



Jacobs Environmental Regulatory Insights, United States

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Welcome to the 2023 Jacobs Environmental Regulatory Insights ninth edition, which features insights by Jacobs' regulatory and market experts, along with links to additional information on current environmental planning and regulatory topics.

■ IN THIS EDITION:

- › [National Environmental Policy Act Climate Change Greenhouse Gas Emissions](#)
- › [NEPA Phase 2 Rule Changes](#)
- › [First Impressions of Proposed PFAS National Primary Drinking Water Regulations](#)
- › [New National Environmental Justice Tools](#)
- › [New WOTUS Drama](#)
- › [Bat Crazy](#)
- › [BLM Programmatic NEPA for Solar Projects in the West](#)
- › [White House Issues new Guidebook for Clean Energy and Climate Investments in Indian Country](#)

Jacobs' environmental planning and permitting experts are available to assist you and your team with building regulatory resiliency into your projects and programs with the intent of increasing your regulatory schedule and outcome confidence. Please reach out to the Jacobs' contacts provided after each article for more information.

| National Environmental Policy Act Climate Change Greenhouse Gas Emissions

On January 9, 2023, the U.S. President's Council on Environmental Quality (CEQ) published its *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*. The interim guidance is effective

immediately. Agencies are expected to apply it to all new National Environmental Policy Act (NEPA) documents, and encouraged to exercise judgment on whether to apply it to ongoing activities. This guidance does not apply to activities that have completed the NEPA process. Refer to [Federal Register: National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change](#).

CEQ recognizes that climate change effects on the human environment fall squarely within NEPA's purview; yet, climate change assessment is complex given the global nature of the problem, and because no single project is responsible for climate change. For these reasons, CEQ sets forth a series of steps to help practitioners understand their expectations when it comes to climate change assessments in NEPA documents.

First, agencies are required to consider the potential effects of a proposed action on climate change. This is performed by implementing the following steps:

1. Quantify the foreseeable greenhouse gas (GHG) emissions associated with the proposed action, including all alternatives and the no action alternative. The GHG emission calculations should consider the full life cycle of the proposed action. CEQ maintains a list of GHG accounting tools on its website. Refer to the NEPA.gov web page "[GHG Tools and Resources](#)."
2. Place the GHG emissions in the appropriate context. This can be performed multiple ways, including the monetizing of the social cost of GHG (SC-GHG), using established protocols (refer to [Technical Support Document: Social Cost of Carbon, Methane on whitehouse.gov](#)), and comparisons against established equivalents such as household emissions, or cars on the road. However, it is expected that agencies will monetize the effects to the degree possible and explain why if it is deemed impossible.

3. Disclose relevant climate impacts in relation to expected effects, such as sea level rise and wildfires.
4. Identify measures to avoid or reduce GHG emissions.

Second, agencies will also need to consider the effects of climate change on the proposed action. This should be done by integrating the best available climate change reports into the affected environment section of the NEPA document and explaining how the changing environment could affect the proposed action. Practitioners should remain aware of the evolving body of scientific information around the effects of climate change, but for the time being CEQ recommends the use of the U.S. Global Change Research Program's Fourth National Climate Assessment (refer to [Fourth National Climate Assessment on GlobalChange.gov](#)).

Finally, the guidance encourages agencies to consider climate change resilience and adaption and prioritize the national need to ensure climate resilient infrastructure and operations.

Please reach out to Jacobs NEPA Compliance Principals [Michelle Rau](#) or [Doug Huxley](#) for more information.



Michelle Rau



Doug Huxley

| NEPA Phase 2 Rule Changes

In April 2022, CEQ issued the [Phase 1 Final Rule](#), which finalized a "narrow set of changes to generally restore regulatory provisions that were in effect for decades before the 2020 rule modified them for the first time." CEQ provided that the Phase 1 Final Rule would be followed by a [Phase 2 Rule](#) that will provide additional improvements to the "efficiency and effectiveness of environmental review processes and reflect the Administration's commitment to achieving environmental justice and confronting climate change."

When preparing the Phase 1 Final Rule, CEQ received public comment requesting additional guidance on addressing impacts related to climate change and environmental justice or more detailed requirements to make the "effects" analyses more objective. While CEQ stated in the Phase 1 Preamble that it "is considering these comments in the development of its Phase 2 rulemaking and its guidance on assessing greenhouse gas emissions and climate change in environmental reviews," the *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change* described earlier does not represent Phase 2 of CEQ's NEPA revisions, although this guidance is expected to be a part of the Phase 2 Rulemaking.

Phase 2 of CEQ's NEPA revisions is expected to be released very soon. Our understanding is that the Phase 2 draft revisions were sent to the Office of

Management and Budget (OMB) on January 30. This triggers an up-to-90-day review period, meaning the revisions could be released as early as May of this year, assuming no major revisions by OMB. Expected revisions include requirements for a more in-depth consideration of climate change and environmental justice concerns as well as a removal of page counts and time limits enacted by the previous administration.

Please reach out to Jacobs NEPA Compliance Principals [Michelle Rau](#) or [Doug Huxley](#) for more information.



Michelle Rau



Doug Huxley

| First Impressions of Proposed PFAS National Primary Drinking Water Regulations

On March 14, 2023, the [U.S. Environmental Protection Agency \(EPA\) issued proposed drinking water regulations](#) for six per- and polyfluoroalkyl substances (PFAS) compounds, including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). The proposed maximum contaminant levels (MCLs) for the compounds PFOA and PFOS are 4.0 nanograms/liter or 4.0 parts per trillion (ppt). Additionally, the proposed regulation includes a hazard index of 1.0 for a mixture of four other PFAS compounds, including perfluorononanoic acid (PFNA), perfluorohexane sulfonic acid (PFHxS), perfluorobutane sulfonic acid (PFBS), and hexafluoropropylene oxide dimer acid (HFPO-DA or GenX).

The proposed MCLs for PFOA and PFOS are consistent with the anticipated order of magnitude levels based on the revised draft health advisories that EPA issued in June 2022. What is surprising is that while EPA had signaled that actions would occur in 2023 related to other PFAS compounds, it was not expected that EPA would accelerate to issuing a proposed legally enforceable level for these compounds so quickly, or that the draft enforceable level would take the form of a "Hazard Index" for a mixture.

The proposed actions are only in draft form and are not enforceable at this time. EPA has said they intend to finalize the regulations by the end of 2023; however, the regulations first will be subjected to public comment. The proposed rulemaking signals a change to a more complex regulatory environment—even if the final rules end up being different than what is anticipated.

Jacobs is closely evaluating the implications of the proposed rules for our Clients. For more information, reach out to [Ali Salter-Blanc](#) and [Bahman Bani](#), who are Jacobs' Co-Community of Practice and Market Solutions Leads for Emerging Contaminants.



Ali Salter-Blanc



Bahman Bani

| New National Environmental Justice Tools

CEQ, in partnership with the U.S. Digital Service, released version 1.0 of the [Climate and Economic Justice Screening Tool](#) (CEJST) on November 22, 2022. Federal agencies will use the tool to help identify disadvantaged communities that will benefit from programs included in the Justice40 Initiative. CEQ had released a beta version of the CEJST in February 2022 to solicit feedback. The version 1.0 changes to the tool include new datasets, an updated methodology, the identification of lands of federally recognized Tribes, including Alaska Native Villages, improvements to the site experience, and more. In all, version 1.0 of the tool identifies 27,251 communities as disadvantaged or partially disadvantaged, an increase of 3,781 from the beta version. The CEJST will be updated on an annual basis. In the meantime, the tool continues to be controversial, because the Administration has not included race-based data. CEQ has asked a National Academy of Sciences, Engineering, and Medicine committee to help make the tool “more robust” while ensuring it passes legal muster even though it excludes race as a criterion.

EPA recently updated [EJScreen](#) (version 2.1) in October 2022 and included the addition of new data on U.S. territories, threshold maps, supplemental indices, and refreshed demographic data—now relying on the 2016 to 2020 American Community Survey data. EJScreen and CEJST complement each other: the former provides a tool to screen for potential disproportionality at the community level, while the latter defines and maps disadvantaged communities for the purpose of informing how federal agencies guide the benefits of certain programs, such as the Justice40 Initiative.

On February 16, 2023, President Biden signed Executive Order 14091, “[Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government](#).” The Executive Order aims to complement previous equity actions, such as Executive Orders 13985 ([Advancing Racial Equity and Support for Underserved Communities Through the Federal Government](#)), 13988 ([Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation](#)), 14008 ([Executive Order on Tackling the Climate Crisis at Home and Abroad](#)), and 14020 ([Establishment of the White House Gender Policy Council](#)). By March 18, 2023, every federal agency is required to create an Agency Equity Team comprised of senior officials from that agency’s various divisions and develop a comprehensive and agency-specific and public Equity Action Plan. The initial Equity Action Plans are due in September 2023, and annually thereafter, and must include a discussion of potential barriers to the ability of underserved communities to access federal resources, strategies for overcoming those barriers, and a plan for community engagement, as well as annual progress reports and milestones. The Executive Order came just weeks before EPA and other agencies are slated to unveil their budget requests for fiscal year 2024, which means the new mandates will not be funded any sooner than fiscal year 2025.

Reach out to Jacobs’ Environmental Justice Practice Lead and leader of the National Association of Environmental Professionals Environmental Justice Working Group [Emily Gulick](#) for more information.



Emily Gulick

| New WOTUS Drama

On March 20, 2023, the United States Army Corps of Engineers and EPA’s Final Rule on “Waters of the United States” (WOTUS) became effective in 48 states (not in Idaho or Texas, discussed as follows). The Final Rule replaced the current “pre-2015” regulatory regime, which has been enforced since August 2021 when the 2020 Navigable Waters Protection Rule (NWPR) was vacated and remanded.

The Final Rule establishes a much broader definition of WOTUS than the NWPR, and while it reverts significantly back to the pre-2015 rule (aka, *Rapanos*), it does not include all of the jurisdictional triggers of the pre-2015 rule. It does codify certain elements from the 2006 *Rapanos* decision of both Justice Kennedy’s “significant nexus” jurisdictional test, which was used as the basis for the pre-2015 Rule, and Justice Scalia’s “relatively permanent, standing or continuously flowing” jurisdictional test, which was articulated in response to *Rapanos*, but not codified. Two of the more consequential exceptions in the Final Rule are “ditches, (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water” and “swales and erosional features (for example, gullies, small washes) characterized by low volume, infrequent, or short duration flow.”

[Implementation](#) or even the legality of the Final Rule could change dramatically with the Supreme Court’s upcoming [Sackett v. EPA](#) opinion on the extension of Clean Water Act jurisdiction to lands and waters with a “significant nexus” to a WOTUS. It is widely expected that the Sackett opinion, anticipated before the court adjourns in June, will add more regulatory uncertainty into an already uncertain regulatory arena. One of the resulting lawsuits was found to have merit by a Texas District Judge, who issued a March 19 injunction that freezes the Final Rule in Idaho and Texas until the Sackett opinion is issued. A court ruling on April 12, 2023, preliminarily enjoins the Final Rule for 24 additional states which means that the Pre-2015 WOTUS definition is now in effect in 26 states while the Final Rule applies in the remaining 24 states, for now at least. The pre-2015 definition has also been enforced for the past 18+ months, and is likely to be the fallback position while the Final Rule is litigated. The similarities between the Final Rule and pre-2015 rule for major jurisdictional categories mean that there will not be a significant change in the definition either way in the near future, at least until the Sackett opinion is issued.

Please contact Jacobs Senior Scientific Technologist [Joe Thacker](#) or Senior Biologist [Pat Hickey, CERP](#) for more information.



Joe Thacker



Pat Hickey

| Bat Crazy

White nose syndrome (WNS) has resulted in major impacts on bat populations in the U.S. The U.S. Fish and Wildlife Service (USFWS) reports that millions of bats have died and [90 to 100 percent](#) of bats have perished in some locations due to WNS infections since the fungus was first detected in 2006. Some species appear to be less vulnerable to the effects of the fungus, while others, including northern long-eared bat (NLEB, *Myotis septentrionalis*), tri-colored bat, and little brown bat (*Myotis lucifugus*) appear to be particularly affected by the disease.

The NLEB was listed as a threatened species in 2015, and the proposal to reclassify the species as endangered was finalized in November 2022. On January 25, 2023, the USFWS announced that the reclassification date was [extended from January 30, 2023 to March 31, 2023](#) to give USFWS time to “finalize conservation tools and guidance to avoid confusion and disruption for landowners, federal partners and industry with projects occurring in suitable habitats within the northern long-eared bat’s 37-state range.” One new tool is a [range-wide NLEB determination key](#) that replaces the existing 4(d) rule determination key, [state-specific inactive season dates](#), and hyperlinks to [state resources on roost tree and hibernacula data](#). USFWS also published a new [interim consultation framework](#), in effect until April 1, 2024, that “provides a mechanism to improve the efficiency and consistency of completing formal section 7 consultation for the NLEB for projects consistent with the former 4(d) rule and provide for exemptions from section 9 prohibitions for incidental take that is reasonably certain to occur before April 1, 2024.” This consultation framework will require additional consultation with USFWS. New and voluntary [interim habitat modification guidance](#) that focuses on the most sensitive life stages of the NLEB was also issued. Because these interim documents specifically exclude wind projects, USFWS also issued new [interim guidance for land-based wind energy projects](#) and a [frequently asked questions supplement](#).

Two other bat species are also proposed to be listed by USFWS as a result of the effects of WNS. Tri-colored bat was [proposed to be listed as endangered](#) on September 14, 2022, and a listing decision is expected later in 2023. Tri-colored bat has a larger range than NLEB, as well as different and less discriminating habitat preferences. Because this species roosts in roots, branches, leaves of trees, and not necessarily on tree trunks, peripheral clearing of woody vegetation for maintenance actions, including side-trimming, may become more complex. Before the anticipated listing date, USFWS will issue guidance for how to address tri-colored bat, and that guidance is expected to be similar to that for NLEB, with standard summer and winter clearing restrictions, and possibly mitigation requirements for impacts of 1 acre or more on tri-colored bat habitat. A proposal to list the little brown bat is expected in the next few months.

This species is also more of a habitat generalist and has a wider range than NLEB, with a 48-state range. If and when little brown bat is listed, similar clearing restrictions, mitigation requirements, and expanded USFWS consultation as those for tri-colored bat are anticipated.

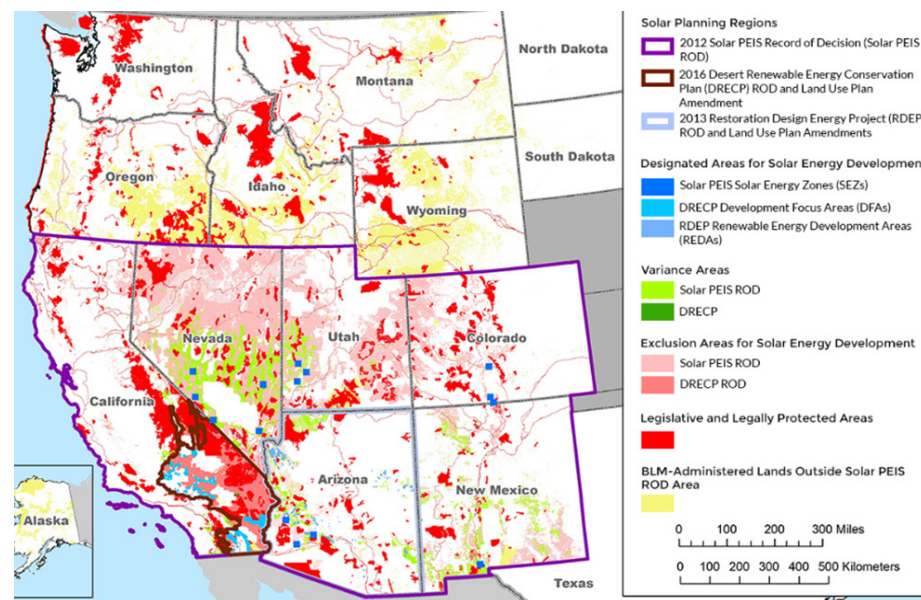
To find out more about how these listings might affect your upcoming projects, please contact Senior Biologist [Kay Nicholson](#).



Kay Nicholson

| BLM Programmatic Environmental Impact Statement for Solar Projects in the West

In 2012, the Bureau of Land Management (BLM) signed a Record of Decision implementing solar energy policies, procedures, and land use plan amendments related to permitting of utility-scale solar energy developments in six southwestern states (Western Solar Plan). The Western Solar Plan identified specific public lands or categories of lands in six states (Arizona, California, Colorado, Nevada, New Mexico, and Utah) where BLM (1) prioritizes solar development (that is, solar energy zones or SEZs), (2) may allow development in accordance with procedures in a specified variance process (variance areas), and (3) excludes utility-scale solar energy development (exclusion areas). BLM has since recognized that updating and expanding the Solar Energy Program would be “appropriate to advance current and future renewable energy goals and to support conservation and climate priorities.”



Solar Planning Regions, from BLM's Solar Energy Permitting and Program Resources webpage

In December 2022, BLM issued a [Federal Register notice](#) of their intent to prepare resource management plan amendments with an associated programmatic environmental impact statement (EIS) to update the BLM's utility-scale solar energy planning process. The programmatic EIS would help facilitate the goals of the Energy Act of 2020 by streamlining the process for approval of renewable energy production projects on public lands. BLM is proposing to expand the Western Solar Plan to include Idaho, Montana, Oregon, Washington, and Wyoming, and update its solar energy planning process, and is also considering the extent to which lands covered by the Desert Renewable Energy Conservation Plan in California and the Restoration Design Energy Project in Arizona should be included. More specifics about the EIS planning criteria, areas to be covered, and previously held virtual scoping meetings can be found on [BLM's ePlanning webpage](#). While BLM proposes to issue a draft EIS as early as summer of 2023, this schedule could be challenged by public opposition, which has focused largely on the perceived and abbreviated EIS schedule. Click on the map (shown on this page) for a [link](#) to other BLM resources related to solar energy permitting and planning or this link for more information about BLM 2023 solar planning.

To learn how this could affect your western state/BLM solar projects, please contact Senior Project Manager [Carrie Andrews](#).



[Carrie Andrews](#)

| White House Issues New Guidebook for Clean Energy and Climate Investments in Indian Country

News Flash! On April 4, 2023, the White House issued a "[Guidebook to the Inflation Reduction Act's Clean Energy and Climate Investments in Indian Country](#)". The purpose of the Guidebook is to help Tribes identify and navigate the financial incentive opportunities presented by the Inflation Reduction Act (IRA), including more than \$720 million in programs dedicated to Tribal lands and Native American communities, plus billions of dollars in grant and loan programs and clean energy tax incentives. One notable and significant change made by the IRA allows Tribes to receive direct payments in lieu of tax credits for their clean energy investments. As non-taxable entities, Tribes have previously been unable to benefit from clean energy tax credits designed to incentivize clean energy deployment. The Guidebook also provides information on current and prospective clean energy and climate programs.

For more information about this Guidebook and how it might facilitate new clean energy opportunities on Tribal lands, please contact Cultural Resource Program Managers [Jeremy Hollins](#) or [Lori Price](#).



[Jeremy Hollins](#)



[Lori Price](#)

These regulatory insights have been prepared by and represent the opinions and interpretations of Jacobs environmental planning and permitting staff. They are not prepared by attorneys, do not provide legal advice, and are intended for distribution to Jacobs clients only.

