Sackett v. EPA

A brief overview of the decision & the Clean Water Act

Go back to the toolkit -
www.nwf.org/watertoolkit

Sackett v. EPA Narrowed the Scope of the Clean Water Act

NJ vernal pool used by spotted turtles. Photo: USFWS

About the decision:

- Technically unanimous but …
- 5-4 disagreement what the new test should be
- Majority opinion written by Alito and signed by Roberts, Thomas, Gorsuch, and Barrett.
- Kavanagh's opinion:
  - "the continuous surface connection test raises 'a host of thorny questions' and will lead to 'potentially arbitrary results.'"
  - "significant repercussions for water quality and flood control throughout the United States"
  - "will generate regulatory uncertainty"
- Kagan's opinion:
  - "The Court's analysis today therefore seems stuck in a bit of a time warp—relitigating an issue that Congress settled in 1977 and that this Court has long treated as settled: The Act covers adjacent wetlands. By adopting a test that substitutes "adjoining" for "adjacent," the Court today errs."

Sources:
May 2023: Sackett opinions (Alito p. 6-28)
Aug 2023: EPA Rule interpreting Sackett

Sackett's new test

Alito's new test:

- The Clean Water Act only protects "those relatively permanent, standing or continuously flowing bodies of water" that are "connected to traditional interstate navigable waters" and …
- Wetlands with a "continuous surface connection" to bodies that are 'waters of the United States' in their own right," so that they are effectively "indistinguishable" from those waters.

What does that mean? EPA estimates:

- Up to 63% of wetlands have lost protections
- Up to 4.9 million miles of streams

Is this dry Texas creek "relatively permanent"? Photo by David Grant-cc-Flickr

Sources:
May 2023: Sackett opinions (Alito p. 6-28)
Aug 2023: EPA Rule interpreting Sackett
August 2023: EPA explanation video

How the Clean Water Act Protects Our Waters

and what the loss of these protections could mean

Discharge Permits

Section 402 requires polluters like factories, sewage treatment plants, hog farms, mines, etc. to get National Pollutant Discharge Elimination System (NPDES) permits before polluting any water protected by the law.

This program alone keeps 700 billion pounds of pollution out of America's waters each year.

In most places, this program is administered by the states and the states are able to define which waters it applies to.

Damage Permits

Section 404 requires a permit before causing permanent physical change to any water body protected by the law. These "dredge and fill" permits are approved by the U.S. Army Corps of Engineers.

Newly unprotected streams can now can be dammed, rerouted and channelized without a permit. Wetlands will be at particular risk of destroyed entirely.

Oil Spill Recovery

The Oil Pollution Act is an amendment to the Clean Water Act and many of its provisions only apply to waters protected by the Clean Water Act.

For example:
- Oil spills that do not threaten downstream waters may no longer be required to be reported.
- Spills in newly unprotected waters may no longer be eligible for immediate cleanup using funds from the Oil Spill Liability Trust Fund.
- The companies responsible may no longer have to pay Clean Water Act or Oil Pollution Act penalties.

Local Review

Section 401 allows states and Tribes to have input into federally funded or permitted projects, like pipelines and mines, that affect waters in their states.

This decision could also limit States' and Tribes power to request changes to or block damaging federal-approved projects.

Clean Water Act Veto

Section 404c allows EPA to deny a permit for any federally-permitted project that will cause significant damage to the drinking water, fisheries or recreational areas.

EPA has only permanently canceled two proposals in the past forty years -- Alaska's Pebble Mine and a large coal mine in WV.

Potential New Rule Limiting Protections

- 2023 Rule already conforms definition of protected waters to the Sackett decision
- In March, Trump Administration asked for information to inform a new rule
- March guidance memo indicated wetlands connected to other waters by conveyances like culverts and pipes would not be jurisdictional
- April and May – Administration received comments and held listening sessions
- Proposed rule expected this year that will restrict the meaning of terms like “continuous surface connection” and “relatively permanent”

What Protections Does Your State Have?

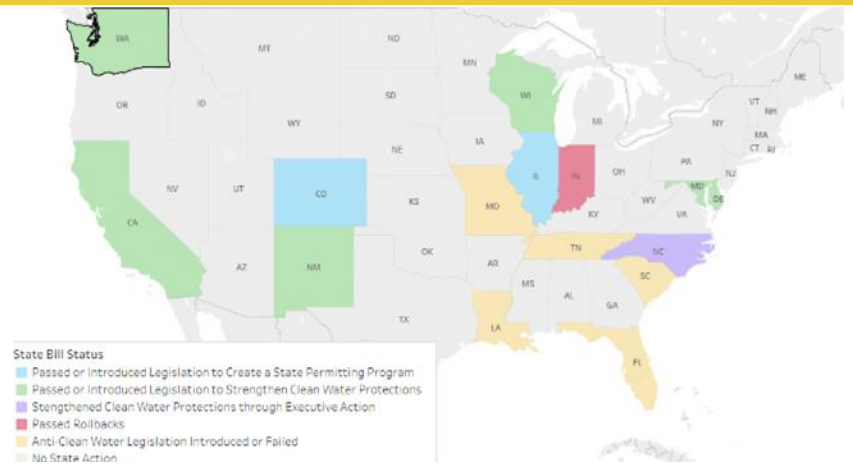
The Sackett *decision leaves it up to the states to protect these waters*

Find out more about your state's laws via [Lawyers for Good Government]

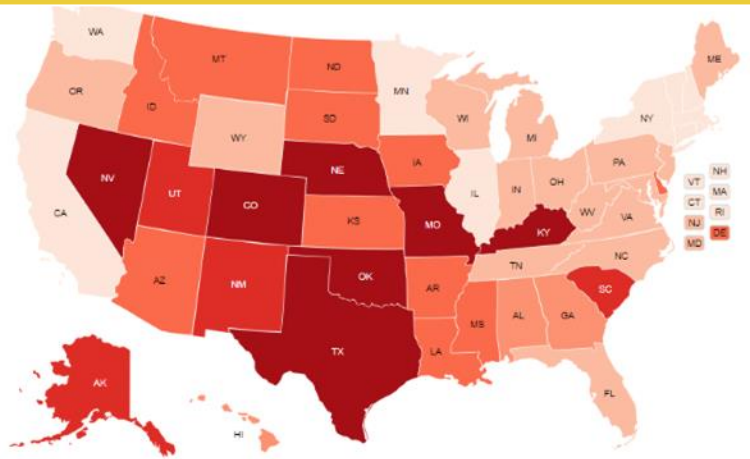
Type here to quickly find a specific state or territory

Alabama	Alaska	Arizona
Arkansas	California	Colorado
Connecticut	Delaware	District of Columbia
Florida	Georgia	Hawaii
Idaho	Illinois	Indiana
Iowa	Kansas	Kentucky
Louisiana	Maine	Maryland
Massachusetts	Michigan	Minnesota
Mississippi	Missouri	Montana

[Protect Our Waters] is tracking changes to state laws after *Sackett*



[Earthjustice] has created a number of helpful maps & resources



Sackett’s impacts on wetlands in your state

Talking about what it means

Go back to the toolkit -
www.nwf.org/waterstoolkit

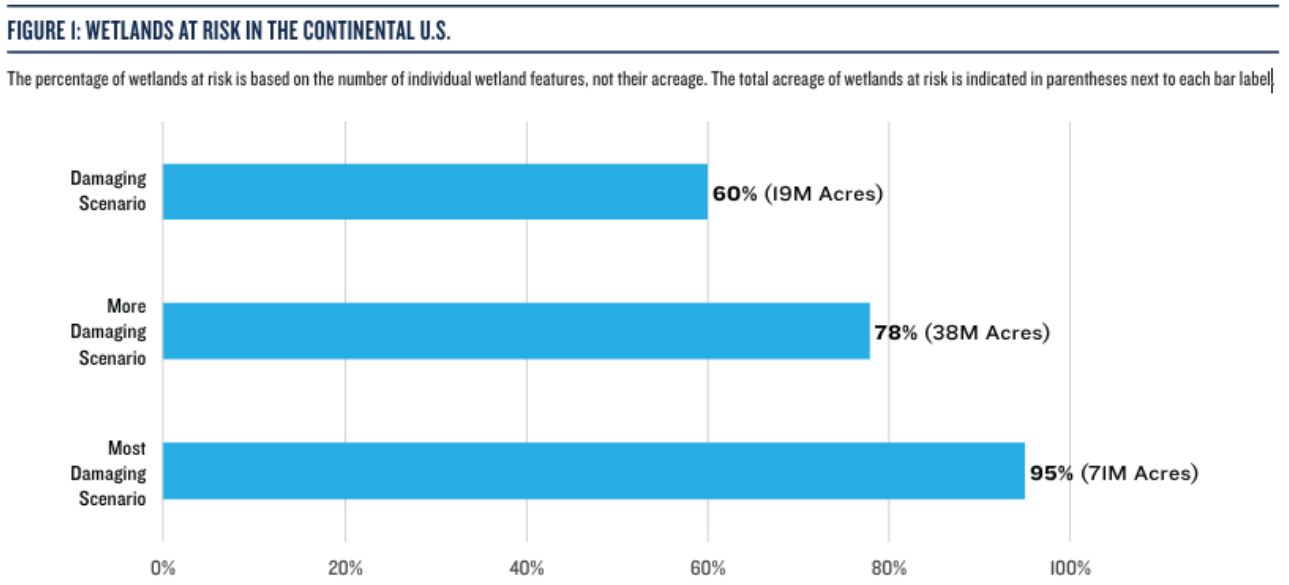
New NRDC Report & Models

best source for making a wetlands estimate in each state

Mapping Destruction:

report & interactive map

- After *Sackett*, at least 60% of the nation's wetlands are unprotected
- 2023 rule was close to the Damaging Scenario
- Upcoming rule will remove more wetlands from protection

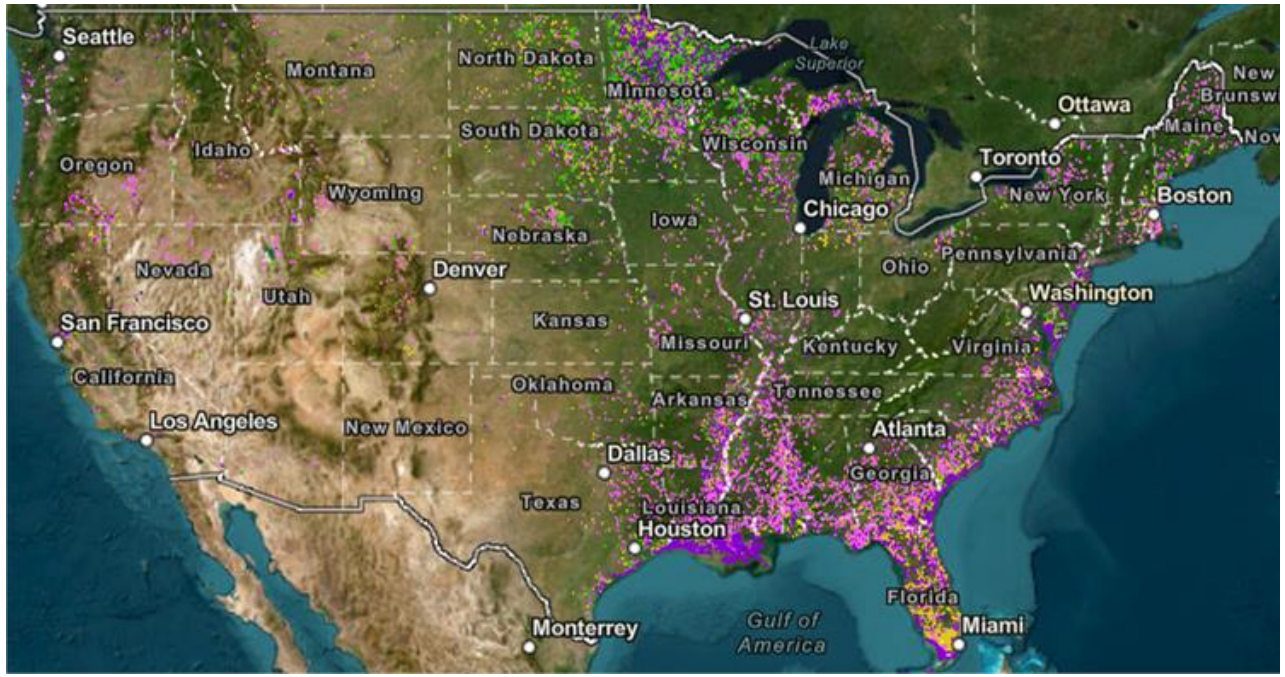


New NRDC Report & Models

best source for making a wetlands estimate in each state

TABLE 1: WETLANDS AT RISK UNDER MODELED SCENARIOS

State	Baseline: Regulatory Wetlands		Damaging Scenario		More Damaging Scenario		Most Damaging Scenario	
	Number of Regulatory Wetlands	Acres of Regulatory Wetlands	Percent Number of Wetlands at Risk	Percent Acres of Wetlands at Risk	Percent Number of Wetlands at Risk	Percent Acres of Wetlands at Risk	Percent Number of Wetlands at Risk	Percent Acres of Wetlands at Risk
Alabama	183,285	3,196,623.6	39%	9%	65%	26%	95%	92%
Arizona	21,643	208,131.6	46%	23%	67%	49%	97%	98%
Arkansas	133,915	2,378,881.8	39%	11%	71%	32%	94%	83%



Make a Best Guess Estimate

Estimating the impact helps people understand

- No one knows exactly how this will be implemented on the ground
- Round percentages are easier for reporters/the public to understand

Connect the estimate to people and places:

- Water quality, wildlife, way of life
- Specific areas of your state
- estimate the flood storage lost
- Talk about the impact on places they do know
- Communities they now
- impacts on drinking water
- connect to extreme weather

Stories using the 'best guess' frame - click the headlines

'Huge swaths' of SC wetlands now vulnerable due to weakened federal protections

Isolated NC wetlands face loss of protection following federal ruling

What the Supreme Court's 'Sackett' ruling could mean for Kentucky's dwindling wetlands

Kentucky bill would give coal, other industries the right to pollute our water

Millions of acres of NC wetlands threatened by Supreme Court

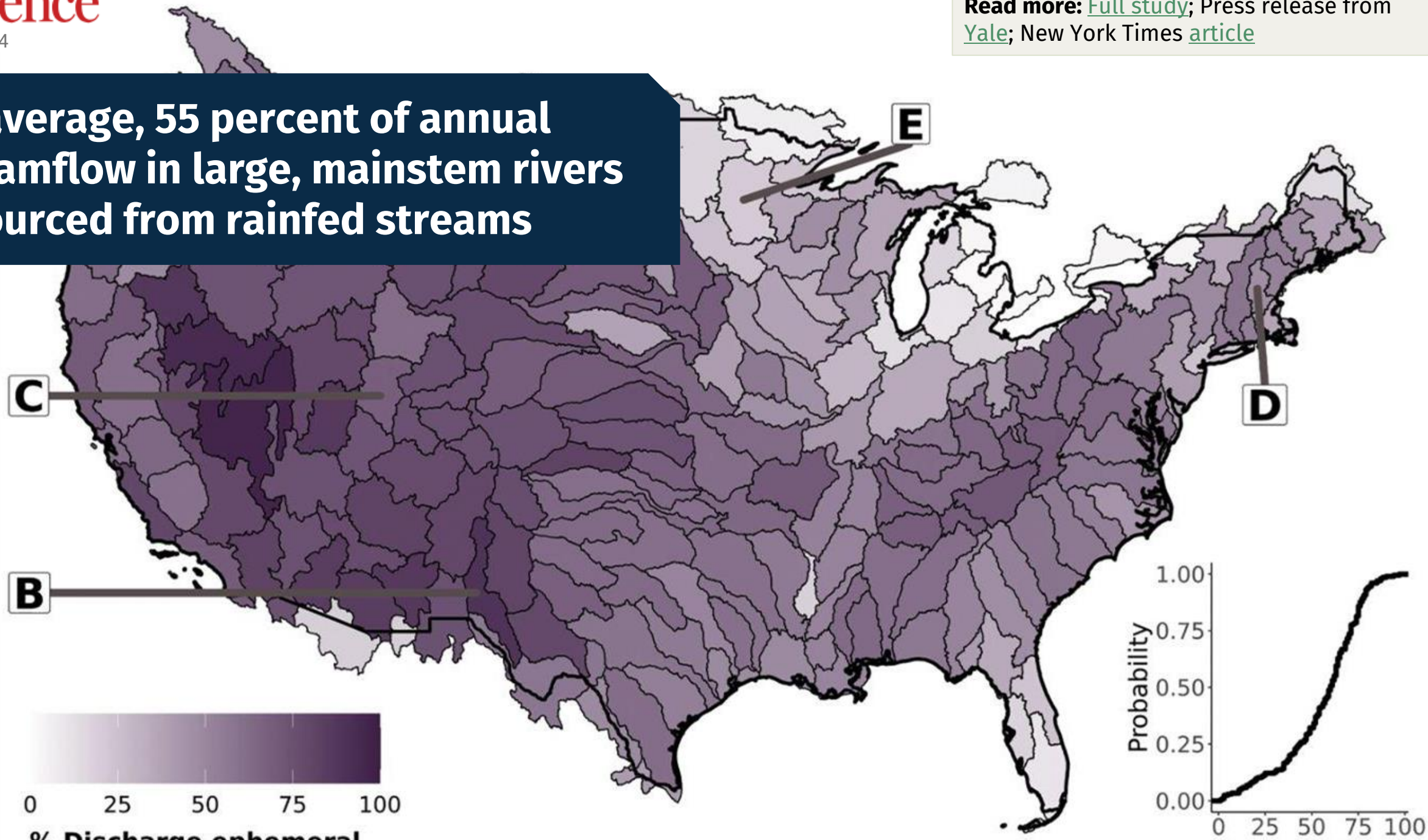
Loss of protections for streams

Go back to the toolkit -
www.nwf.org/waterstoolkit

Science
Jun 2024

Read more: Full study; Press release from Yale; New York Times article

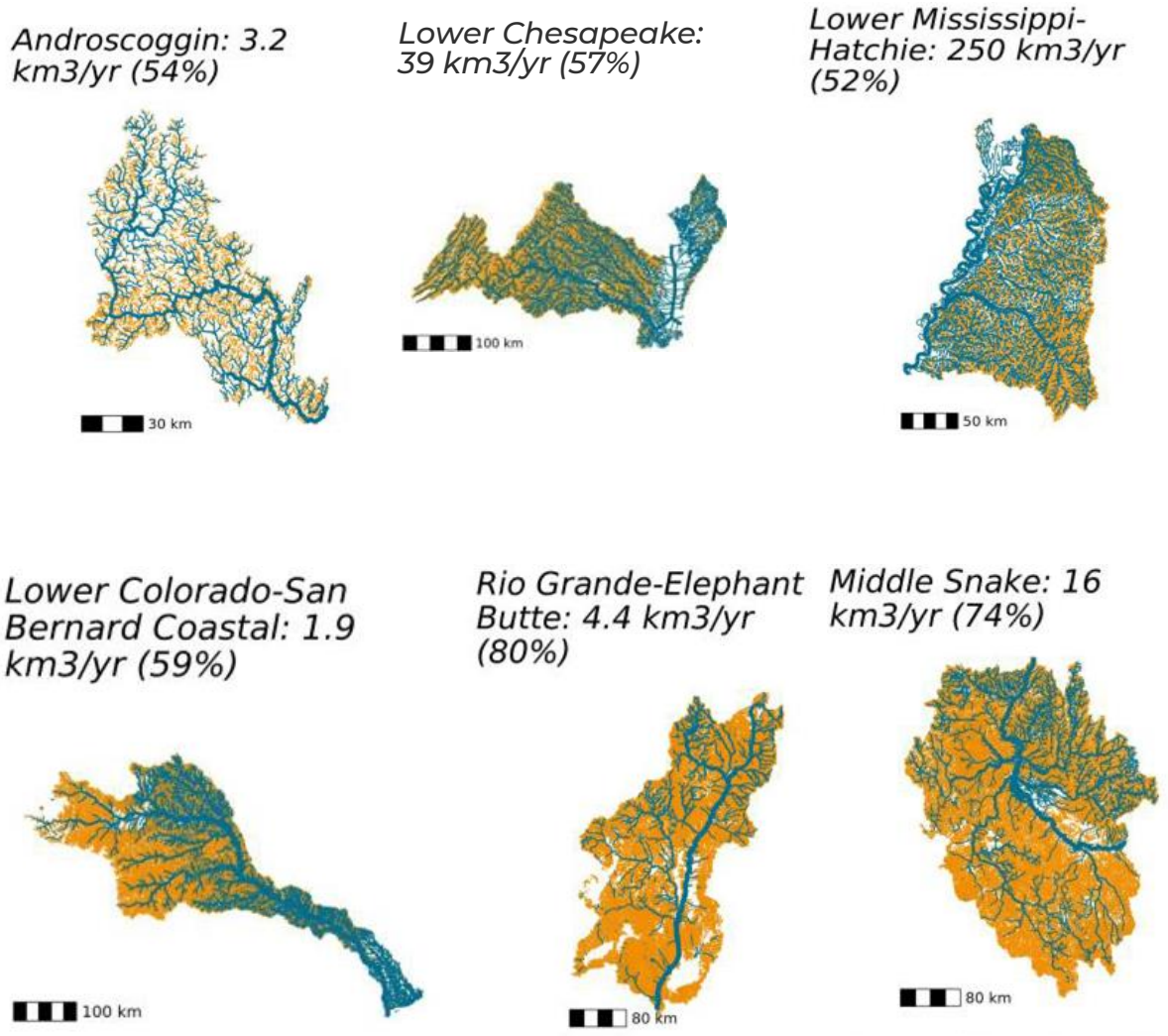
On average, 55 percent of annual streamflow in large, mainstem rivers is sourced from rainfed streams



How much water in your local rivers is ephemeral?

Theory underpinning the research: Since rain-fed streams flow only in direct response to rainfall, they have to be above the water table year-round.

- Ephemeral streams are important nationwide: More than two-thirds of the networks export water that is at least half ephemeral.
- Mississippi River - 51%
- Columbia River - 52%
- West of the Mississippi, ephemeral streams flow infrequently, but contribute ~79 percent of the downstream river flow
- In the East, ephemeral streams flow far more frequently - some might be considered “relatively permanent”

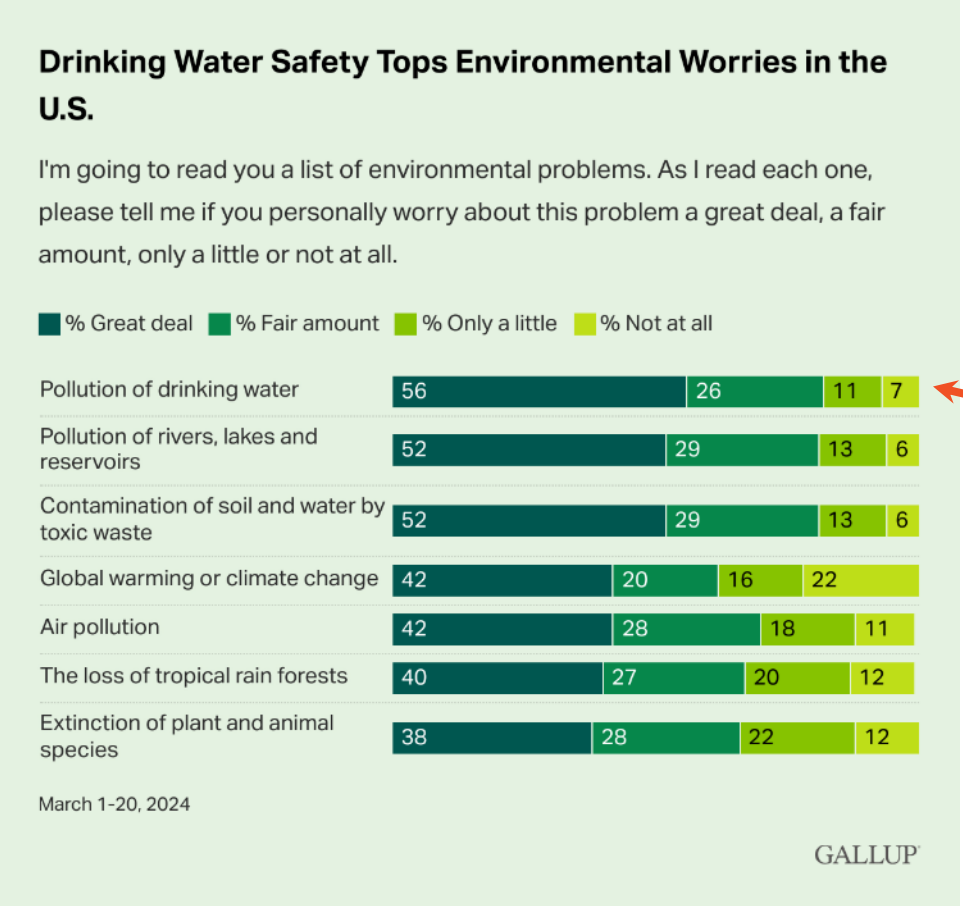


To find out the situation in your rivers, go to Supplemental Materials & download “science.adg9430_sm”

Meeting People Where They Are

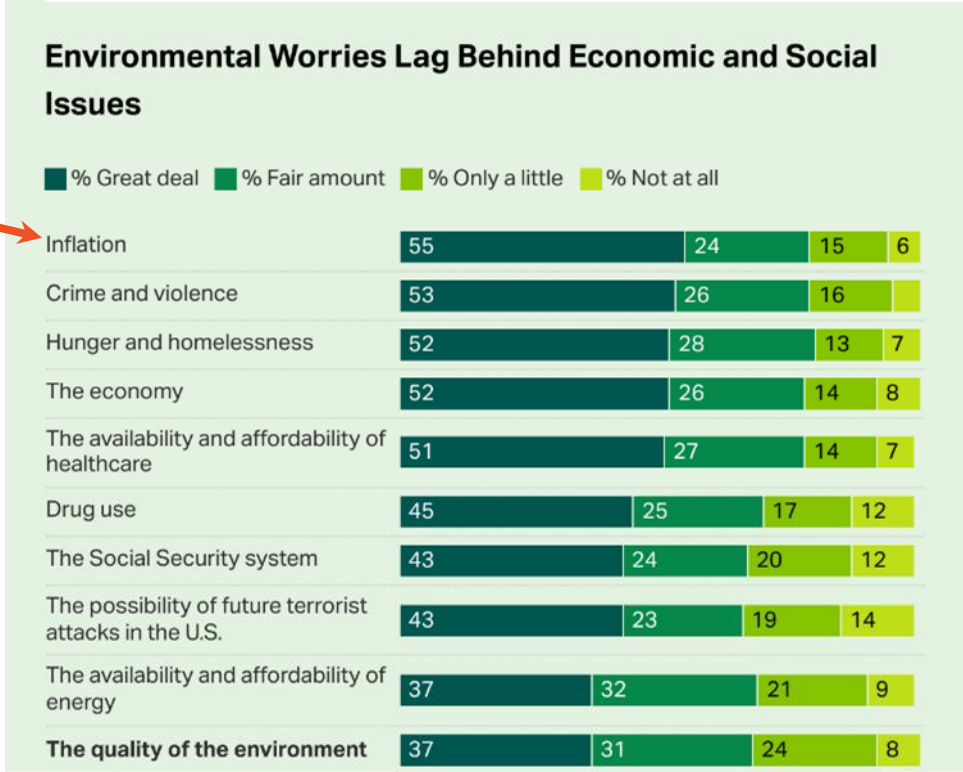
Understanding How the Public Perceives Water Protections

People worry more about water pollution than inflation



Government overreach is a fairly niche concern:

- 50% think the U.S. government is doing too little to protect the environment
- Only 19% think it is doing too much



Source:
[Seven Key Gallup Findings About the Environment]

Americans Strongly Support A Strong Clean Water Act

After a brief description of the issue:

- **75% of adults** support protecting more waters and wetlands under the Clean Water Act.
- **88% of adults** would be concerned if the permit requirement to make a permanent physical change to a water body was removed in some cases.

Most convincing argument:

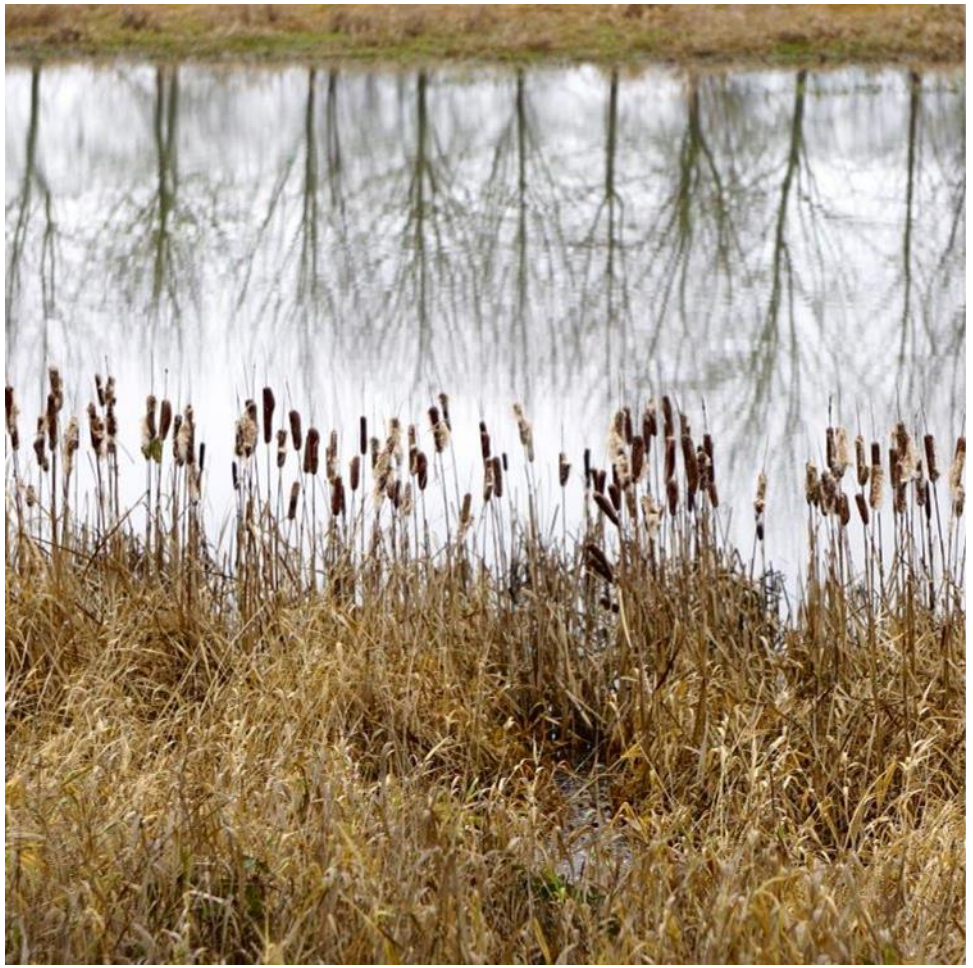
- "Strong federal water protections help to ensure that everyone - no matter which state they live in or their zip code - has access to clean water. Where you live should not determine whether you can access clean and safe water."

Source:
2022 Morning Consult poll
2023 Morning Consult poll

Don’t Get Bogged Down In the Reeds

“The Clean Water Act has protected our nation’s streams and wetlands for decades. Last year, the Supreme Court revoked these protections for many waters, putting the rivers and lakes that supply our drinking water at risk, harming fish and wildlife, and increasing the risk of floods.”

- People care about water very much but they do not care much at all about water policy.
- Focus on what is at stake & what should happen next
- People can understand where we are now without understanding the minutiae of prior cases or rulemakings
- Avoid acronyms and jargon: ~~WOTUS~~ • ~~significant nexus~~ • ~~SWANCC~~ • ~~migratory bird rule~~ • ~~the Clean Water Rule~~ • ~~Navigable Waters Protection Rule~~ • ~~jurisdictional determination~~ • ~~Rapanos~~



Source: Water Messages That Mobilize

Drinking Water, Wildlife, Way of Life

People care about:

- Clean sources of drinking water
- Water bodies that are part of the local “way of life” or “quality of life”
- Public health – physical and mental
- Wildlife
- Future generations – “children and grandchildren”

People need hope to take action. Don’t:

- Lean into doom & gloom
- Lean heavily into how polluted or damaged these waters may already be
- Make it all about climate change

Source: 2023 Language of Conservation Memo

Spotlight a local hero - Frame #2

avoids perception of media bias
more engaging to audiences
otherwise similar to the 'estimate' frame

Rising concerns: Loss of wetlands could increase inland flooding risks

As the chair of Raleigh's Stormwater Advisory Committee, Taylor values wetlands' vital role in flood mitigation, air and water purification, and wildlife habitat, among other things. For these reasons, he's concerned about the potential loss of intermittent wetlands.

NC waterkeeper's message: The wetlands are in danger, but residents can help

When GOP lawmakers opened up North Carolina's wetlands for development, coastal waterkeeper Riley Lewis got busy organizing her neighbors.

Click the headlines to read the articles

Click the headlines to read the full articles

Additional Frames

can be components of other stories or a story on their own

Making the connection after a disaster

Floods reinvigorate push from climate activists for Vermont wetlands restoration

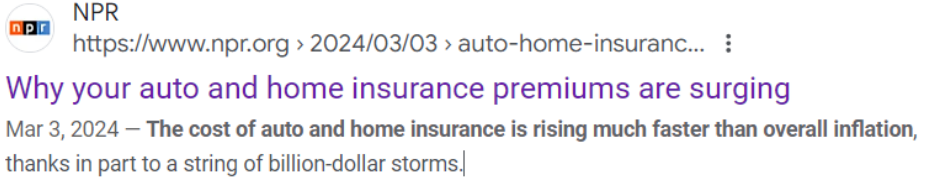
Wetlands as a solution

Wetlands restoration is key to avoiding the worst of future floods along the Mississippi

Connect it to a larger body of water

Environmentalists warn: Changing 'waters of the U.S.' definition could damage Great Salt Lake

Homeowner's insurance



Spotlight ongoing inequality

Houston official: Federal disaster aid widens racial inequities

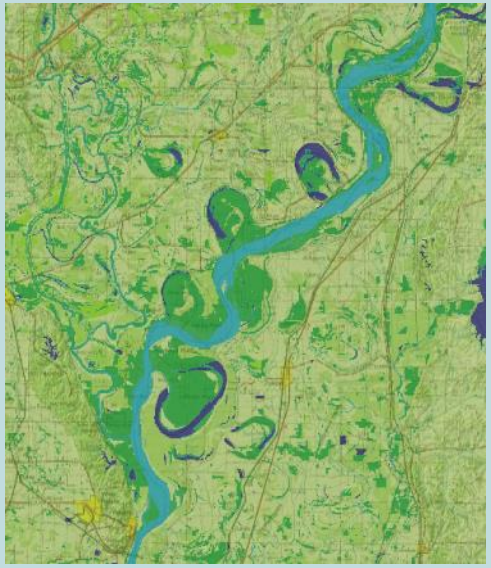
Redlined US homes face higher flood risks from climate change, new study finds

Connect it to a 'hotter' issue

Resources

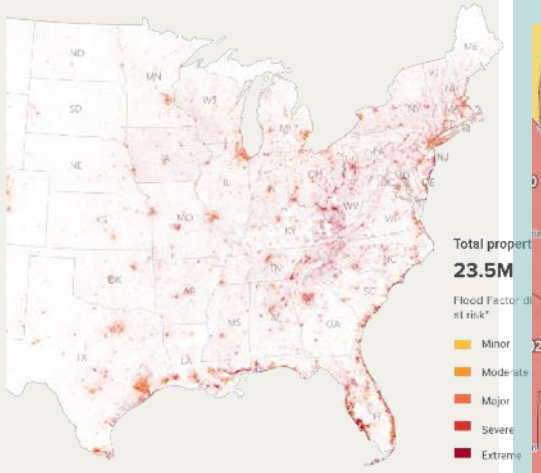
National Wetlands Inventory

USFWS's Wetlands Mapper visualizes National Wetlands Inventory data. This includes a manual, a video and downloadable map data for each state. ArcGIS also has a layer using this data. The EDF study uses this data.



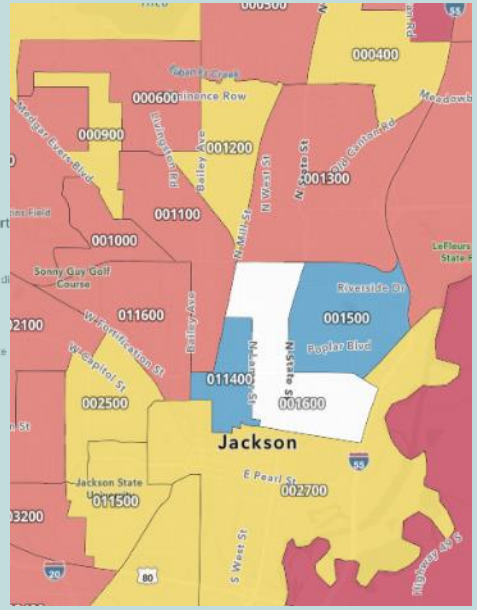
First Street/Risk Factor

First Street's estimates of the risk of property flooding.



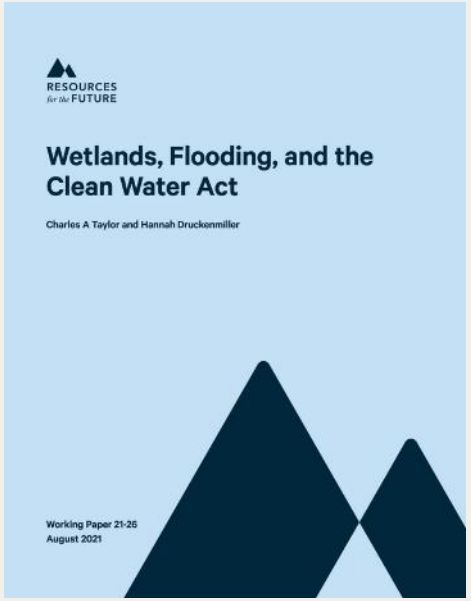
National Risk Index

FEMA's National Risk Index allows you to look at the risk of riverine and coastal flooding by census tract.



Wetlands, Flooding, and the Clean Water Act - RFF study

Each hectare of wetland lost increases claims to the taxpayer-funded National Flood Insurance Program by an average of $1,840 annually - spiking to $8,290 in developed areas. (2021)



2019 Status & Trends

The most recent USFWS report found that the rate of wetlands loss increased by 50% between 2009 and 2019. The study also reported a shift from vegetated wetlands, like salt marsh and swamp, to non-vegetated wetlands, like ponds. (2024)