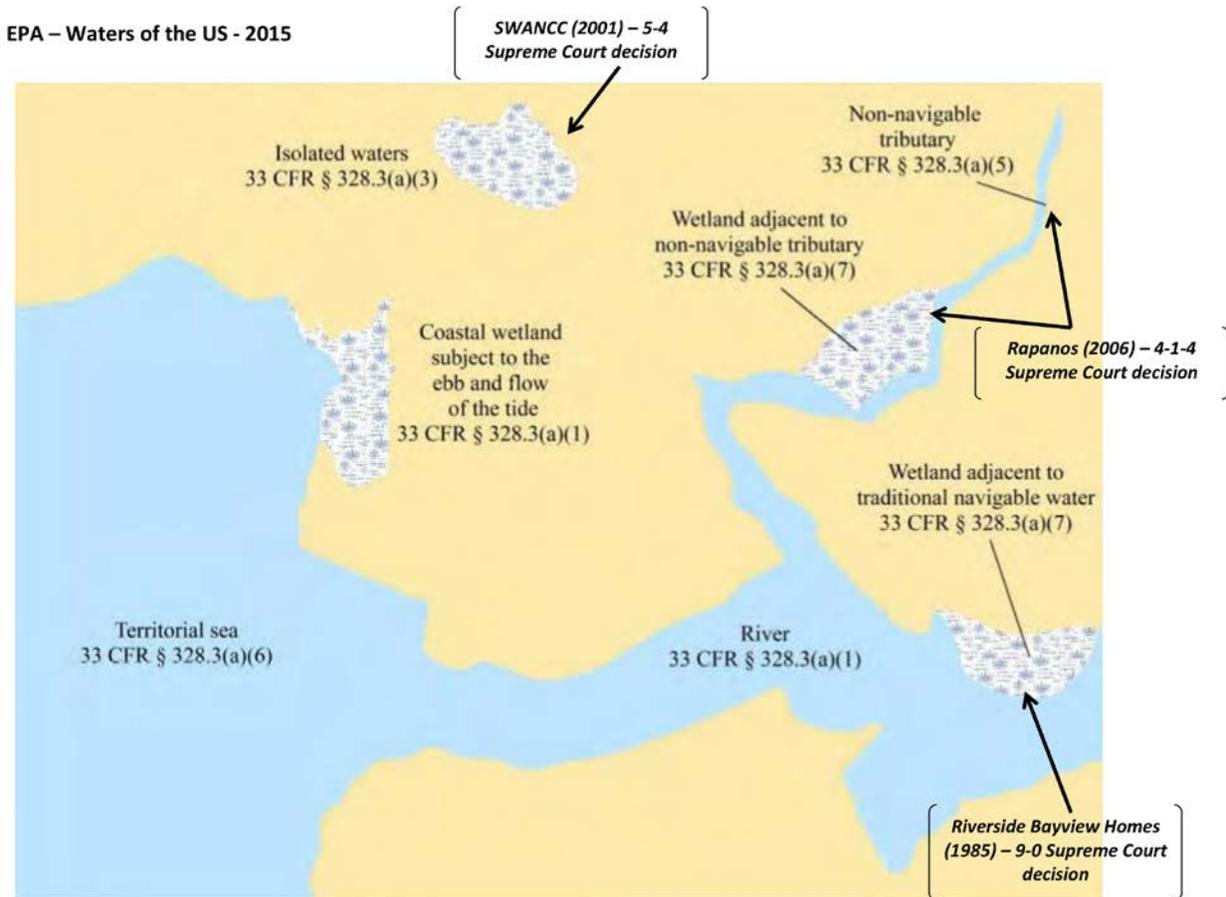


2015 EPA Rule on Waters of United States – Explained Fact Sheet by Montana Audubon 10-8-2015

Clean water is vital to our health, communities, and economy. We need clean water upstream in state like Montana—to provide for healthy communities downstream in other states. Streams and wetlands provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife. Approximately 54% of Montana’s population uses public drinking water systems that rely on clean surface water; the rest of Montanans rely on clean groundwater.

The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) issued a rule in 2015 to clarify the definition of “Waters of the United States.” This rule was issued because regulations protecting our country’s streams and wetlands became confusing and complex because of two main Supreme Court decisions: SWANCC in 2001 (a 5-4 decision on isolated wetlands) and Rapanos in 2006 (a 4-1-4 decision on tributaries and wetlands adjacent to tributaries). The map below outlines the names of the Supreme Court cases, their votes, and the portion of streams or wetlands impact by the decision. The 1985 Riverside Bayview Homes decision (a 9-0 decision on wetlands adjacent to navigable waters) is also noted below.



The 2015 Clean Water Act Rule Did Not Go Into Effect in Montana—or Any Other State—Yet:

Although the Clean Water Act rule was finalized on August 28, 2015 it has been blocked by a court injunction in two separate court decisions. So...until these lawsuits play out, the rule will not apply.

Why the Rule:

As noted above, the Clean Water Act rule was adopted because of several confusing US Supreme Court decisions. Because the EPA and Corps were operating under guidance documents, many entities—including the Farm Bureau, many local governments, and more—requested that a rule be adopted (FYI: the EPA has a list of organizations requesting the rule on their website). During the rulemaking process, the EPA/Corps received about 1.2 million comments and held 400 meetings with stakeholders.

Background on Acreage of Waterways in Montana:

- The State of Montana has 147,039.71 square miles in total area = 94,105,414 acres
- There are 145,545.80 square miles of land area in Montana = 93,149,312 acres
- There are 1,493.91 square miles in water in Montana = 956,102 acres = 1.0%
- According to the best inventory in Montana, wetland areas occupy the following acreage (Source: MT Natural Heritage Program; May 15, 2015): Wetlands = 2,435,123 acres = 2.6%
- So the amount of acreage impacted in some way by the Clean Water Act rule is approximately 3,391,225 acres = 3.6% (wetland acres + water acres).

Background on the Clean Water Act:

The Clean Water Act protects clean water—our nation’s waters – which we use as drinking water, recreate in. Clean water is critical for our communities and quality of life.

- Clean water is an economic driver in Montana: for communities, the fishing and tourism industries, and agriculture.
- The more clean water we have, the less water treatment we have to do.

The Basic Idea Behind the Clean Water Act Rule:

In order to understand the Clean Water Act Rule, first you need to understand why we have a rule, and then you need to understand what the rule is basically trying to accomplish:

1. Why We Have Clean Water Act Rules (in general):

- Since we want to keep our waters clean, we’ve decided to set up a system where development projects that potentially affect water quality are looked at closely: they need permits. Professionals look at the proposed project and make suggestions on how the project can be designed so it won’t impact waters as greatly.
- NOTE: a Clean Water Act permit is only needed if Waters of the US are going to be polluted or destroyed.

2. What Does the New Rule (Basically) Try to Accomplish:

- In order to understand what this rule impacts, it helps to visualize the area that the rule impacts. The new rules set up 3 buckets which represent all the types of waters in Montana:



- Bucket 1: Waters we want to have regulators look at because projects putting sediment or other pollutants in our streams and wetlands could damage drinking water/downstream water users.
- Bucket 3: Waters we don't think will impact our drinking water—so we don't want to ever look at them. This includes most ditches, isolated wetlands, basic agricultural practices, puddles, etc.
- Bucket 2: Waters we should look at—because polluting these waters might impact drinking water/downstream users—they need to be looked at on a case-by-case basis to assess their impact.
- Basically: the new rule puts more wetlands and streams in Buckets 1 and 3, and shrinks the gray area—Bucket 2—those waters that are looked at on a case-by-case basis.
- **The new rule is designed to be consistent, predictable, and reduce the amount of time and money wasted looking at a project we don't need to be looking at. It also:**
 - **Reduces the use of case-specific analysis; and**
 - **Does NOT protect any types of waters that have not historically been covered by the Clean Water Act.**
- **Because of the interest in better defining which wetlands and streams go in each bucket, one of the important definitions that the rule adds to the Clean Water Act is the definition of "tributary." Tributaries:**
 - Must have a "bed" and "bank." Those two terms are commonly used by Montana's Conservation Districts to look at streams.
 - Must have an "Ordinary High Water Mark." All Montana's fisherman should understand the Ordinary High Water Mark to understand our state's stream access laws.

Who Administers the Program in Montana:

- The Montana Dept. of Environmental Quality administers most of the Clean Water Act permitting in the state of Montana. Specifically they administer the permits that regulate the discharge of pollutants going into our state's waterways. They also administer preventative programs such as storm water, nonpoint, etc.
- The Army Corps of Engineers administers Section 404 of the Clean Water Act in Montana; these are the permits that regulate activities when people propose to place fill material in our streams and wetlands. Please note: the Corps approves 99.8% of the applications that are submitted for their review (this is a national average that also holds true for Montana).

For More Information:

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- Bruce Farling, Executive Director, Montana Trout Unlimited, bruce@montanatu.org, 406-543-0054.
- EPA website – with everything from Frequently Asked Questions about the rule to updates on lawsuits: <http://www2.epa.gov/cleanwaterrule>.