

# Redefining Clean Water Act Jurisdiction

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# Clean Water Act Jurisdiction post- *Rapanos*: Case-by-Case Chaos?

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## What is a Water of the United States?

- *Rapanos* Plurality: Waters that are permanent, flowing or standing; physically connected wetlands; not intermittent streams or groundwater.
- Kennedy: Waters with a “significant nexus”: waters that “significantly affect the chemical, physical and biological integrity of waters more readily understood as navigable.



















## Clean Water Restoration Act

- HR 2421 and S.1870
- Intended to restore the scope of the term Waters of the United States to its pre-SWANCC “commonly understood” meaning.

## According to the Sponsors:

- Since 2001, federal clean water programs have been in “turmoil.”
- The *SWANCC* and *Rapanos* decisions have “created confusion and uncertainty for communities, developers and agricultural interests.
- As stated by J. Stevens in his dissent in *SWANCC*, the Supreme Court has “needlessly weaken[ed]our principle safeguard against toxic water.”

## According to the Sponsors, HR 2421 Will:

- Provide jurisdictional certainty
- Reduce permitting delays and paperwork
- Protect economically important wetlands and water bodies
- Improve fishing and hunting through the protection of habitat.

## According to the Sponsors, HR 2421 Will Not:

- Affect existing Agricultural and Silvicultural Exemptions
- Increase litigation (the law will be much clearer)
- Impose new costs on states or local governments.

## What About the Regulatory Exemptions?

- Thanks to NACWA and CASA, the sponsors have agreed to preserve the waste treatment exemption in the new legislation.
- The sponsors have also agreed to consider additional report language to make clear that the bill is not intended to alter the status of groundwaters.

## Meanwhile, back in the Judicial Branch...

- Our next two speakers will address what has happened post-*Rapanos* in the lower courts and the implications of HR 2421.