

Message From Chris....

Waters of the United States (WOTUS), we've heard a little bit about this in the past couple years. Accordingly, I'll answer the most commonly asked questions I've received about this topic. This should be helpful to everyone... (and don't forget to click on my Facebook or YouTube links below to also see my short video on this material).

WOTUS

**Q:** Whether Oklahoma builds more in-fill development nearby its rivers in urban areas (whether in OKC or Tulsa) or in its now more rural areas which involve lakes, streams or other bodies of water - either will make highly relevant the recent changes in the Federal Government's jurisdiction over such waters as set forth in the "Waters of the United States" ("WOTUS") as codified in 33 USC 1344. *What is it?*

**A:** Through the Clean Water Act of 1972, WOTUS gives two (2) federal agencies, the "EPA" and the "Army Corps of Engineers," large regulatory authority over land use. The EPA regulates the discharge of contaminants/pollutants into WOTUS and the Army Corps of Engineers governs over the discharge/dredging of fill material into the WOTUS; *as well as how to go about defining those waters that shall be WOTUS.*

**Q:** What's the big deal about how WOTUS is defined?

**A:** Those waters that are defined as WOTUS (and hence subject to EPA and Army Corps of Engineers control), shall consequently trigger the potential need for different permits to be obtained under the Clean Water Act of 1972 before any land use/development can occur.

**Q:** If the Clean Water Act has been around since 1972, what's news?

**A:** On August 28<sup>th</sup>, 2015, the EPA and the Army Corps of Engineers issued a "New Rule."

**Q:** What does the New Rule do?

**A:** It broadens out the meaning of WOTUS to include waters that are not only traditionally navigable, known as traditional navigable waters ("TNW's"), and interstate waters, territorial seas, *but now also tributaries and all waters adjacent to TNW's and the foregoing.*

**Q:** What are the practical results of the New Rule?

**A:** The EPA and the Army Corps of Engineers will now have expanded jurisdiction to decide whether certain waters are WOTUS and thus subject to Section 404 permitting under the Clean Water Act; all to be decided prior to the required permits being issued under the Clean Water Act. In some cases, prairie potholes have been decided to be WOTUS after having been found to have a significant nexus to TNW's, along with waters lying within 100 year floodplains or those waters within 4,000 feet of the high tide line or ordinary high water mark of a TNW, among others....

**Q:** What is the permitting process like under Section 404?

**A:** It's lengthy and expensive. The U.S. Supreme Court found under *Rapanos v. United States* (2006) that an average applicant spent over \$270,000 in transaction costs (not including required mitigation costs) and waited an average of 788 days for a permit to be issued. You can call the Army Corp of Engineers for a "jurisdictional determination" about sixty (60) days ahead of time, but expect delays as a practical matter.

#### What My Clients Are Saying

"I would certainly like to commend Chris for his efforts in a recent transaction and for keeping communications with distant legal departments of large companies informed and involved as regarding the negotiations. Chris Griswold has been a real asset in bringing together people and has the ability to center the focus on the transaction and that is really needed in today's commercial real estate market. Even though we may be experienced and seasoned veterans of commercial real estate, it's good to have qualified, energetic, and capable legal support ready to move the process along at the faster rate we need today. My thanks to Chris for his efforts in this most recent exchange and transaction which served everyone satisfactorily."  
**Irmon Gray / Broker / NAI Sullivan Group / Oklahoma City, Oklahoma**

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