Jacobs Environmental Regulatory Insights, United States

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Welcome to the Jacobs Environmental Regulatory Insights eleventh 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:

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.

Faster Buildout of a More Resilient and Reliable Grid

In 2024, the Biden administration has been busy with a number of new initiatives that are focused on modernizing, securing, enhancing, and expanding the U.S. electrical grid while making it more resilient to both physical and cyber threats. These improvements are to be funded by various mechanisms, ranging from grants and loans to prizes and cooperative agreements. A few of the initiatives in the portfolio are described as follows.

| Coordinated Interagency Authorizations and Permits Program

The U.S. Department of Energy (DOE) established the Coordinated Interagency Authorizations and Permits (CITAP) Program to streamline the federal permitting process for qualifying electric transmission infrastructure. The program is limited to high-voltage transmission projects that are expected to require preparation of an Environmental Impact Statement (EIS) and establishes the DOE as the lead agency for coordinating and accelerating federal environmental reviews and transmission permitting processes. Currently, on average, federal permitting for a new electric transmission line takes approximately 4 years, while this new program sets a 2-year deadline for issuing permits and authorizations. The CITAP Program will enable the U.S. to expand new transmission capacity at a faster rate to modernize the grid, enhance grid resilience and reliability, spur economic growth, and increase access to clean, reliable, and affordable energy.

As of May 31, 2024, the CITAP final rule is effective, and the DOE's Grid Deployment Office (GDO) has opened the CITAP online portal in which transmission developers can track the status of their application, submit materials, and facilitate communication with DOE and other federal agencies. Based on Federal Energy Regulatory Commission's (FERC's) Pre-Filing Process, GDO's Integrated Interagency Preapplication (IIP) Process requires submittal and agency review of detailed information before an application can be filed.

National Interest Electric Transmission Corridor Designations

On May 8, 2024, the GDO released a preliminary list of 10 potential National Interest Electric Transmission Corridors (NIETCs) to accelerate the development of transmission projects in areas that have an urgent need for expanded transmission. As a reminder, an NIETC designation unlocks federal financing and permitting tools to drive transmission development, including direct loans through the Transmission Facility Financing program, public-private partnerships through the Transmission Facilitation Program, and the federal siting and permitting authority of the FERC in certain limited circumstances. GDO's public comment period on these proposed NIETCs ended on June 24, 2024, and the next step is Phase 3 of the four-phase process that will lead to the designation of final NIETCs.

When the final corridors are designated, transmission developers can access federal financing and siting tools. While this program is new, the funding mechanisms are expected to be similar to those for many of the other DOE funding programs authorized by the Bipartisan Infrastructure Law and the Inflation Reduction Act. Jacobs has extensive experience with most of these programs.

Transmission Siting and Economic Development Grants

On July 24, 2024, DOE announced that GDO will administer up to $371 million in grants to 20 projects across 16 states to accelerate the permitting of high-voltage, interstate transmission projects. These projects will also support community infrastructure projects along major new and upgraded transmissions lines, including upgrading public school buildings and emergency response facilities. These Transmission Siting and Economic Development grants will support at least 16 high-impact transmission lines across the country.

DOE's Grid and Transmission Siting and Economic Development grants will support at least 16 high-impact transmission lines across the country. Program Conductor serves as a clearinghouse for GDO's transmission and grid resilience financing programs, as well as other existing DOE transmission and grid programs. For an excellent resource on the available programs and how to find the best program for your company, visit the Grid and Transmission Program Conductor page.

Jacobs Transmission and Distribution Lead Dan Laubenthal can answer all your questions about the programs and our transmission and distribution line services. Please direct your questions about DOE funding opportunities and the various processes for applying for these opportunities to Jacobs' Program Manager Rod Schwass.

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Coal and Gas Electric Generation Affected by Air Toxics and Greenhouse Gas Rules

Two sets of rules impose stringent air toxics carbon and rules on fossil-fueled generators, with particular focus on coal-fired plants, which may be forced to close due to rule impacts. The rules were signed by U.S. Environmental Protection Agency (EPA) Administrator Michael S. Regan on April 25, 2024, and formally promulgated in June 2024.

Mercury and Air Toxics Standards Rule for Coal Plants

Per Clean Air Act (CAA) requirements, EPA reviewed the existing Mercury and Air Toxics Standards rule and concluded that the filterable particulate matter (fPM) standards should be reduced by two-thirds for most coal plants; the standard was revised from 0.030 to 0.010 pounds per million British thermal units, with compliance required by July 6, 2027. The rule also requires the use of continuous emissions monitoring systems (CEMS) for compliance, rather than quarterly source tests, making the new limit applicable at all times, rather than during closely controlled quarterly source tests. Although EPA notes that existing source test data indicate most sites can meet the new PM standard (EPA concluded only 33 sites will need to upgrade), the continuous compliance aspects will at a minimum require more close monitoring of performance, and additional plants may have to upgrade their emissions control systems to ensure compliance.

The PM CEMS requirement may be challenging for the coal fleet to engineer, procure, and install the systems before the 2027 compliance date.

The rule also removes a provision allowing 4 hours for start-up (during which emission standards do not apply), and establishes the end of start-up to when electricity is generated. This change is effective January 2, 2025.

Greenhouse Gas Standards for All Coal and New Gas Plants

EPA issued new carbon emission guidelines for existing sources and new source performance standards. The rules require coal plants in particular to identify how to dramatically reduce emissions of carbon dioxide or commit to shut down by certain dates. Natural gas plant requirements primarily affect base load plants, but require planning to meet standards.

Coal plants face a shutdown deadline of January 1, 2032, or they must meet limits based on 90% carbon capture and sequestration (CCS) by January 1, 2039. Alternatively, plants can elect to operate only through 2038, and meet a less stringent emission limit. EPA notes that CCS technology should be well established by the 2039 compliance date, but current commercial deployment of the technology is extremely limited.

The limits for natural gas plants were greatly simplified from the original proposal, with EPA electing to limit the rule to plants beginning construction or reconstruction after May 23, 2023 (date of proposed rule). New gas plants that are base load (40% or greater capacity factor) must meet 90% reduction via CCS by 2032, with lesser requirements for non-base load plants.

Existing gas plants may face a future rulemaking. The original proposed rule included a complex approach wherein sources were required to identify future technology paths, but EPA did not finalize those requirements, and instead opened a non-regulatory docket to solicit ideas on the appropriate approach, which closed in May 2024 (refer to https://www.epa.gov/stationary-sources-air-pollution/nonregulatory-public-docket-reducing-greenhouse-gas-emissions), and EPA notes a future rulemaking is planned.

Litigation/Administration Change

Both rules were swiftly litigated, with Petitions for Review submitted to the U.S. Court of Appeals immediately after promulgation by collections of Attorneys General (many from states with coal interests), one trade association (National Rural Electricity Cooperative), and the Texas Commission on Environmental Quality. Legal arguments have not yet been filed, but are expected to include issues such as grid reliability, achievability of standards, and requiring CCS technology that is unproven. Other parties may join on the petitions already filed. Beyond litigation, the rules may face action by the incoming presidential administration in 2025. Note that this rulemaking included repeal of the 2019 Affordable Clean Energy rule issued during the previous administration, and is in stark contrast to the approaches of that administration.

For more information about these rules, please contact Senior Environmental Scientist Tom Nilan or Air Quality Practice Lead Moha Parikh.

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Recent Endangered Species Act Final Rules

On June 22, 2023, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively, the "Services") issued two proposed joint rules and the USFWS issued a third proposed rule related to the Endangered Species Act (ESA). Following receipt of more than 450,000 comments, the Services published three final rules that became effective on May 6, 2024. A main focus of the final rules simply was to restore the regulatory policy that was in place before the previous administration's August 2019 ESA Regulations. In addition, new authorities related to mitigation and use of the "best available science" were provided to the Services.

To access an approximate 13-minute overview presentation of these revisions provided by the Services, click on the image.

The Final Rules modified three separate sections of Title 50 of the Code of Federal Regulations (CFR) – Wildlife and Fisheries.

Revised regulations for classifying species and designating critical habitat (50 CFR 424): This final rule revises Section 4 of the ESA and the Services' joint regulations regarding listing and reclassification of species and designation of critical habitat. The rule reinstates prior language affirming that listing determinations are once again made "without reference to possible economic or other impacts of such determination," revises the foreseeable future regulation, clarifies the standards for delisting species, and revises the set of circumstances for when designating critical habitat may be not prudent. One more notable rollback implemented by this final rule is that critical habitat can once again be considered by the Services in unoccupied areas that meet certain criteria, even if occupied habitat is adequate for the conservation of the species, which significantly expands the Services' authority to designate critical habitat. The Services propose to be "exceedingly circumspect" before making such a designation and also ensure that these areas meet the recent U.S. Supreme Court's definition of "habitat."

Source: USFWS Endangered Species Act Regulation Revisions webpage: https://www.fws.gov/project/endangered-species-act-regulation-revisions

Revised regulations for interagency cooperation (50 CFR 402): This final rule revises Section 7 of the ESA and clarifies the definition of "effects" of the action and "environmental baseline," removes 402.17 "Other Provisions" clarifies the Services' responsibilities regarding reinitiation of consultation, and revises the definition of reasonable and prudent measures and the provisions related to reasonable and prudent measures in an incidental take statement.

Source: USFWS Endangered Species Act Regulation Revisions webpage: https://www.fws.gov/project/endangered-species-act-regulation-revisions

Two more of the notable rollbacks and changes implemented by this final rule include:

- In clarifying the August 2019 ESA Regulations stand-alone definition of "environmental baseline," the Services reiterated that the environmental baseline does include "impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify," even if the activities are ongoing. This clarification allows the Services to consider the management and/or operation of ongoing actions and existing facilities as a part of the action assessed in Section 7 consultation, a major change from the August 2019 ESA Regulations.
- The final rule for interagency consultations (Section 7) now allows the Services to require either on- or off-site "offsets" (that is, "mitigation measures") as a condition in "no-jeopardy" biological opinions. Mitigation measures, including conservation bank funding, in-lieu fee programs, and habitat preservation, can offset unavoidable take of listed species, but are not expected for all consultations. The regulations lack guidance on cost proportionality, leaving it to the Services' discretion to ensure reasonable and prudent offsets.

Revised regulations protecting endangered and threatened species (50 CFR 17): This final rule reinstates the USFWS' "blanket" ESA Section 4(d) rules that extend the ESA's endangered species protections to threatened species (which had been available before the 2019 ESA Regulations), unless USFWS specifies otherwise, through a "special 4(d) rule." USFWS also extended to federally recognized Tribes the exceptions to prohibitions that the regulations currently provide to the employees

or agents of the USFWS and other federal and state agencies to aid, salvage, or dispose of threatened species and updated the endangered plant regulations at 50 CFR 17.61(c)(1) to match the language in amendments to Section 9 of the ESA, enacted in 1988.

Source: USFWS Endangered Species Act Regulation Revisions webpage: https://www.fws.gov/project/endangered-species-act-regulation-revisions

In the preamble to the revised regulations for interagency cooperation (50 CFR 402) Final Rule, the Services announced their intention to update the 1998 "ESA Consultation Handbook" and provide it for public comment. The updated Handbook will reportedly address "application of the definition of 'effects of the action' and 'environmental baseline,' examples for defining when an activity is reasonably certain to occur and guidance on application of the two- part causation test, additional information on consulting programmatically, guidance on implementation of Section 7(a)(1) of the Act, and implementation of the expanded scope of RPMs [reasonable and prudent measures]." When provided, Jacobs staff will be providing comments on this new guidance.

To find out how these new changes might affect your projects please reach out to Jacobs Biologists Dr. Dominic Gentilcore or Kevin Fisher for projects in the western U.S., Ryan Wnuk or Ben Otto for projects in the central U.S., or Keith D'Angiolillo or Jeremy Scott in the eastern U.S.

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Conservation Benefit Agreements

On April 12, 2024, the USFWS issued a final rule regarding the issuance of enhancement of survival and incidental take permits under the ESA. Per the USFWS, these regulatory changes are intended to "reduce costs and time associated with negotiating and developing the required documents to support" ESA Section 10(a) permit applications, and will "encourage more individuals and companies to engage in these voluntary programs". This final rule went into effect on May 13, 2024 and revised the regulations to:

- Clarify the appropriate use of enhancement of survival permits and incidental take permits;
- Clarify the USFWS' authority to issue these permits for non-listed species without also including a listed species;
- Simplify the requirements for enhancement of survival permits by combining safe harbor agreements and candidate conservation agreements with assurances into one agreement type; and,
- Incorporate portions of the USFWS' five-point policies for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans into the regulations to reduce uncertainty.

The most significant changes are to the enhancement of survival agreements, and the final rule replaces the two available enhancement of survival agreements, namely Safe Harbor Agreements (SHAs) and Candidate Conservation Agreements with Assurances (CCAAs), with a new type of agreement, a "Conservation Benefit Agreement" or CBA. According to the USFWS, a CBA "is a voluntary agreement involving private or other non-federal property owners where the actions in the agreement contribute to the conservation or recovery of the agreement's covered species. Covered species can include both species listed as endangered or threatened under the ESA and/or at-risk non-listed species" (USFWS 2024). Any existing CCAAs and SHAs (or drafts published in the Federal Register before May 13, 2024) will not be expected to convert to a CBA until the associated enhancement of survival permit expires, or the agreement requires amending.

For more information about CBAs or to talk about how this new tool could be used to benefit your project, please reach out to Kay Nicholson.

Kay Nicholson
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Final NEPA Phase II Regulations

On May 1, 2024, the Council on Environmental Quality (CEQ) issued a final rule that revises the regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), including recent amendments made to NEPA by the Fiscal Responsibility Act of 2023 (FRA). The final rule became effective on July 1, 2024, and completes a multiphase rulemaking process that CEQ initiated in 2021. Agencies have 1 year from the final rule's effective date (that is, by June 30, 2025) to submit to CEQ proposed revisions to their NEPA procedures addressing these changes. Until then, the federal agency's current NEPA procedures remain in effect; however, if any provisions conflict with the CEQ regulations, the CEQ regulations should be used.

Some of the more important changes made by the final rule include:

- **Deadlines and page limits:** As required by the FRA, EISs are limited to 150 pages (or 300 pages for "extraordinary circumstances") and must be completed within 2 years of issuance of the Notice of Intent (NOI) to prepare an EIS. Similarly, Environmental Assessments (EAs) are limited to 75 pages and have a 1-year deadline, following issuance of the NOI to prepare an EA. Agencies are also required to make the schedules publicly available.
- **Establishing Categorical Exclusions (CatExs):** As required by the FRA, the final rule streamlines the process for establishing new CatExs, by allowing agencies to adopt and use other agencies' CatExs without having to amend their regulations. Agencies can now establish CatExs individually as well as jointly with other agencies, and establish CatExs through existing planning and programmatic decisions, without the need to go through a separate rulemaking process.
- **Applicant-prepared NEPA documents:** Applicants are permitted to prepare NEPA documents under an agency's supervision. This requires that agencies include procedures for applicants to prepare NEPA documents in their implementing regulations. The agency will continue to have some involvement in applicant-prepared documents, including reviewing and approving the purpose and need and reasonable alternatives and preparing of the decision document (Record of Decision [ROD] or Finding of No Significant Impact [FONSI]).
- **Codifies environmental justice and climate change in NEPA reviews:** Before NEPA Phase 2, climate change and environmental justice provisions were included solely in guidance documents or executive orders. Now, agencies are required to consider climate change and environmental justice ("disproportionate and adverse") impacts in NEPA documents and incorporate these findings into the alternatives analysis, identify the "environmentally preferred alternative," and outline mitigations.
- **Official recognition of indigenous knowledge:** When considering cooperating agencies, a lead federal agency should now consider the special expertise associated with indigenous knowledge. Additionally, indigenous knowledge is also included in the definition of "high-quality information."
- **Elevates importance of meaningful public and government engagement:** NEPA Phase 2 emphasizes the importance of creating an accessible and transparent public engagement process by increasing opportunities for public engagement and increasing transparency in the decision-making process. It also requires the designation of a Chief Public Engagement Officer responsible for facilitating community engagement in public reviews across an agency.
- **Administrative changes:** Agencies will now need to include tracking numbers for EAs and EISs. Also the requirement to include the cost of the NEPA document on an EIS cover page, which was included in the 2020 changes, has been removed.

Click on this image to view a Bureau of Indian Affairs presentation on Indigenous Knowledge

Please reach out to Jacobs NEPA Compliance Principal Michelle Rau or NEPA Specialist Emily Gulick for more information about the NEPA Phase II changes.

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Western Burrowing Owl Listing Petition

On March 5, 2024, the Center for Biological Diversity and other organizations submitted a petition to the California Fish and Game Commission (Commission) to list the western burrowing owl (Athene cunicularia hypugaea) as either endangered or threatened under the California Endangered Species Act (CESA). Specifically, the petition proposes listing San Francisco Bay Area, Central-Western California, and Southwestern California populations of burrowing owl as endangered, and listing Central Valley and Southern Desert Range populations of burrowing owl as threatened; it also suggests listing the entire California statewide population of the species as threatened.

This species is currently a California Species of Special Concern (SSC) but not listed under the federal ESA or under the CESA. The California state SSC designation is used to denote native wildlife species that are State of California conservation priorities but are not listed under ESA or CESA; it is purely an administrative designation and carries no formal legal status.

The burrowing owl petition was received by the Commission on March 18, initiating a 90-day window in which the CDFW must perform an evaluation of the petition and provide recommendations regarding listing the species. During the June 19-20 meeting of the Commission, CDFW requested a 30-day extension, extending the deadline to July 16, 2024. It is anticipated that the Commission will formally receive CDFW's evaluation and recommendation, and discuss and issue a decision at its August 14-15, 2024, meeting. This would be a decision on candidacy, and then the formal peer-reviewed status process/report preparation would begin.

If the Commission finds that the petition does not contain sufficient scientific information to support listing, then the listing process ends and there is no change in legal status for this species; the burrowing owl would remain a California SSC. If, however, the Commission finds there is sufficient scientific information to indicate that listing may be warranted, the Commission will designate the species as a candidate species. Under CESA, CDFW applies protections for candidate species rather than applying protections later (typically about 1 year later) at the time that the species is formally listed as threatened or endangered.

Image Credit: Scott Lindemann

Despite not being listed under the ESA or under CESA, the burrowing owl is currently protected through California state regulatory mechanisms such as the California Environmental Quality Act (CEQA) and California Fish and Game Code (FGC) Section 1600 Lake and Streambed Alteration Agreements (for impacts on lakes, streams, and riparian areas). If CESA protections are applied, take of this species would also require an Incidental Take Permit from the CDFW pursuant to CA FGC Section 2081.

In addition, survey methods and avoidance and minimization measures that are currently either voluntary or inconsistently required across projects are more likely to become required as standard project measures statewide (for projects with the potential to affect burrowing owls) if the burrowing owl is designated as a candidate, threatened, or endangered species under CESA.

Section 10 of the 2024 burrowing owl CESA petition includes the following notable recommendations for management and recovery actions:

- Phase out passive relocation methods for evicting burrowing owls using one-way doors, which has been documented to be ineffective as a conservation method.
- Ensure consistent use of the 2012 Staff Report on Burrowing Owl Mitigation survey and mitigation guidelines for projects with potential to affect burrowing owls.
- Incorporate burrowing owl conservation into existing county and city general plans, management plans, and land use plans, and create a statewide recovery plan.

Jacobs has staff across the U.S. with expertise related to the ESA and protected species, and consultation with the USFWS and NMFS. For more information about recent changes related to the ESA, please refer to the articles included earlier in this edition of Regulatory Insights, and articles on northwestern and southwestern pond turtle (in Edition 10 of Regulatory Insights), and bats (in Edition 9 of Regulatory Insights).

New ESA Species Listings in 2024			
Species	**States**	**Listing Date**	**Federal Register Link**
North American Wolverine	CA, ID, MT, OR, UT, WA, WY	January 2, 2024	https://www.govinfo.gov/content/pkg/FR-2023-11-30/pdf/2023-26206.pdf#page=1
Black-Capped Petrel	FL, GA, NC, SC, Caribbean Islands	January 29, 2024	https://www.govinfo.gov/content/pkg/FR-2023-12-28/pdf/2023-28456.pdf#page=1
Silverspot Butterfly	CO, NM, UT	March 18, 2024	https://www.govinfo.gov/content/pkg/FR-2024-02-15/pdf/2024-03042.pdf
Dunes Sagebrush Lizard	NM, TX	June 20, 2024	https://www.govinfo.gov/content/pkg/FR-2024-05-20/pdf/2024-11025.pdf
Guadalupe Fatmucket, Texas Fatmucket, Guadalupe Orb, Texas Pimpleback, Balcones Spike, False Spike, Texas Fawnsfoot	TX	July 5, 2024	https://www.govinfo.gov/content/pkg/FR-2024-06-04/pdf/2024-11645.pdf
Suwanee Alligator Snapping Turtle	FL, GA	July 29, 2024	https://www.govinfo.gov/content/pkg/FR-2024-06-27/pdf/2024-13946.pdf
Mount Rainier White-Tailed Ptarmigan	WA	August 2, 2024	https://www.govinfo.gov/content/pkg/FR-2024-07-03/pdf/2024-14315.pdf
Pearl River Map Turtle	LA, MS	August 12, 2024	2024-15176.pdf (govinfo.gov)
Alabama Map Turtle	AL, GA, MS	August 12, 2024	2024-15176.pdf (govinfo.gov)
Barbour's Map Turtle	AL, FL, GA	August 12, 2024	2024-15176.pdf (govinfo.gov)
Escambia Map Turtle	AL, FL	August 12, 2024	2024-15176.pdf (govinfo.gov)
Pascagoula Map Turtle	AL, MS	August 12, 2024	2024-15176.pdf (govinfo.gov)
San Francisco Bay-Delta distinct population segment of longfin smelt	CA	August 29, 2024	https://www.govinfo.gov/content/pkg/FR-2024-07-30/pdf/2024-16380.pdf

Please contact Jacobs Biologist Scott Lindemann, Biologist Christy Payne, or Principal Scientist Gary Santolo for more information about the western burrowing owl or other protected species in California.

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The End of Chevron "Deference" and its Implications for Environmental Planning and Permitting (Goodbye Chevron, Hello Loper Bright)

In their 1984 Chevron U.S.A. v. Natural Resources Defense Council ruling, the Supreme Court of the United States (SCOTUS) developed what is known as "*Chevron* deference." The Chevron doctrine addressed two scenarios, one where Congress' intent was clearly conveyed in the statute, and another where Congress' intent is ambiguous and can be interpreted in more than one way. When language is unambiguous, the letter of the law applies and no deference is required. Chevron deference provided that when ambiguous language in a statute leads to a dispute with a federal agency, federal courts must defer to the relevant federal agency's "reasonable" interpretation of the statute. Chevron deference placed federal agencies, not federal judges, in the lead role in interpreting statutes that they administer.

Depending on your point of view, Chevron deference was either: a way to allow a government party with arguably the most knowledge and best data about a regulated resource, issue, or concern (that is, an administrative agency with regulatory authority provided by Statute X) to make a reasonable interpretation of the vagaries and imprecisions of Statute X; or, a hijacking of the court's role in interpreting the law and an unconstitutional power grab by an administrative agency used to further their conspiratorial agenda. If you land in the middle, you might see Chevron deference as a compromise that provides the courts with agency expertise, knowledge, and "reasonable" recommendations that allow the courts to perform their statutory interpretation role using the best available supporting information.

In two SCOTUS rulings [Loper Bright v. Raimondo, No. 22-451, 603 U.S. ____ (2024), and Relentless v. Department of Commerce, No. 22-1219, 603 U.S. ___ (2024)], both decided on June 28, 2024, the Chevron doctrine and the Chevron deference were overruled. Focusing on language from the 1946 Administrative Procedures Act (APA), the SCOTUS majority determined that, under the APA, the courts "need not and … may not defer to an agency interpretation of the law simply because a statute is ambiguous." In the ruling, Chief Justice John Roberts stated, "agencies have no special competence in resolving statutory ambiguities. Courts do." Regardless of your view of the Chevron doctrine, the Loper Bright decision will result in a major shift in authority from the executive branch, where reside the agencies with the ability to enforce the law, to the judicial branch, who can now interpret "ambiguous" law without input from the executive branch.

Importantly, the Loper Bright and Relentless decisions do not automatically mean that an agency cannot interpret their own regulations. As cited in Loper Bright, the 2019 *Kisor v. Wilkie, Secretary of Veterans Affairs* SCOTUS decision states that a federal court should defer to agency regulatory interpretations if they are "reasonable" and:

- Are the agency's authoritative or official position, rather than an ad hoc statement that does not reflect the agency's views
- In some way implicate the agency's substantive expertise and are not "distant from the agency's ordinary duties" or merely a "convenient litigating position"
- Reflect the agency's "fair and considered judgment" and were issued with fair notice

Such determinations require the services of an attorney. The legal profession will surely benefit from these recent SCOTUS decisions.

Also of significant importance to this ruling is that even though federal courts now have the sole authority to interpret ambiguous language, with or without agency input, they always have the option to "seek aid" from an agency. Provided that the federal judge considers the agency aid, and the aid is complete and reasonable, this could effectively substitute for Chevron deference, a decision to be made by each judge on a case-by-case basis. This points to a different issue within the federal judiciary, namely the extremely wide range of philosophies, beliefs, and relevant knowledge/experience of the 800+ lower court judges across the U.S. Empowering each of these judges to solely interpret ambiguous statutes will generate inconsistent findings and a "patchwork" of different interpretations and requirements across the country. In the near term, this will cause additional regulatory uncertainty, because it will lead to more legal challenges and subsequent appeals. As for many of the current regulatory challenges, the final resolution of this issue will require congressional action.

Finally, the SCOTUS decision makes it clear that this action is prospective and all agency rules that were enforceable (that is, holdings) before the decision are still in effect. Specifically, SCOTUS Chief Justice Roberts noted that mere "reliance on Chevron cannot constitute a 'special justification,'" which is a requirement for initiating an appeal of these holdings. This point is relevant unless as expressed in the dissenting opinion, "[c]ourts motivated to overrule an old Chevron-based decision can always come up with something to label a 'special justification.'"

Other SCOTUS Rulings

Within a 5-day period, two other SCOTUS decisions were issued that further compound the effects of the Loper Bright and Relentless decisions.

The Corner Post v. Board of Governors, No. 22-1008, 603 U.S. ____ (2024) decision, issued on July 1, 2024, essentially shifts the APA-specified default statute of limitations for filing a lawsuit. In this ruling, SCOTUS concluded that the 6-year statute of limitations begins on the date a party suffered injury as a result of the rule, not the date that the rule was published. This means that a regulation can be challenged at any future time, as long as the plaintiff first became injured no more than 6 years before the suit. With a few exceptions related to statutes that codify their own limitation periods for judicial review of regulations (CAA, Clean Water Act, and the Resource Conservation and Recovery Act), this will provide litigation opportunities for any regulation of any age, and for any "newly injured" plaintiff. This decision opens the door for easy challenge to potentially overbroad or otherwise invalid federal agency actions.

Issued the day before the Loper Bright decision, in the *SEC v. Jarkesy, No. 22-859, 603 U.S. ____ (2024)* decision, SCOTUS held that a defendant has a right to a jury trial in a federal district court when an administrative agency seeks civil penalties (only those fines and penalties designed to "punish and deter" as opposed to cost-recovery) for claims that are based in the "common law." Before this decision it was generally accepted legal precedent that federal agencies could administratively prosecute and resolve penalty proceedings, without the need for protracted litigation (that is, a jury trial) in federal courts. This will likely lead to agencies being reluctant to pursue enforcement cases, even for egregious and otherwise clear-cut violations, if those cases would be required to undergo an expensive and resource-draining (for an agency) jury trial. It is also expected to result in a wave of appeals of earlier cases that relied on that generally accepted legal precedent.

The "major questions doctrine" requires that clear congressional authorization be provided to an agency before that agency seeks to decide an issue of major national significance. Combined with overruling of the Chevron doctrine, this will allow federal judges to evaluate this type of decision based solely on their knowledge without any deference to agencies and their experts. This could and likely will affect any number of recent regulations, such as the EPA's new perfluoroalkyl and polyfluoroalkyl substances rules.

Implications of the SCOTUS Decisions

A major factor in the overall impact of these SCOTUS decisions is the political party to be installed in January 2025. Even though the SCOTUS decision overturned Chevron deference, it does not commit any agency to specific regulatory actions, although it will make agencies more deliberate when codifying new regulations. The political party in charge has broad ability to enforce (or not) violations of or inconsistencies with SCOTUS rulings. Compare the SCOTUS' May 2023 Sackett v. Environmental Protection Agency decision and the current administration's rulemaking regarding waters of the U.S. for a case study.

The basic failure that lead to the Chevron doctrine is the inability of Congress to author statutes that are unambiguous. This is hardly surprising because it is not practical to anticipate every nuance or scenario related to a wide range of resources covered under numerous statutes (for environmental examples, the ESA, Clean Water Act, NEPA, CAA, Resource Conservation and Recovery Act, to name a few), or the pace of technology, or habitat change, or what might happen over time. Even though the Loper Bright case revolved around the Magnuson-Stevens Fishery Conservation and Management Act, its implications apply to any federal law that is enforced by any executive branch agency, and to practically any resource, from taxes to insurance to financial, technology, and environmental resources.

Although Congress is the only entity with the authority to fully resolve the "ambiguity" issue, it would still be very difficult, and would take many years of dedicated and bipartisan effort to address all of the affected regulations. Per Loper Bright, much of the ambiguity will now be resolved by federal judges via litigation. However, there will be immense pressure on the executive branch offices to write "bulletproof" regulations that implement the statutory text as written. Where this statutory text is ambiguous, it will be difficult to develop defensible regulation particularly in light of these new SCOTUS decisions, and the associated and expanded litigation potential. Look no farther than the ongoing "Waters of the United States" Clean Water Act saga (related to the SCOTUS May 2023 Sackett v. Environmental Protection Agency decision) for a clear example of how difficult it can be to author "durable" regulations and clearly define the scope of "regulated resources."

Based on a review of numerous legal articles, the implications of these recent SCOTUS decisions will be many and varied. A few of these that apply to the universe of environmental permitting and planning are described as follows.

- There will be a large increase in the number of legal challenges to previous court decisions that relied on Chevron deference, if the litigant can identify another "special justification."
- Any new agency regulations, and new agency interpretations of existing regulations, can now be challenged (1) without the benefit of Chevron deference; (2) without the benefit of all of the previous case law that relied on Chevron deference; and (3) potentially without input from the agency responsible for enforcing the regulations.
- The Corner Post decision will provide litigation opportunities for any regulation of any age, and for any "newly injured" plaintiff, and opens the door for an easy challenge to potentially overbroad or otherwise invalid federal agency actions. Notably, this decision does not discriminate between pro-climate and anti-climate cases, meaning that challenges can be expected from both industry groups and environmental non-governmental organizations/citizens.
- By most accounts, EPA is likely to be the most affected environmental agency. Not only has EPA relied more heavily on Chevron deference than other agencies, but some of their recent decisions and policies related to climate change (for example, vehicle emissions standards, the power plant rule, the U.S. Securities and Exchange Commission greenhouse gas disclosure rule) are already highly contested, and in some cases, have been overturned by SCOTUS.
- As legal outcomes unfold, and unless and until congressional action addresses the root cause of the problem, regulatory "certainty" is even less certain than it was two months ago.
- Administrative law professors preparing for fall classes have their work cut out for them!

Jacobs does not provide legal services but is one of the nation's leading providers of environmental planning and permitting services. If you have questions about how these changes might affect your projects and how we can help you minimize risk for your projects in this time of regulatory uncertainty, please reach out to Senior Environmental Regulatory Advisor Joe Thacker, Senior NEPA Specialist Michelle Rau, or Senior Biologist Jeremy Scott for information and a long conversation.

Jeremy Scott
Florida
Bio

Michelle Rau
Georgia
Bio

Joe Thacker
Alabama
Bio

Tom Nilan
Oregon

Tom is a senior environmental scientist with more than 30 years of experience (20 with Jacobs) in environmental engineering, compliance, and policy. His primary technical focus is air quality compliance and permitting for the utility sector.

Moha Parikh
Utah

As Jacobs' Air Quality Practice lead, Moha has over 20 years of experience in air quality permitting and compliance. Moha is an experienced manager of impact studies and permitting projects in compliance with the CAA, NEPA, and local permitting pathways.

Emily Gulick
Colorado

Emily is an environmental planner/scientist with more than 8 years of experience specializing in NEPA assessments and environmental justice evaluations. She has CEQA experience and is Jacobs' Environmental Justice Practice Lead as well as the leader of the National Association of Environmental Professionals' Environmental Justice Working Group.

Dominic Gentilcore
Washington

Dr. Gentilcore is a field-proven botanist, biologist, ecologist, and project manager who helps facilitate permitting and environmental compliance for a wide range of facilities. He has 10 years of experience.

Kevin Fisher
California

Kevin is a certified Professional Wetlands Scientist with 22 years of experience working on natural resource management and infrastructure projects in the western U.S. Working in habitats from tidal marshes to alpine meadows, he has extensive permitting and compliance experience.

Ryan Wnuk
Minnesota

Ryan is a senior biologist with more than 10 years of experience. He leads teams through complex environmental permitting and compliance efforts, including CWA Sections 404 and 401, NEPA, ESA Section 7, Industrial Siting, Conditional Use, and local permitting.

Ben Otto
Ohio

Ben is a senior ecologist and permitting specialist with over 18 years of experience in the environmental consulting industry. He has extensive experience with wetland and sensitive species surveys, agency coordination, and federal, state, and local environmental permitting.

Keith D'Angiolillo
New Jersey

Keith is a senior project manager with 30 years of experience who specializes in permitting and consultations under the CWA, Coastal Zone Management Act, and the ESA. As a lifelong resident, he is an expert in the nuances of permitting with the New Jersey Department of Environmental Protection and the species in New Jersey.

Jeremy Scott
Florida

Jeremy is a senior biologist with more than 25 years of experience with ecological and human health risk assessments, ecological monitoring, aquatic habitat assessments, stream geomorphology assessments, contaminated sediments, and EAs.

Julie Benco
Pennsylvania

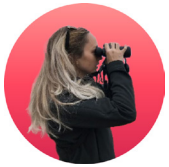
Julie is a Siting Specialist and Project Manager for electric transmission projects supporting our large infrastructure clients. She has 5 years of experience and a Master's degree. Julie's technical expertise also includes land use planning, stormwater planning and permitting, and climate action strategies.

Michelle Rau
Georgia

Michelle has over 25 years of experience as an NEPA practitioner, environmental planner, and project manager. At Jacobs she serves as the NEPA practice manager and leads a group of over 200 environmental practitioners.

Scott Lindemann
California

Scott, a generalist wildlife biologist, holds a Master of Science in Wildlife Conservation degree and has 9 years of professional biological consulting experience. His expertise spans various industries, and he is well-versed in California's flora and fauna.



Christy Payne
California

Christy has more than 17 years of expertise, specializing in avifauna, wildlife, wetlands, and water quality. She excels in field research, environmental policy compliance, permitting, endangered species recovery, and wildlife monitoring.

Gary Santolo
California

Gary is a seasoned wildlife biologist and toxicologist, and boasts 37 years of expertise at Jacobs. Specializing in vertebrate biology, ecology, and wildlife toxicology, he conducts comprehensive field surveys for various species.

Joe Thacker
Alabama

Joe is a professional geologist with more than 32 years of experience. He has extensive field and permitting/agency consultation experience in the eastern U.S. and has permitting experience with most federal agencies. Joe is the head of Jacobs' Regulatory Council.

Dan Laubenthal
Ohio

Dan is part of Jacobs' routing team and supports clients by leading and managing routing and permitting efforts for a wide variety of energy projects. He has 16 years' experience and excels at counseling clients on best routing practices and strategies.

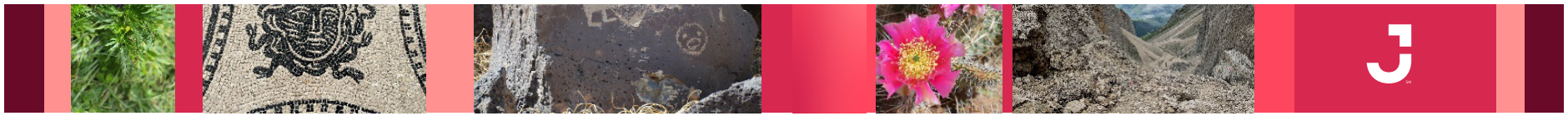
Rod Schwass
Missouri

Rod, a former commander in the U.S. Navy with 25 years of post-Navy experience, focuses on the development of renewable energy projects and technologies. He has been helping clients secure grant funding under various DOE programs for more than a decade.

Kay Nicholson
Arizona

Kay has 25 years of experience as a wildlife biologist in the southwestern U.S., including special status species habitat assessments and surveys; conducting wildlife inventories; monitoring impacts to special status species during construction; conducting surveys for and analyzing impacts to bats; and conducting wildlife hazard assessments for airports and adjacent landowners.

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.



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