

WILL YOUR PROPERTY BE AFFECTED BY THE WATERS OF THE U.S. RULE?*

1) Is there a USGS blue line water on your property or do you have a ditch or tributary that contributes flow to a feature designated as a blue line water on a USGS map?

- In many instances, landowners may think of their ditch or irrigation conveyance system as man-made created ditches but if they show up on a USGS map as a blue line they are regulated. Further, if there is a ditch or other feature that originates on your property that contributes flow to a USGS blue line that ditch may also be regulated, even if the hydrological connection occurs off the property.
- A USGS blue line shows the generalized extent of waterways, including streams, flumes, rivers, lakes, and man-made features that significantly contribute flow to rivers, streams, and lakes. The database for blue lines can be found at: <http://nhd.usgs.gov/data.html>. Note that this database may not reflect ephemeral drainages, shallow swales, jurisdictional ditches, and is based on 1:100,000 scale topographic maps. This database is updated periodically so check annually.

2) Are there current or historical wetlands identified in the National Wetland Inventory database?

- You can access the current and historical wetlands inventory here:
<http://www.fws.gov/wetlands/Data/Mapper.html>

3) Is your land within a floodplain and specifically is it within a 100 year floodplain as designated by FEMA?

4) Know your soils! Are you farming on soils listed as hydric?

- Your activities may be subject to federal regulation if you are farming rice or other irrigated crops on hydric soils and switch to upland crops such as wheat or orchards, including vineyards. <http://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/use/hydric/>
- To create custom soil reports go to:
http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_019422.pdf

5) Does the land include a tributary, including those that flow only after a storm or during wet seasons? Are there tributaries on neighboring land and, if so, how far away are they from your land?

- Features are considered jurisdictional by rule if any portion neighbors, meaning that they are located within 1,500 feet of the ordinary high water mark (“OHWM”) and within the 100 year floodplain.
- The OHWM is difficult to ascertain but as a general rule it contains all portions of an ephemeral, intermittent, or permeant stream plus the active floodplain which is the area of land that is frequently flooded from regular events (2-10 year flood interval).

- The Corps does not need any field data to determine the extent of the OHWM. They can determine the OHWM by looking at aerial photographs. A helpful tool to view aerial photographs of your property is Google Earth—this is generally the same set of aerials the Corps will use and the photography goes back to late 1980s.
- The OHWM Guidelines can be found at:
http://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/Ordinary_High_Watermark_Manual_Aug_2008.pdf

6) Does your property have a ditch? Many ditches are now regulated as categorically jurisdictional tributaries unless an exemption applies.

- The Rule excludes:
 - i. Ditches with ephemeral flow (after rainfall) that are not a relocated tributary or excavated in a tributary.
 - ii. Ditches with intermittent flow (ie: seasonal flow) that are not a relocated tributary, or excavated in a tributary, or drain a wetland.
 - iii. Ditches that do not flow, either directly or through another water, into a traditional navigable water, interstate water, or territorial sea.
- Additionally, ditches that collect surface or subsurface flows from agricultural fields can be considered point sources. Ditches and ponds that are excluded as waters of the U.S. can be determined to be a point source and subject to other provision of the Clean Water Act, including sections 402 and 301. (80 Fed. Reg. page 37097 3rd column, June 29, 2015.)

7) Do you use a tile drainage system?

- Tile drainage is an agriculture practice that removes excess water from soil subsurface.
- While surface water can be drained via pumping and/or open ditches, tile drainage is often the best recourse for subsurface water. The **ditch** used to collect and convey subsurface flow from precipitation could be jurisdictional if the ditch meets the definition of a tributary or water from the ditch makes a hydrologic connection to a tributary and/or conveys water to traditional navigable water.

8) Is your land within a USFWS critical habitat designation for a water dependent species such as the federally listed tadpole shrimp, vernal pool fairy shrimp, California red-legged frog, or California tiger salamander?

- If so, the federal government may have already considered your land to have waters of the U.S. The burden of proof now resides with the landowner to demonstrate otherwise. Tools to determine if your land is within critical habitat for a water dependent species can be found at:
<http://ecos.fws.gov/ipac/>

** This paper is intended to provide a basic guidance to farmers and ranchers, but it does not provide legal advice. Farmers and ranchers should consult with a lawyer if they need legal advice.

**The above list is for illustrative purposes only and describes features on land that may be regulated under the Clean Water Act's Final Waters of the U.S. Rule. Note that this list is not exhaustive nor is it a formal decision of applicability or inapplicability of jurisdiction under the CWA. Thus, other features and waterways may be jurisdictional. Additionally, even if a parcel meets one of the criteria listed above, it may not be jurisdictional due to specific features of the land.