Conservation Service doesn't have authority over drainage law, NRCS staff can help determine if the drainage project you have in mind could potentially cause you to be found out of compliance with USDA's "Swampbuster" or wetland drainage restrictions through the Farm Bill.

This fact sheet is not a comprehensive guide. This is for educational purposes only. This resource is not intended and should not be used as a substitute for individual legal advice.



## NRCS Evaluation of Proposed Changes in Drainage

Once there is a certified wetland determination completed, NRCS can evaluate the proposed changes a downstream landowner would like to implement to address the increase in water flows.

If the certified wetland determination shows there are no wetlands in the field/landscape downstream of the tile outlet, the landowner/operator can work with the upstream landowner to possibly hook onto the existing tile line and extend the outlet to another part of their property, OR they may install an independent tile system on their land, or make other drainage improvements. Before implementing these actions, producers need to sign an AD-1026 form at the FSA office indicating what is being propose.

If the certified wetland determination shows there is a wetland in the field/ landscape downstream of the tile outlet, then the landowner MAY be allowed to make some changes to accommodate this increased water, IF the water increase is a result of human activity in the watershed that occurred after December 23, 1985. In order to maintain program eligibility, you must provide sufficient documentation and receive approval from NRCS prior to making any changes that will have the effect of increasing the capacity of the existing drainage systems. Federal regulations (7 CFR 12.33) place the burden on the downstream landowner to provide the appropriate documentation for making any changes to the drainage system. The three bullets below outline what the regulations require of the landowner should they wish to address the increased water regime.

Following each bullet is a list of specific information that NRCS would request to review the project:

Documentation of the causes of this increased water regime. a. When did the increased water start?b. What caused it?c. What impact is it having beyond what would have existed without the increased flows?

Documentation of the increased water regime. a. How much total water is coming from the upstream throughout the year? b. How much extra water is coming from the upstream throughout the year? c. Has the timing of flows been affected and if so how?d. What is the future expected water regime if nothing was done?

What are the planned changes to the existing system?a. Provide a description of any proposed work and the associated plans or designs.b. Describe how the proposed work would impact or change the above conditions.

To gather the information outlined above, the landowner may need to secure the services of a consultant or engineering firm. A directory of environmental consultants and engineers that may be able to assist with this effort can be found on the Nebraska Department of Environmental Quality's web site: <http://deq.ne.gov/NDEQProg.nsf/ConsultantDir.xsp>

Please note: this listing is not a complete listing of consultants or engineering firms available for this

kind of work. In addition, NRCS does not endorse one specific consultant over another. It is the landowner's decision who they hire, if anyone, to provide the required documentation to NRCS.

Once this information is submitted to NRCS, it will be evaluated to determine if the proposed project has minimal effects on any downstream wetlands. These effects are relative to the conditions of the downstream wetlands prior to the water increase that resulted due to human activity in the watershed and occurred after December 23, 1985. If a minimal effects determination is granted, the landowner will be notified by NRCS that their planned changes can proceed without affecting their Farm Program eligibility.

### For More Information

To locate the USDA Service Center nearest you visit <https://offices.sc.egov.usda.gov/locator/app>. More information about NRCS' programs and services is available at [ne.nrcs.usda.gov](http://ne.nrcs.usda.gov)

