



# REGULATORY ROUNDUP

NATURAL RESOURCE USERS LAW & POLICY CENTER  
COLLEGE OF AGRICULTURE & LIFE SCIENCES AND COLLEGE OF LAW

## REGULATORY ROUND-UP

*Issue 9 – June/July, 2023*

### Quick Topics

#### SCOTUS DECISION: Sackett v EPA

The long awaited Supreme Court decision on [Sackett v EPA \(round 2\)](#) has been unanimously decided in favor of the Sacketts. The decision overturns “the significant nexus” precedent set by [Rapanos v United States \(2006\)](#) that was maintained by agencies in the implementation of the Clean Water Act (CWA) and overturns many aspects of the [EPA/Corps of Engineers 2023 WOTUS rule](#) that went into effect March 2023. The SCOTUS opinion(s) set out a new precedent that a “continuous surface connection” to navigable waters is required to be considered protected waters covered by the CWA. Currently the agencies plan to follow the new directive set by the SCOTUS Sackett decision and are working out the details on how that decision impacts their rulemaking/permitting ability for a rule rewrite by September 1 ([EPA, 2023](#)).

For Arizona however, in 2021, “ADEQ recognized a “local control approach” was needed to ensure protection of our state’s important water resources, regardless of changes at the federal level” (Arizona Surface Water Protection Program <https://azdeq.gov/SWPP>, 2023). The legislature enacted [HB 2691](#) the law tasked the ADEQ with “additional authorities to proactively protect certain non-WOTUS waters, specifically those used for drinking, fishing and other forms of recreation.” [Arizona Revised Statutes §49-221\(G\)](#) required ADEQ publish a Protected Surface Waters List (PSWL) which is now under revision and rulemaking. For more information visit [Best Management Practices for Non-WOTUS Protected Surface Waters](#) and exclusions and the [Non-WOTUS Protected Surface Waters Map](#) and see [Arizona Protected Surface Waters List Technical report](#).

Other resources:

Eisenberg et al. (2020). [2020 WOTUS Rule: Analysis of the 2020 WOTUS rule and policy implications for ephemeral washes in Arizona](#). The Water Report Issue 196.

Reviews on SCOTUS and WOTUS from other university extension programs:

- [National Agricultural Law Center WOTUS Update](#) and Webinar with University of Arkansas law faculty Series 2: July 19 register [here](#), Series 1 Mar. 15, 2023, [here](#) for slides from the presentation.
- Texas Cooperative Extension AgriLife interview with law professors Jesse Richardson and Anthony Schutz on *Sackett v EPA* [Podcast](#).
- Essman, E., and M. Brown. 2020. “[Mandatory Legal Approaches to Agricultural Nutrient Management](#).” National Agricultural Law Center.



## Debt Ceiling Legislation and NEPA

The Debt Ceiling Legislation ([Fiscal Responsibility Act of 2023](#)) under Title III Permitting Reform Section 321 created the Builder Act that revises components of NEPA. Legal Planet Blog author, Dan Farber, Co-Director of the Center for Law, Energy & the Environment, Berkeley Law has written a helpful series of blog posts on these NEPA revisions. See [The New NEPA a User's Guide](#), [CEQ and Permitting Reform](#) and website side bar for additional posts on the topic.

## Grazing

[High Desert to the Hill](#). A morning of discussion on public grazing regulatory changes sponsored by Good Grazing Makes Cent\$ (Society for Range Management). July 11, 2023, 9am – noon PT. Register in person or livestream on Facebook or YouTube. “Slated for conversation are important issues like the Bureau of Land Management’s (BLM) proposed [Public Lands Rule](#), potential grazing regulation changes, and how public lands grazers can benefit from the U.S. Department of Agriculture’s (USDA) risk management and disaster aid programs.”

## Wildfire Management

[USFS funded \\$200M Community Wildfire Defense Grants](#) – An Arizona project received \$341,217 to reduce wildfire risk to the communities of Gila County. The International Association of Fire Chiefs (IAFC) is to provide peer-to-peer guidance, subject-matter expertise, and funding to aid in the exercise and implementation of projects within Gila County's 2022 Community Wildfire Protection Plan (CWPP) over a 24-month period. The CWPP identifies high-priority projects, community education and outreach, evacuation planning, and fuels mitigation projects.

### ***Further reading on the wildfire management topic:***

Sadegh, Mojtaba. 2023. “Human Exposure to Wildfires Has More than Doubled in Two Decades – Who Is at Risk Might Surprise You.” *The Conversation*. July 3, 2023.

<http://theconversation.com/human-exposure-to-wildfires-has-more-than-doubled-in-two-decades-who-is-at-risk-might-surprise-you-207903>.

## Wildlife Conservation

[How States Shape Wildlife Conservation on Private Lands](#), a Property and Environment Research Center (PERC) 50-state analysis report. Policies highlighted in the report for Arizona were tax incentives for habitat maintenance or improvement: [Arizona Agriculture Tax and Credit](#) and the [Healthy Forests Enterprise Incentives Program](#); Landowner Rewards for Providing Public Access: [AGFD Landowner Compact](#); Wildlife Damage: [Small Game Depredation Permit](#). See the [Appendix](#) for further notes on these AZ programs as well as programs of other states or the specific program links to Arizona agencies.

## Executive Orders, Agency Rulemaking & Grants

[The White House Council on Environmental Quality Wildlife Corridors Guidance](#) for improved federal agency planning and decision-making. “The guidance highlights the importance of wildlife corridors

and ecological connectivity across terrestrial, marine, and freshwater habitats, encouraging collaboration across management and ownership boundaries with states, Tribes, local governments, and private landowners. This helps deliver on one of the America the Beautiful Initiative's six early focus areas – supporting collaborative conservation of fish and wildlife habitat and corridors.” Many states have now also enacted legislation for habitat connectivity policies. See a map of those states at <https://conservationcorridor.org/digests/2022/09/state-summaries-2022-legislation-passed-to-build-wildlife-crossings/>.

## Interior

**[The Bureau of Land Management's Rights-of-Way, Leasing, and Operations for Renewable Energy](#)** proposed rule lowers fees up to 80% for solar and wind developments on public lands until 2036 ([88 FR 39726](#)). Fees will be either based on the larger amount, acreage rent or a 'capacity fee' based on energy generation. The acreage rent is “based on per acre values for pastureland from the National Agricultural Statistics Service (NASS) Cash Rents Survey.” The rule also removes the requirement for a pre-processing public meeting in affected potential areas. Virtual informational meetings [registration](#): July 11 1:30-3 p.m. ET and July 25 1:30-3 p.m. ET. The public comment period ends August 15.

**[Interior Updated Guidance for Mining Claims](#)** outlines approaches that applicants may take to site waste rock and tailings facilities on federal lands under the General Mining Act of 1872 (Mining Law) to enhance permitting certainty and consistency for mining operators.

**[BLM dedicates \\$161 M to 21 Restoration Landscapes](#)**. Two locations in Arizona are funded under this restoration landscapes initiative. The Yanawat region was awarded \$5.59 M for work on 3,040,446 total acres (1,592,087 BLM acreage). The Sky Islands region was awarded \$9.59 M for work on 3,986,671 total acres (657,994 BLM acreage). See the [story map for Arizona locations benefitting from BLM restoration funds](#).

**[BLM Seeks Public Comment on Hassayampa River Protection Corridor](#)**. The requested withdrawal would protect 3,739 acres of land in the Prescott National Forest for 20 years along the Hassayampa River from potential impacts from new mining, oil, gas, and geothermal development, subject to valid existing rights. Comments due Sept 5, 2023 email to [BLM AZ Withdrawal Comments@blm.gov](mailto:BLM_AZ-Withdrawal-Comments@blm.gov).

**[BLM Public Lands Rule: Healthy Landscapes, Abundant Wildlife Habitat, Clean Water](#)**. This rule modifies 43 CFR Parts 1600 and 6100 and highlights the following three areas of impact ([88 FR 19583](#)). “1) Promotes restoration of our lands and waters. 2) Provides for balanced, responsible development. 3) Conserves the best intact, healthy landscapes. “Although the BLM addresses conservation and ecosystem management through the Federal Land Policy and Management Act it is not applied to all resources. The proposed rule is intended to address this gap in the Bureau's regulations and to codify some of the existing tools and resources into regulation, so that conservation is applied more broadly across the landscape to all program areas.” The comment period ended July 5, 2023. [Review the proposed rule](#) and some of the 216,403 comments received.

[\*BLM Issues Programmatic Environmental Impact Statement Scoping Report for Utility-Scale Solar \(87 FR 75284\)\*](#). “This Programmatic EIS update evaluates the potential impacts of eliminating technology-based criteria for solar development on public lands; expanding the Solar Energy Program to [5] additional states [Idaho, Montana, Oregon, Washington, and Wyoming]; identifying new priority (or preferred) areas for solar development; changing the process for solar development applications outside of priority areas (the variance process); and re-evaluating appropriate criteria for excluding high-value resource areas from renewable energy development.”

EPA

[\*EPA and DOE webinar on Potential Environmental Liability Associated with Developing Clean Energy on Mine Land\*](#), July 26, 1-2 pm ET to [register link](#). This webinar will review the [RE-Powering America's Lands Initiative](#) and liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). [The Clean Energy Demonstration Program on Current and Former Mine Land \(CEML\)](#) will demonstrate the technical and economic viability of deploying clean energy on current (operating) and former (abandoned or inactive) mine land and received \$500 M through the Infrastructure Investment and Jobs Act to fund these projects.

[\*EPA \\$7bn Solar for All competitive grant program\*](#) provides access to residential solar panels to low-income communities. This effort is part of the \$27bn greenhouse gas reduction fund established by the Inflation Reduction Act.

“The deadline to apply to this competitive grant competition is September 26, 2023. Eligible applicants to Solar for All include states, territories, Tribal governments, municipalities, and eligible nonprofit recipients. Coalitions, led by an eligible lead applicant, are also eligible to apply to this competition. Additional detail on eligibility can be found in Section III of the [Notice of Funding Opportunity \(NOFO\)](#). EPA intends to make up to 60 awards under this competition with three award options for applicants. All applicants are required to submit a Notice of Intent (NOI) to apply to the competition. The deadline for the NOI differs by applicant type and are:

- **July 31, 2023** for states, the District of Columbia and Puerto Rico;
- **August 28, 2023** for Tribal governments and Intertribal Consortia.
- **Public Briefing** recording on [EPA’s GGRF webpage](#).
- **Informational Webinar** on the Solar for All grant competition and the application process is July 12, 2023, 1:00pm – 3:00pm ET ([Register Here](#)).
- Tools and resources for prospective grantees can also be found on [EPA’s GGRF webpage](#).

According to the [energycommunities.gov](#) website, EPA will also launch two other programs. 1) The [National Clean Investment Fund \(NCIF\)](#) - \$14B grant competition that expands national scale deployment of clean energy technologies. 2) The [Clean Communities Investment Accelerator \(CCIA\)](#) - \$6 billion grant competition that builds local clean financing capacity through community lenders. EPA plans to release the NOFOs for these two competitions in the coming weeks.

## ESA/USFWS

**[USFWS revised Mitigation Policy and Endangered Species Act \(ESA\) Compensatory Mitigation Policy went into effect May 15, 2023](#)** (88 FR 31000). “The revised Mitigation Policy establishes fundamental mitigation principles and provides a framework for applying a landscape-scale approach to achieve, a no net loss of resources and their values, ecosystem services, and functions resulting from proposed actions. The ESA Compensatory Mitigation Policy adopts the mitigation principles established in the Mitigation Policy, establishes compensatory mitigation standards, and provides guidance for the application of compensatory mitigation through implementation of the ESA.” According to the federal register notice, the concepts of “nexus and proportionality” noted from the opinions of [Koontz v. St. Johns River WMD](#), [Nollan v. California Coastal Commission](#), and [Dolan v. City of Tigard](#), have been incorporated into the reissue of these two policies. According to USFWS, “the policy will help promote the most effective and efficient mitigation measures to be implemented across the landscape and if loss impacts are unable to be avoided, it allows project proponents to compensate by replacing similar resource values in other locations.”

**[ESA USFWS Strengthens Protection and Recovery of Threatened and Endangered Wildlife](#)** - Three Proposed Rulemakings. These proposed rulemakings revise the ESA, 50 CFR Parts 17, 402 and 424. This [video](#) is an overview presentation on each of the following rules. All comments for each are due 8/21/2023. 1) Revision of Regulations for Interagency Cooperation/consultation process ([88 FR 40753](#)). 2) Listing Endangered and Threatened Species and Designating Critical Habitat, listing criteria ([88 FR 40764](#)). 3) Reinstating Regulations Pertaining to Endangered and Threatened Wildlife and Plants the Blanket 4(d) rule ([88 FR 40742](#)).

To learn more about the ESA recent regulatory changes, click here to read “[The National Agricultural Law Center’s Endangered Species Manual: A Practical Guide to the ESA for Agricultural Producers.](#)”

## USDA

**[The Prescott National Forest has completed a draft environmental assessment \(DEA\) and FONSI on the Upper Verde Wild and Scenic River Suitability Study](#)** for 37 miles of the Upper Verde River on the Prescott and Coconino National Forests. The river segments studied are the thirty-seven miles generally west and north of Clarkdale, Arizona and east of Chino Valley, Arizona in the Chino Valley Ranger District.

**[USDA Natural Resources Conservation Service](#)** announced \$12 million in support for Farmers and Ranchers with Grazing Lands Conservation Cooperative Agreements. Funded projects for 2023 include Funding for the Arizona Association of Conservation Districts, Inc. included a project to Improve Consistency of Methods and Utility of Data for Planning and Assessment of Grazing Management Plans.

**[USDA announces \\$9.7 B for Empowering Rural America \(ERA\) and \\$1B for Powering Affordable Clean Energy \(PACE\) Programs.](#)** [The New ERA Program](#) funding is open to rural electric cooperatives, including current and previous USDA borrowers, are also eligible for funding. To apply, submit a Letter of Interest between July 31 and Aug. 31, 2023. [The Pace Program](#) is a loan forgiveness program for



renewable energy (see link for eligibility), applications are due between June 30 and Sept 29, 2023.

[\*\*USDA announces expansion of Working Lands for Wildlife \(WLFW\)\*\*](#) with \$500 million over the next five years. [WLFW](#) programs focus on working lands in key geographies providing conservation assistance to farmers, ranchers, private forest owners and tribes. According to the program website(s), “NRCS provides technical and financial assistance to support the voluntary improvements participants make to their working lands, while the US Fish and Wildlife Service (FWS) provides participants with regulatory predictability for the Endangered Species Act (ESA) when needed. The funding will help deliver a series of cohesive [Frameworks for Conservation Action](#), which establish a common vision across the partnership of public and private interests and goals for delivering conservation resources in a given ecosystem, combining cutting-edge science with local knowledge.” The funding includes Arizona relevant western regional programs already in place such as the [Sagebrush Biome](#) and a new program to be developed for Western Migratory Big Game focused on iconic wildlife migrations.

## Online Planning Tools

[\*\*USFWS Wetlands Inventory Advance Water Mapping and Analytics\*\*](#) tool is not operational yet but looks promising. Check the [GIS Story Map](#) for more information and contacts for a development timeline.

[\*\*Wetland Evaluation Tool\*\*](#). Powered by Google Earth Engine Apps, this spatial wetland analysis product developed by the Intermountain West Joint Venture enables users to track changes in surface water over space and time in the Western United States. Combined with local knowledge, the tool can help land managers create a landscape-scale picture of key areas to target for land and water conservation. To monitor the timing and duration of seasonal flooding on both natural and agricultural wetland habitats the tool has three useful wetland characteristics modules to help with the analysis: resilience, hydroperiod and surface water.

[\*\*USGS Arizona Groundwater Explorer \(AGEx\)\*\*](#). This tool a series of interactive maps to help increase understanding of groundwater conditions in the state of Arizona. The tool includes data on groundwater sites, changes in groundwater levels and trends in groundwater levels. Note: this link is very slow to load.

[\*\*USGS Land Treatment Exploration Tool\*\*](#). This tool is designed to assist land managers with rangeland restoration and/or rehabilitation planning processes. New features include: 1) a new Monitoring tab that displays data collected by the Bureau of Land Management Assessment, Inventory, and Monitoring (AIM) program. Users can search for monitoring data within a specified distance from a user proposed treatment area. Relevant monitoring data can be added to the printable PDF report generated by the tool. 2) A new interactive time-series vegetation cover figure allows users to select vegetation cover categories from the [USGS Rangeland Condition Monitoring Assessment and Projection \(RCMAP\)](#) dataset to visualize changes over time. This figure also includes time-series plots of precipitation, wildfire, and land treatments. 3) An improved report generation function opens the print to PDF.