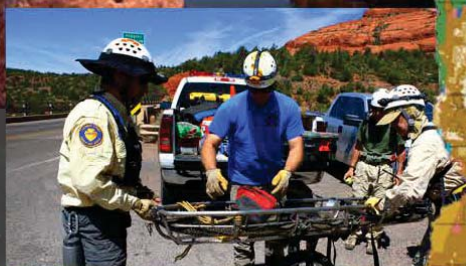
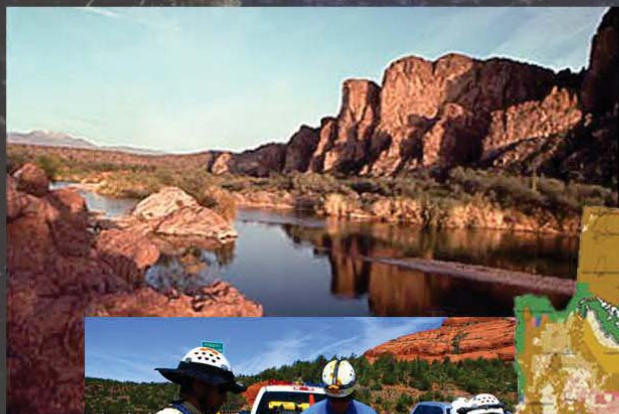




County Supervisors
ASSOCIATION
of arizona

Volume 1, Issue 2
Fall 2015

Briefing Book



Public Lands

Table of Contents

PILT Payments & Acreage	
NACo Background & Talking Points	
NACo PILT Advocacy Tools	
NACo PILT Policy Brief	
CSA/NACo PILT Background Briefing	
NACo SRS Advocacy Tools	
NACo SRS Policy Brief	
CSA/NACo SRS Background Briefing	
NACo WOTUS Advocacy Tools	
NACo WOTUS Policy Brief	
Public Lands Research	
USDA Analysis of PILT-Related Payments and Likely Property Tax Liability	
Headwaters: Realizing the Potential of PILT	
Headwaters: White Paper; County Payments, Jobs, & Forest Health	
CRS: PILT: Somewhat Simplified	
Report to Congress: Recommendations for Making Payments to States and Counties	
CRS: Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000	
SRS: Does It Make Rural Schools Secure?	
GAO Report: Revenue Sharing Payments to States and Counties	
LWCF: Overview, Funding History, and Issues	
Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the U.S.	
CRS Report: EPA & the Army Corps' Rule to Define "Waters of the United States"	
Federal Laws	
PILT: 31 USC Ch. 69: Payment for Entitlement Land	
SRS: 16 USC Ch. 90: Secure Rural Schools and Community Self Determination	
LWCF: 16 USC Ch. 1, Subchapter LXIX, Part B: Land and Water Conservation Fund	
Clean Water Rule: Definition of "Waters of the United States"	
33 USC Ch. 26, Subchapter I: Research and Related Programs	



Relevant Congressional Committees	
House Committee on Natural Resources.....	
Subcommittee on Federal Lands	
House Committee on Transportation and Infrastructure	
Subcommittee on Water Resources and Environment	
House Committee on Appropriations	
Subcommittee on Interior, Environment, and Related Agencies	
Senate Committee on Energy and Natural Resources.....	
Subcommittee on Public Lands, Forests, and Mining.....	
Senate Committee on Environment and Public Works	
Subcommittee on Fisheries, Water, and Wildlife	
Senate Committee on Appropriations	
Subcommittee on Interior, Environment, and Related Agencies	

PILT Payments											
	FY09	FY10	FY11	FY12	FY13	FY14	FY15*	2015 PILT Entitlement Acres	County Population 2010 Census	FY15 Payment per Acre	FY15 Payment per Capita
Apache County	\$ 1,553,599	\$ 1,589,034	\$ 1,602,166	\$ 1,635,348	\$ 1,595,835	\$ 1,657,182	\$ 1,616,327	688,396	71,518	\$ 2.35	\$ 22.60
Cochise County	\$ 2,062,865	\$ 1,860,869	\$ 1,914,667	\$ 2,000,332	\$ 1,986,080	\$ 2,142,985	\$ 1,951,371	901,148	131,346	\$ 2.17	\$ 14.86
Coconino County	\$ 1,548,284	\$ 1,563,802	\$ 1,561,960	\$ 1,609,371	\$ 1,572,295	\$ 1,705,008	\$ 1,571,671	4,740,390	134,421	\$ 0.33	\$ 11.69
Gila County	\$ 3,133,057	\$ 3,108,571	\$ 3,023,345	\$ 3,271,245	\$ 3,197,536	\$ 3,426,420	\$ 3,121,489	1,771,484	53,597	\$ 1.76	\$ 58.24
Graham County	\$ 2,564,987	\$ 2,672,505	\$ 2,644,642	\$ 2,700,447	\$ 2,636,873	\$ 2,784,560	\$ 2,536,842	1,099,637	37,220	\$ 2.31	\$ 68.16
Greenlee County	\$ 643,949	\$ 755,663	\$ 816,028	\$ 891,483	\$ 783,176	\$ 844,890	\$ 774,382	905,970	8,437	\$ 0.85	\$ 91.78
La Paz County	\$ 1,744,946	\$ 1,786,191	\$ 1,806,515	\$ 1,842,363	\$ 1,800,102	\$ 1,928,269	\$ 1,756,669	1,848,763	20,489	\$ 0.95	\$ 85.74
Maricopa County	\$ 2,997,005	\$ 2,652,085	\$ 2,728,933	\$ 2,802,089	\$ 2,781,842	\$ 3,011,264	\$ 2,749,905	2,434,825	3,817,117	\$ 1.13	\$ 0.72
Mohave County	\$ 3,148,076	\$ 3,216,280	\$ 3,248,358	\$ 3,314,048	\$ 3,238,586	\$ 3,469,643	\$ 3,161,016	6,421,638	200,186	\$ 0.49	\$ 15.79
Navajo County	\$ 1,418,214	\$ 346,772	\$ 1,341,507	\$ 1,451,974	\$ 1,417,672	\$ 1,519,256	\$ 1,384,066	598,977	107,449	\$ 2.31	\$ 12.88
Pima County	\$ 3,073,106	\$ 2,800,949	\$ 2,855,411	\$ 2,958,214	\$ 2,924,105	\$ 3,152,584	\$ 2,973,597	1,534,068	980,263	\$ 1.94	\$ 3.03
Pinal County	\$ 1,403,450	\$ 1,070,449	\$ 1,096,781	\$ 1,146,328	\$ 1,153,625	\$ 1,223,747	\$ 1,119,899	618,760	375,770	\$ 1.81	\$ 2.98
Santa Cruz County	\$ 1,006,572	\$ 322,344	\$ 777,268	\$ 956,273	\$ 910,527	\$ 978,173	\$ 931,826	432,662	47,420	\$ 2.15	\$ 19.65
Yavapai County	\$ 2,214,680	\$ 853,278	\$ 2,872,793	\$ 2,985,878	\$ 2,960,656	\$ 3,177,599	\$ 2,895,889	2,599,497	211,033	\$ 1.11	\$ 13.72
Yuma County	\$ 3,149,333	\$ 3,224,801	\$ 3,256,516	\$ 3,321,182	\$ 3,244,942	\$ 3,476,376	\$ 3,166,280	1,556,650	195,751	\$ 2.03	\$ 16.18

STATE TOTAL	\$ 30,674,473	\$ 31,662,123	\$ 27,823,593	\$ 31,546,890	\$ 32,886,575	\$ 32,203,852	\$ 31,711,229	28,152,865	6,392,017	\$ 1.13	\$ 4.96
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	Total Area	Private Lands		Federal Lands		State Lands		Tribal Lands		City, County, Other	
	Acres	Acres	Percent	Acres	Percent	Acres	Percent	Acres	Percent	Acres	Percent
Arizona	72,864,243	12,901,805	17.7%	30,708,194	42.1%	9,301,752	12.8%	19,835,742	27.2%	116,748	0.2%
Apache County	7,179,804	952,524	13.3%	763,681	10.6%	674,648	9.4%	4,787,634	66.7%	1,317	>0.1%
Cochise County	3,921,756	1,530,293	39.0%	1,014,198	25.9%	1,377,264	35.1%	N/A	N/A	2	>0.1%
Coconino County	11,941,017	1,612,090	13.5%	4,759,645	39.9%	1,121,278	9.4%	4,447,921	37.2%	85	>0.1%
Gila County	3,069,101	123,196	4.0%	1,756,339	57.2%	31,463	1.0%	1,158,102	37.7%	N/A	N/A
Graham County	2,967,974	284,277	9.6%	1,114,137	37.5%	492,170	16.6%	1,077,390	36.3%	N/A	N/A
Greenlee County	1,182,998	95,524	8.1%	913,024	77.2%	174,447	14.7%	3	0.0%	N/A	N/A
La Paz County	2,888,797	153,906	5.3%	2,247,191	77.8%	254,490	8.8%	233,209	8.1%	1	>0.1%
Maricopa County	5,903,622	1,709,714	29.0%	3,124,419	52.9%	748,372	12.7%	269,748	4.6%	51,369	0.9%
Mohave County	8,614,712	1,475,607	17.1%	6,153,656	71.4%	555,878	6.5%	429,526	5.0%	44	>0.1%
Navajo County	6,374,231	1,141,184	17.9%	603,148	9.5%	379,662	6.0%	4,249,568	66.7%	668	>0.1%
Pima County	5,873,130	750,699	12.8%	1,816,350	30.9%	769,093	13.1%	2,475,073	42.1%	61,914	1.1%
Pinal County	3,439,308	880,227	25.6%	671,350	19.5%	1,189,946	34.6%	696,541	20.3%	1,244	>0.1%
Santa Cruz County	776,260	279,424	36.0%	433,776	55.9%	63,059	8.1%	N/A	N/A	1	>0.1%
Yavapai County	5,201,845	1,529,676	29.4%	2,391,849	46.0%	1,277,124	24.6%	3,092	0.1%	103	>0.1%
Yuma County	3,529,688	383,464	10.9%	2,945,431	83.4%	192,858	5.5%	7,935	0.2%	N/A	N/A

*The FY 2015 Payment reflects only about 95% of the funds authorized. The Department of The Interior has refused to release the additional \$37 million, nation wide, until the first quarter of 2016 due to a drafting error in authorizing language



NACo Background & Talking Points Table of Contents

NACo Background & Talking Points	
NACo PILT Advocacy Tools	
NACo PILT Policy Brief	
CSA/NACo PILT Background Briefing	
NACo SRS Advocacy Tools	
NACo SRS Policy Brief	
CSA/NACo SRS Background Briefing	
NACo WOTUS Advocacy Tools	
NACo WOTUS Policy Brief	



PAYMENTS IN LIEU *of* TAXES (PILT)

BACKGROUND

The Payments in Lieu of Taxes (PILT) program was created in 1976 and provides payments to counties and other local governments to offset losses in tax revenues due to the presence of substantial acreage of federal land in their jurisdictions. As federal land is not taxable by local governments, public land counties have struggled to provide adequate services to the public in light of the annual losses in tax revenue. Counties with public lands in their jurisdictions often provide critical services on those lands including law enforcement, search and rescue, fire management, solid waste disposal, and emergency medical services. Today, the U.S. Department of the Interior makes PILT payments to over 1,850 counties in 49 states, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.

COUNTY INTEREST

The federal government owns roughly 635-640 million acres, or 28 percent, of land in the U.S. Approximately 62 percent of counties have federal public land within their jurisdictions. As federal land is not taxable by local governments, PILT provides payments to counties to offset losses in property tax revenues and also to reimburse counties for the critical services they provide on that land.

STATUS

For FY 2015, PILT was extended with \$70 million in appropriations provided by the FY 2015 National Defense Authorization Act (P.L. 113-291) and \$372 million in appropriations provided by the FY 2015 Consolidated and Further Continuing Appropriations Act (P.L. 113-235). Together the two bills provided full discretionary funding of \$442 million for PILT in FY 2015. In FY 2014, PILT was extended through the farm bill (P.L. 113-79) as a fully funded, mandatory entitlement program at \$425 million. Mandatory funding for FY 2013 was achieved through the Moving Ahead for Progress in the 21st Century Act (MAP-21) (P.L. 112-141) and provided \$399 million in PILT funding. Previously, the enactment of the Emergency Economic Stabilization Act (P.L. 110-343) provided full funding for PILT from FY 2008 through FY 2012. From 1995 to 2007, PILT remained an appropriated program, and as a result was underfunded year after year. **PILT is a top priority for NACo and counties across the country, and we continue to urge lawmakers to support a fully funded, sustainable, long-term solution.**

TALKING POINTS:

- Without further mandatory funding, PILT will revert to a discretionary program subject to the annual appropriations process. Counties require a public commitment from the administration and Members of Congress to support long-term predictable funding at its full authorized levels for FY 2016 and beyond.

- As local governments are unable to tax the property values or products derived from federal lands, PILT payments are necessary to support essential government services (mandated by law) such as education, first responders, transportation infrastructure, law enforcement and healthcare in over 1,850 counties in 49 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.
- While the U.S. Senate and U.S. House of Representatives continue to discuss legislative solutions for funding the PILT program, NACo will continue to urge leadership in both chambers and on both sides of the aisle to act in a spirit of bicameral and bipartisan cooperation to work together to pass a final legislative solution.

RELEVANT COMMITTEES (FIND YOUR MEMBER):

- [Senate Energy & Natural Resources Committee](#)
- [House Natural Resources Committee](#)

NACo RESOURCES

- To view NACo's PILT presentation, click [here](#)
- To view NACo's Policy Brief, click [here](#)
- To view NACo's PILT advocacy video, click [here](#)

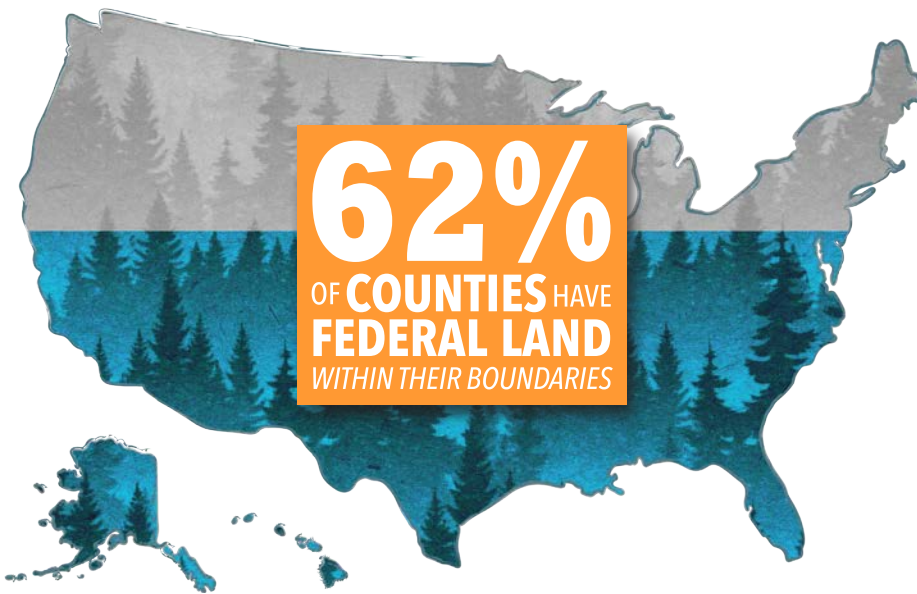


2014 PAYMENT IN LIEU OF TAXES (PILT)

U.S. COUNTIES AND PILT

PILT RECEIVED, FY 2014:	PERCENT OF COUNTIES WITH FEDERAL LAND:	MEDIAN PROPERTY TAX GENERATED PER TAXABLE ACRE:	MEDIAN PILT AMOUNT PER FEDERAL ACRE:
\$423 M	61.9%	\$13.59	\$2.58

FEDERAL LANDS, LOCAL COMMUNITIES



- **61.9% of counties have federal land** within their boundaries. Even though they are not able to collect property taxes on federal land, county governments must still provide essential services for their residents and those who visit these public lands each year. Such services include road and bridge maintenance, law enforcement, search and rescue, emergency medical, fire protection, solid waste disposal and environmental compliance.
- Our ask: **Counties urge Congress to provide full funding for PILT in FY 2015 and to support a sustainable long-term approach to financing essential local services in America's public lands counties.**

NOTES: NACo Analysis of Department of the Interior data and Census Bureau Census of Governments data. Taxable acres exclude federal land, but not tribal land.

PILT FUNDING CRITICAL FOR SERVICES INCLUDING:



ROAD AND BRIDGE
MAINTENANCE



LAW
ENFORCEMENT



SEARCH AND
RESCUE



EMERGENCY
MEDICAL



FIRE
PROTECTION



SOLID WASTE
DISPOSAL



ENVIRONMENTAL
COMPLIANCE

PROVIDE FULL MANDATORY FUNDING FOR THE PAYMENT IN LIEU OF TAXES (PILT) PROGRAM

ACTION NEEDED: Urge your members of Congress to support mandatory full funding for the Payment in Lieu of Taxes (PILT) program. Unless Congress acts, counties will receive their last fully funded PILT disbursement in FY 2015. Without mandatory full funding, PILT will remain a discretionary program (subject to the annual appropriations process) and could fall back to pre-2008 funding levels, which would devastate local government service delivery in areas with significant federal land ownership.

BACKGROUND: The PILT program was created in 1976 to offset costs incurred by counties for services provided to federal employees and families, the public and to the users of public lands. These include education, solid waste disposal, law enforcement, search and rescue, health care, environmental compliance, fire-fighting, parks and recreation and other important community services.

Annual PILT funding levels remained static for many years. For nearly two decades, counties watched the value of their PILT receipts drop due to inflation. In 1995, NACo was successful in securing a legislative fix for the PILT formula, (P.L. 103-397), which adjusted annual authorization levels for inflation.

For FY 2015, PILT was extended with \$70 million in appropriations provided by the FY 2015 National Defense Authorization Act and \$372 million in appropriations provided by the FY 2015 Consolidated and Further Continuing Appropriations Act (P.L. 113-235). Together the two bills provided full discretionary funding of \$442 million for PILT in FY 2015. In FY 2014, PILT was extended through the farm bill (P.L. 113-79) as a fully funded, mandatory entitlement program at \$425 million. Mandatory funding for FY 2013 was achieved through the Moving Ahead for Progress in the 21st Century Act (MAP-21) (P.L. 112-141) and provided \$399 million in PILT funding. Previously, the enactment of the Emergency Economic Stabilization Act (P.L. 110-343) provided full funding for PILT from FY 2008 through FY 2012. From 1995 to 2007, PILT remained an appropriated program, and as a result was underfunded year after year.

QUICK FACTS

- The U.S. Department of the Interior makes PILT payments to over 1,850 counties in 49 states, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands
- As federal land is not taxable by local governments, PILT provides payments to counties to offset losses in property tax revenues
- 62 percent of counties have federal lands within their boundaries

KEY TALKING POINTS:

- The PILT program provides payments to counties and other local governments to offset losses in tax revenues due to the presence of substantial acreage of federal land in their jurisdictions.
- Without future mandatory funding, PILT will remain a discretionary program subject to the annual appropriations process. Counties require a public commitment from the administration and Members of Congress to support long-term predictable funding at its full authorized levels for FY2016 and beyond.
- As local governments are unable to tax the property values or products derived from federal lands, PILT payments are necessary to support essential government services (mandated by law) such as education,

first responders, transportation infrastructure, law enforcement and healthcare in over 1,850 counties in 49 states, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.

- While the Senate and House continue to discuss legislative solutions for funding the PILT program, NACo will continue to urge leadership in both chambers and on both sides of the aisle to act in a spirit of bicameral and bipartisan cooperation to work together to pass a final legislative solution.

For further information, contact: Chris Marklund at cmarklund@naco.org or 202.942.4207

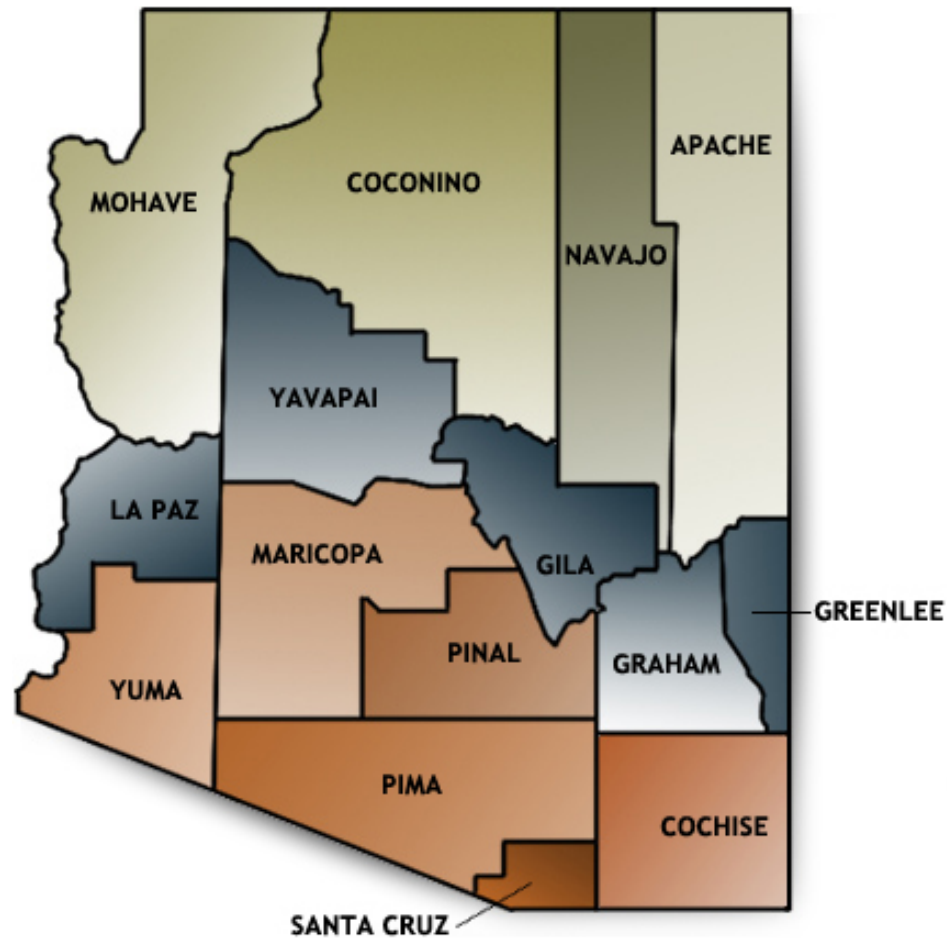
COMMITTEES OF JURISDICTION:

U.S. House Natural Resources Committee		U.S. Senate Energy & Natural Resources Committee
Majority: Rob Bishop (R-Utah) – Chairman Don Young (R-Alaska) Louie Gohmert (R-Texas) Doug Lamborn (R-Colo.) Rob Wittman (R-Va.) John Fleming (R-La.) Tom McClintock (R-Calif.) Glenn Thompson (R-Pa.) Cynthia Lummis (R-Wyo.) Dan Benishek (R-Mich.) Jeff Duncan (R-S.C.) Paul Gosar (R-Ariz.) Raul Labrador (R-Idaho) Doug LaMalfa (R-Calif.) Bradley Byrne (R-Ala.) Jeff Denham (R-Calif.) Paul Cook (R-Calif.) Bruce Westerman (R-Ark.) Garret Graves (R-La.) Dan Newhouse (R-Wash.) Ryan Zinke (R-Mont.) Jody Hice (R-Ga.) Amata Coleman Radewagen (R-AS) Tom MacArthur (R-N.J.) Alex Mooney (R-W.Va.) Crescent Hardy (R-Nev.)	Minority: Raul Grijalva, (D-Ariz.) – Ranking Member Grace Napolitano (D-Calif.) Madeleine Bordallo (D-Guam) Jim Costa (D-Calif.) Gregorio Kilili Camacho Sablan (D-N.M.I.) Niki Tsongas (D-Mass.) Pedro Pierluisi (D-P.R.) Jared Huffman (D-Calif.) Raul Ruiz (D-Calif.) Alan Lowenthal (D-Calif.) Matt Cartwright (D-Penn.) Don Beyer (D-Va.) Ruben Gallego (D-Ariz.) Norma Torres (D-Calif.) Debbie Dingell (D-Mich.) Mark Takai (D-Hawaii)	Majority: Lisa Murkowski (R-Alaska), Chairman John Barrasso (R-Wyo.) Jim Risch (R-Idaho) Mike Lee (R-Utah) Jeff Flake (R-Ariz.) Bill Cassidy (R-La.) Cory Gardner (R-Colo.) Steve Daines (R-Mont.) Rob Portman (R-Ohio) John Hoeven (R-N.D.) Lamar Alexander (R-Tenn.) Shelley Moore Capito (R-W.V.) Minority: Maria Cantwell (D-Wash.), Ranking Member Ron Wyden (D-Ore.) Barnard Sanders (D-Vt.) Debbie Stabenow (D-Mich.) Al Franken (D-Minn.) Joe Manchin III (D-W.V.) Martin Heinrich (D-N.M.) Mazie Hirono (D-Hawaii) Angus King (D-Maine) Elizabeth Warren (D-Mass.)



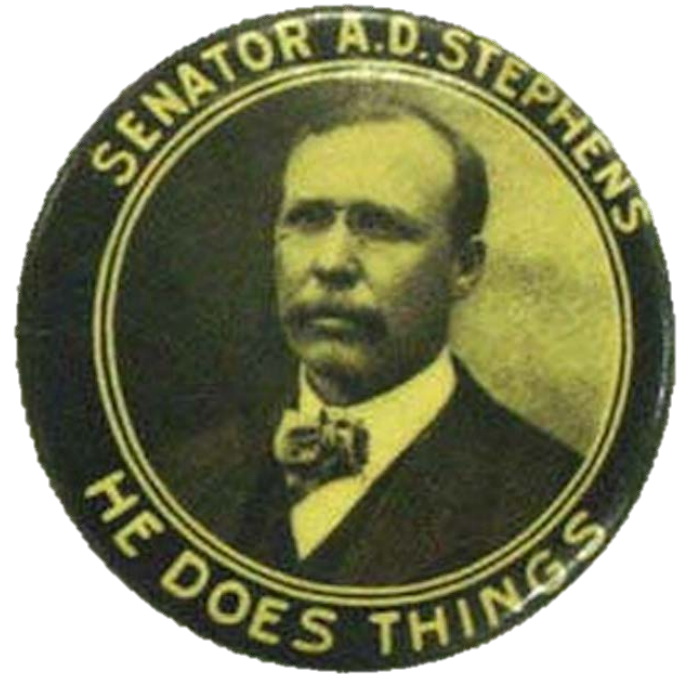
The Payment In Lieu of Taxes(PILT) Program

Arizona Counties



Why Do Counties Matter?

- Counties, cities and towns are *political subdivisions* of the state, charged with implementing state law and policy on a *regional level*
- Unlike cities, counties do not have “home rule” (authority to act independently of the state), therefore, *counties only have powers and authorities delegated to them by the legislature and state constitution*
- Counties provide a mechanism for implementing state law with regional efficiency, including:
 - *State administrative services*, such as elections, property assessment and tax collection, and courts
 - *Essential local services* for 1.3 million Arizonans living in unincorporated areas (20% of state population)

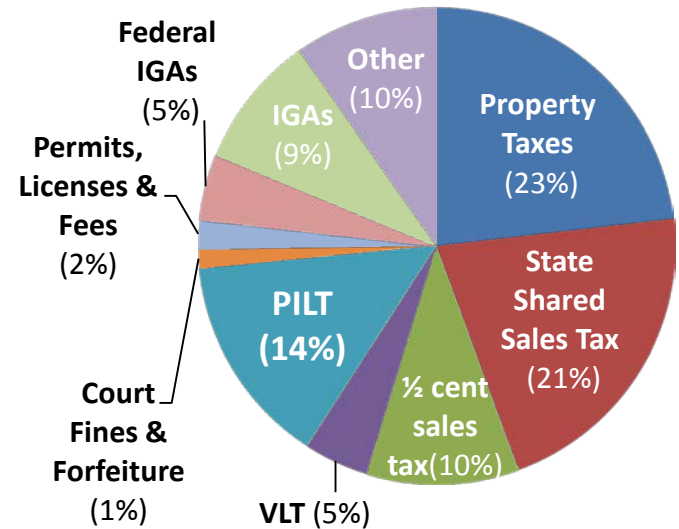


How are counties funded?

Counties are funded through a combination of local and state-shared revenue (sources in **blue** are statutorily capped)

- Local tax revenue
 - **Half-cent sales tax (excludes Maricopa)**
 - **Primary property tax**
 - Secondary property tax (for dedicated purposes & voter approved)
- State-shared revenue
 - Sales tax
 - Vehicle license tax
 - Highway User Revenue Fund (HURF) – dedicated to transportation
 - Over \$115.4M diverted from counties since 2008

Sample Revenue Sources*



PAYMENT IN LIEU OF TAXES (PILT)

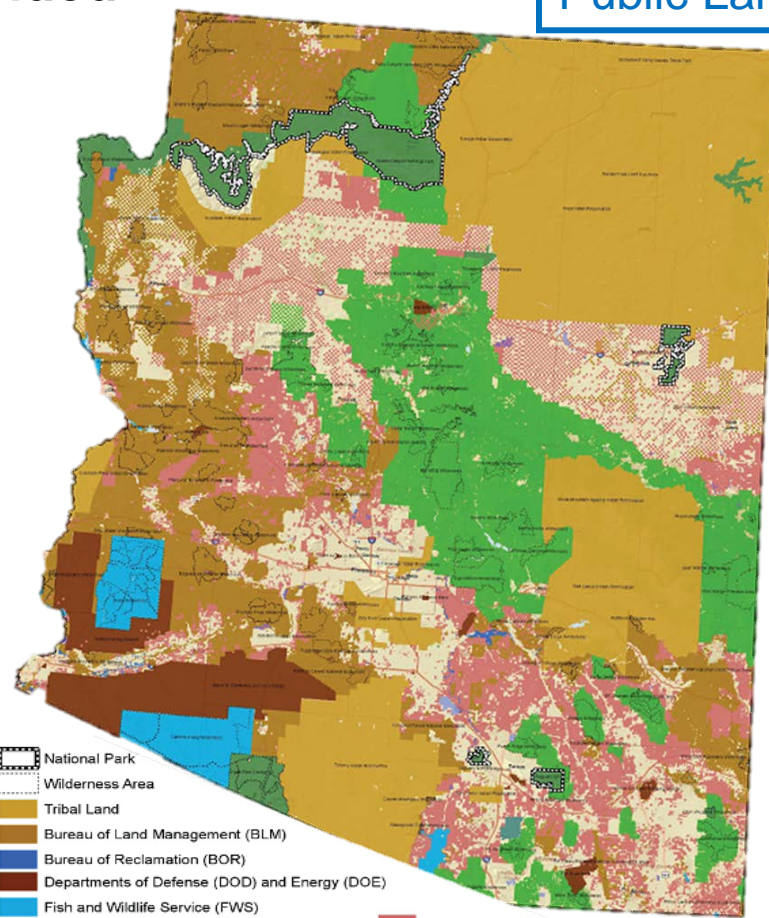


Why PILT Matters to Counties

The purpose of PILT is to offset losses in tax revenue and to reimburse counties for services provided.

Public Land

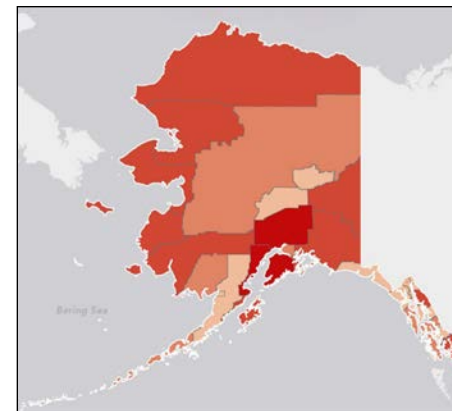
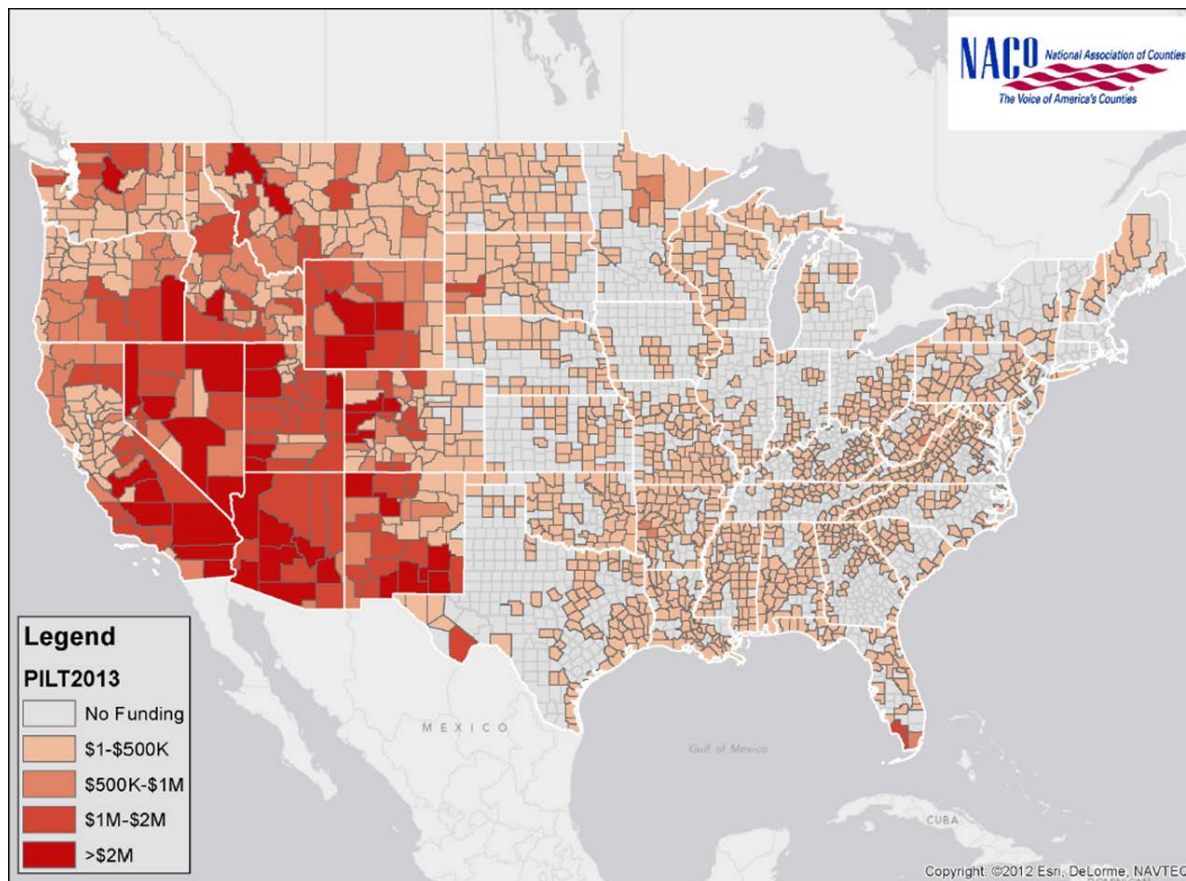
- Federal (public) land is exempt from local property taxes
- Arizona's 72.9 million acres of land is broken up in the following ways:
 - 42.1% Federal Lands
 - 27.2% Tribal Lands
 - 17.7% Private Lands
 - 12.8% State Lands
 - 0.2% City, County, and Other
- Some counties have less than 10 percent of their jurisdictions occupied by private (taxable) land



Source: USGS, GAP-PADUS 2012 version 1.3

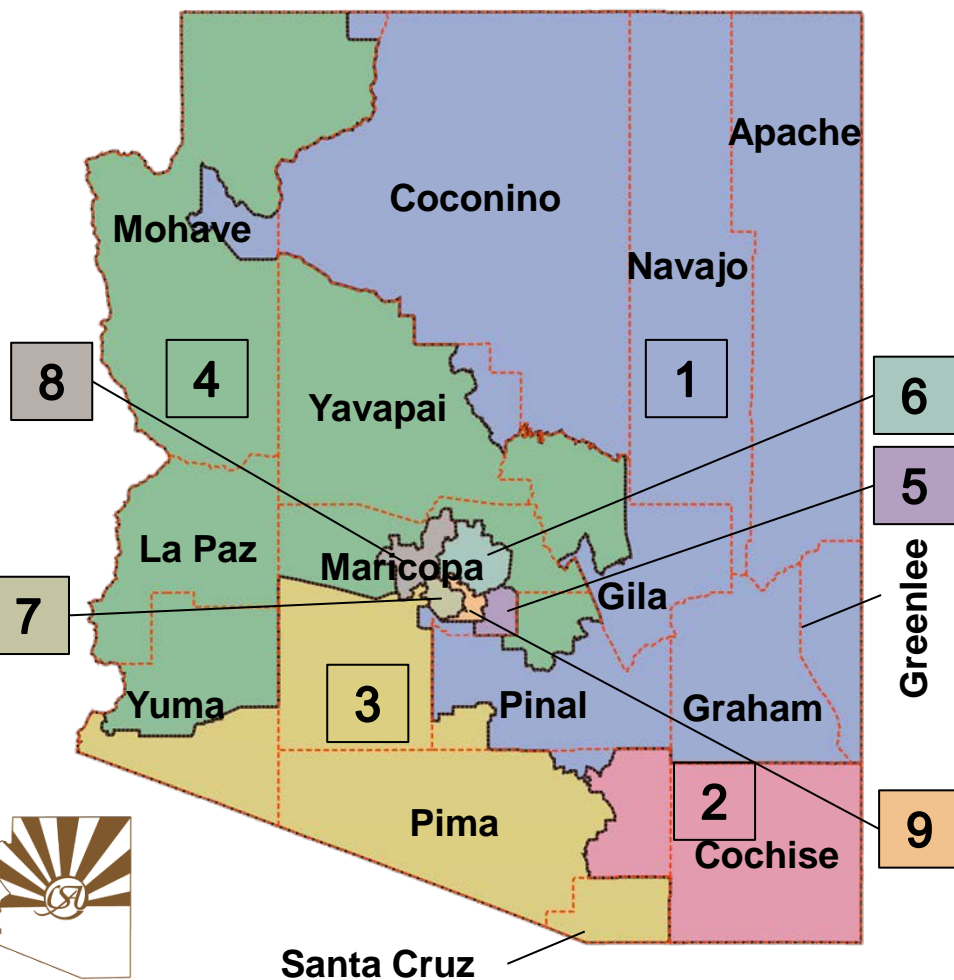
Why PILT Matters to Counties

FY2013 Annual PILT Payments – County by County Breakdown

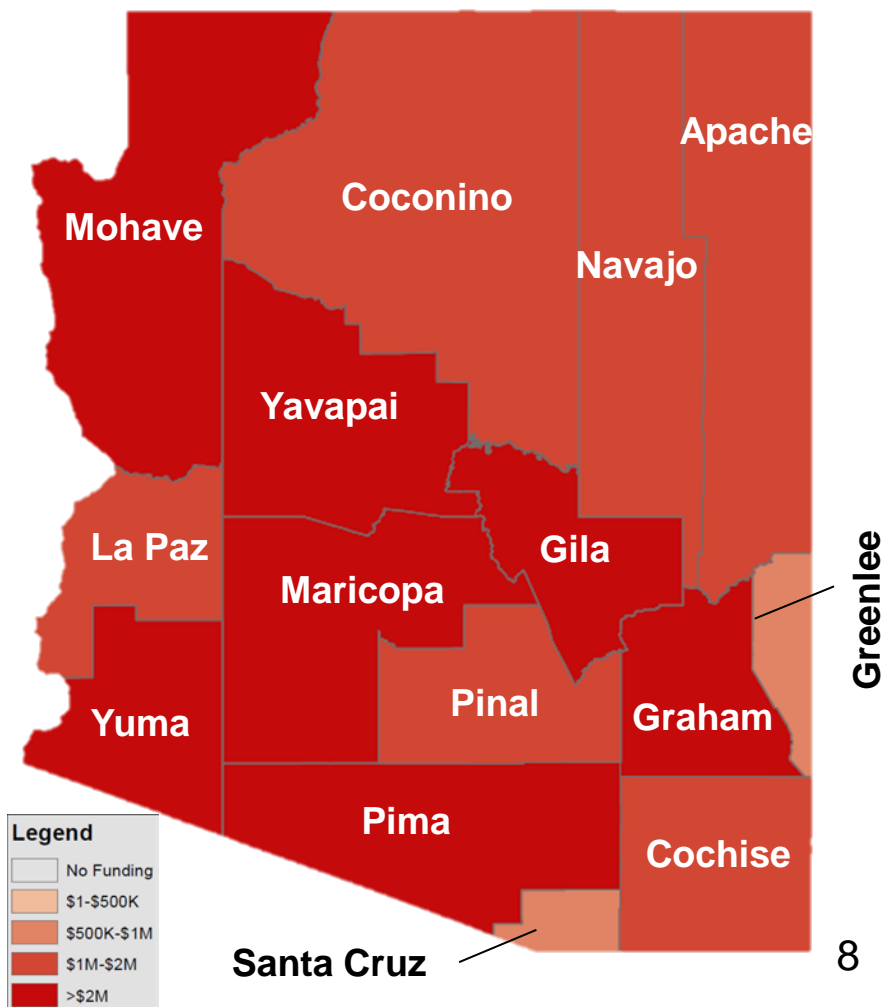


Why PILT Matters to Counties

Congressional Districts Overlaid on Counties



FY2013 Annual PILT Payments



Why PILT Matters to Counties

PILT Funding and Federal Land Presence In Arizona Counties

	Total Area	Private Lands		Federal Lands		FY2013 PILT Funding
	Acres	Acres	Percent	Acres	Percent	
Arizona	72,864,243	12,901,805	17.7%	30,708,194	42.1%	\$32,203,852
Apache County	7,179,804	952,524	13.3%	763,681	10.6%	\$1,595,835
Cochise County	3,921,756	1,530,293	39.0%	1,014,198	25.9%	\$1,986,080
Coconino County	11,941,017	1,612,090	13.5%	4,759,645	39.9%	\$1,572,295
Gila County	3,069,101	123,196	4.0%	1,756,339	57.2%	\$3,197,536
Graham County	2,967,974	284,277	9.6%	1,114,137	37.5%	\$2,636,873
Greenlee County	1,182,998	95,524	8.1%	913,024	77.2%	\$783,176
La Paz County	2,888,797	153,906	5.3%	2,247,191	77.8%	\$1,800,102
Maricopa County	5,903,622	1,709,714	29.0%	3,124,419	52.9%	\$2,781,842
Mohave County	8,614,712	1,475,607	17.1%	6,153,656	71.4%	\$3,238,586
Navajo County	6,374,231	1,141,184	17.9%	603,148	9.5%	\$1,417,672
Pima County	5,873,130	750,699	12.8%	1,816,350	30.9%	\$2,924,105
Pinal County	3,439,308	880,227	25.6%	671,350	19.5%	\$1,153,625
Santa Cruz County	776,260	279,424	36.0%	433,776	55.9%	\$910,527
Yavapai County	5,201,845	1,529,676	29.4%	2,391,849	46.0%	\$2,960,656
Yuma County	3,529,688	383,464	10.9%	2,945,431	83.4%	\$3,244,942



Why PILT Matters to Counties

Counties Often Provide Services Associated with Public Lands

In addition to services traditionally provided by counties to their residents, counties with federal lands in their jurisdictions often provide services on, or associated with those lands, including the following:



**Search and
Rescue**



Law Enforcement



**Road Building &
Maintenance**



**Emergency
Medical Services**



How PILT Works

PILT Payments and Categories of Public Lands

PILT Payments are typically made **directly to counties**. However, states can choose to receive and reroute funds to local governments. Currently, only Wisconsin and Alaska employ this option.

According to the formula established under PILT, there are three categories of public lands:

Section 6902	Section 6904	Section 6905
Federal lands in the National Forest System and the National Park System, lands administered by BLM, lands in federal water resource projects, dredge areas maintained by the U.S. Corps of Engineers, inactive and semi-active military installations, and some lands donated to the federal government	Federal lands acquired after December 20, 1970, as additions to lands in the National Park System or National Forest Wilderness Areas	Federal lands in the Redwood National Park or lands acquired in the Lake Tahoe Basin near Lake Tahoe under the Act of December 23, 1908



Currently, Arizona only receives Section 6902 payments, except for \$261 in Section 6904 monies received by Navajo County and \$5 for Yavapai County

How PILT Works

Management of Public Lands (30.7 million acres in Arizona)



The **U.S. Department of Agriculture (USDA)** **Forest Service** manages **10.9 million** acres of federal land in Arizona



The **Bureau of Land Management (BLM)** manages **12.3 million** acres of federal land in Arizona and is responsible for 700 million acres of subsurface mineral resources national wide



Other Federal Agencies manage an additional **7.5 million** acres of federal land in Arizona

How PILT Works

Section 6902 Payment Calculation (FY2013)

The amount to be paid to each county is the higher of:

- Alternative A:
 - \$2.54 for each acre of 6902 land
 - Reduced by prior year “other federal payments” retained (such as SRS)
- Alternative B:
 - \$0.35 for each acre of 6902 land
 - No reduction of prior year retained payments

Both Alternative A & Alternative B are restricted by population ceilings and all variables are adjusted for inflation using the CPI



The History of PILT

PILT First Signed Into Law – October 1976

After several years of growing pressure from county officials nationwide, the 95th congress passed the Payment In Lieu of Taxes Act (PL 94-565) – which provided annual payments to counties. The PILT Act was codified in Ch. 69 of Title 31 of the USC



1976-1994

Historically, PILT payments were limited to an amount appropriated by Congress. Initially authorized at \$100 million, that amount was appropriated annually during the first decade of the Act. During the 1980s, there were attempts to zero out the amount in budgets, but Congress made the minimum amount available each year.



The History of PILT

PILT Reform in 1994

The Act was amended in 1994 to provide for a more equitable authorization level in light of disparities that existed between property values and current PILT payments. The law, as amended, uses the consumer price index (CPI) to adjust the population limitation and the per acre dollar amount



1995-2007

After the 1994 PILT reform, which tied authorization levels to the consumer price index (CPI), authorized and appropriated levels began to diverge. PILT is one of the few federal funding programs that has a “floating authorization” amount



The History of PILT

PILT Reform in 2008

The Emergency Economic Stabilization ACT (PL 110-343) was enacted in 2008. The Act included language that modified the PILT program from a discretionary program (subject to annual appropriations) to a fully funded mandatory program. Congress provided five years of mandatory funding for PILT, from FY2008-FY2014



2008-2013

Despite increasing authorization levels after 1994, PILT was not fully funded until 2008, when it was changed from a discretionary to a mandatory program. As a result, PILT was fully funded from 2008-2012. In 2013, MAP-21 included mandatory funding for PILT, subject to sequestration.



What's Next for PILT?

Congress has not yet authorized FY2014 PILT funding

FY2012		FY2013 (sequestration)		FY2014	
Authorized	Appropriated	Authorized	Appropriated	Authorized	Appropriated
\$393M	\$393M	\$421M	\$400M	\$437M	\$437M

- Without additional mandatory funding, PILT will be reverted to a discretionary program subject to the appropriations process in Fiscal Year 2015
- Arizona counties rely on PILT payments at the end of each state fiscal year to carry them through the first quarter of the following fiscal year.



Questions?





SECURE RURAL SCHOOLS ("SRS" *or* REVENUE SHARING PAYMENTS *to* FOREST COUNTIES)

BACKGROUND

The Secure Rural Schools (SRS) program provides assistance to rural counties and school districts affected by the decline in revenue from timber harvests on federal lands. Historically, rural communities and schools have relied on a share of receipts from timber harvests to supplement local funding for education services and roads. During the 1980s, national policies substantially diminished the revenue-generating activity permitted in these forests. The resulting steep decline in timber sales decreased the revenues that rural counties and school districts received from these timber sales.

COUNTY INTEREST

The SRS program was enacted to provide funding for counties and schools to compensate for steep reductions in revenues from timber harvests. The enactment of a program to share revenues generated from the management of designated federal lands with forest counties and schools would ensure that students receive essential education services and that rural communities have funding for roads, conservation projects, search and rescue missions, and fire prevention programs.

STATUS

On April 16, 2015, SRS was reauthorized retroactively (P.L. 114-10) for FY 2014, providing \$285 million to 729 rural counties, parishes and boroughs across the nation. The SRS program is set to expire at the end of FY 2015.

TALKING POINTS:

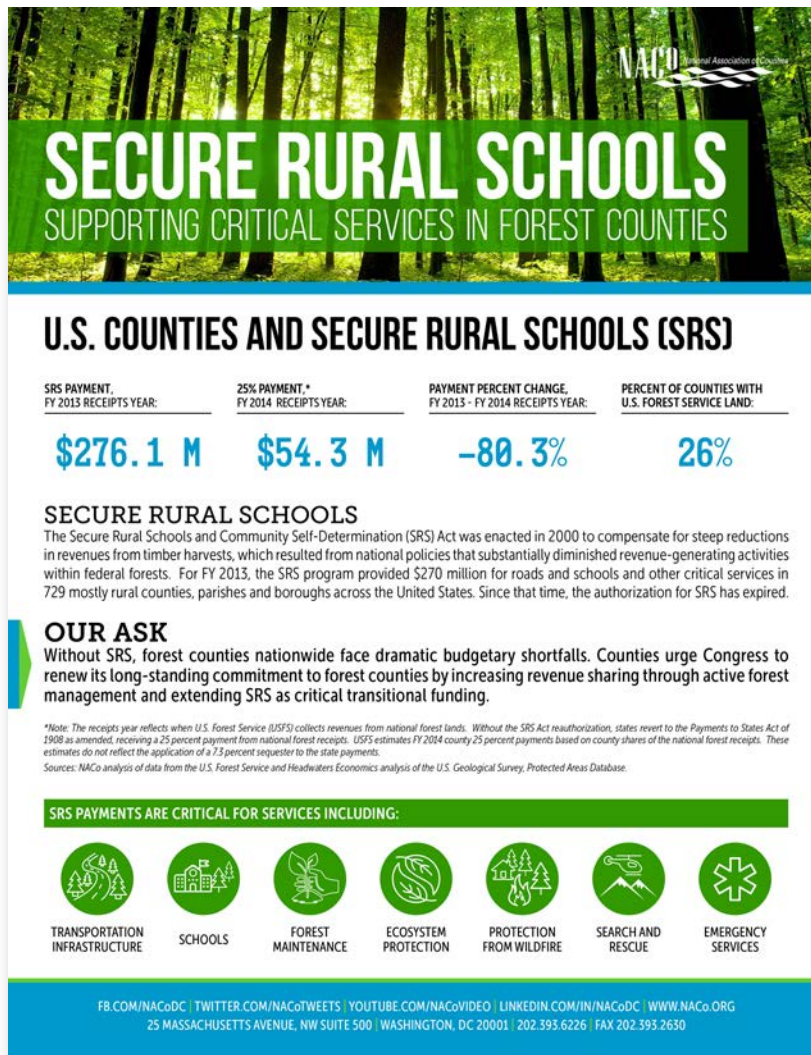
- The expiration of the Secure Rural Schools and Community Self-Determination (SRS) Act at the end of FY 2015 will create dramatic budgetary shortfalls for 729 rural counties unless Congress renews this federal obligation to rural county governments.
- New legislation should be enacted that provides payments to counties and promotes active natural resource management for the stability and well-being of forest counties and communities. NACo supports a forest trust model that would designate specific Forest Service land to be managed by the states on behalf of counties and schools according to state land management practices and federal and state laws as they apply to state land.
- While the U.S. Senate and U.S. House of Representatives continue to discuss legislative solutions for funding the SRS program, NACo will continue to urge leadership in both chambers and on both sides of the aisle to act in a spirit of bicameral and bipartisan cooperation to work together to pass a final legislative solution.

RELEVANT COMMITTEES (FIND YOUR MEMBER):

- [Senate Energy & Natural Resources Committee](#)
- [House Natural Resources Committee](#)

NACo RESOURCES

- To view your county's SRS profile, click [here](#)
- To view NACo's Policy Brief on SRS, click [here](#)



SECURE RURAL SCHOOLS
SUPPORTING CRITICAL SERVICES IN FOREST COUNTIES

U.S. COUNTIES AND SECURE RURAL SCHOOLS (SRS)

SRS PAYMENT, FY 2013 RECEIPTS YEAR:	25% PAYMENT,* FY 2014 RECEIPTS YEAR:	PAYMENT PERCENT CHANGE, FY 2013 - FY 2014 RECEIPTS YEAR:	PERCENT OF COUNTIES WITH U.S. FOREST SERVICE LAND:
\$276.1 M	\$54.3 M	-80.3%	26%

SECURE RURAL SCHOOLS
The Secure Rural Schools and Community Self-Determination (SRS) Act was enacted in 2000 to compensate for steep reductions in revenues from timber harvests, which resulted from national policies that substantially diminished revenue-generating activities within federal forests. For FY 2013, the SRS program provided \$270 million for roads and schools and other critical services in 729 mostly rural counties, parishes and boroughs across the United States. Since that time, the authorization for SRS has expired.

OUR ASK
Without SRS, forest counties nationwide face dramatic budgetary shortfalls. Counties urge Congress to renew its long-standing commitment to forest counties by increasing revenue sharing through active forest management and extending SRS as critical transitional funding.

*Note: The receipts year reflects when U.S. Forest Service (USFS) collects revenues from national forest lands. Without the SRS Act reauthorization, states revert to the Payments to States Act of 1908 as amended, receiving a 25 percent payment from national forest receipts. USFS estimates FY 2014 county 25 percent payments based on county shares of the national forest receipts. These estimates do not reflect the application of a 7.5 percent sequester to the state payments.
Sources: NACo analysis of data from the U.S. Forest Service and Headwaters Economics analysis of the U.S. Geological Survey, Protected Areas Database.

SRS PAYMENTS ARE CRITICAL FOR SERVICES INCLUDING:

- TRANSPORTATION INFRASTRUCTURE
- SCHOOLS
- FOREST MAINTENANCE
- ECOSYSTEM PROTECTION
- PROTECTION FROM WILDFIRE
- SEARCH AND RESCUE
- EMERGENCY SERVICES

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2015 POLICY BRIEF  **NATIONAL ASSOCIATION of COUNTIES**

CONTINUE REVENUE SHARING PAYMENTS TO FOREST COUNTIES
Support the Secure Rural Schools Program

CONTINUE REVENUE SHARING PAYMENTS TO FOREST COUNTIES

Support the Secure Rural Schools Program

ACTION NEEDED: Urge your Members of Congress to pursue a long-term legislative solution for continued revenue sharing payments to forest counties through the Secure Rural Schools Program. The Secure Rural Schools and Community Self-Determination (SRS) Act expired in September 2012 and has not been reauthorized for FY 2014.

Congress should support and improve revenue sharing programs to allocate revenues generated from the management of and production on designated federal lands to all forest counties. If Congress fails to renew its long-standing federal obligation by not providing a solution, counties could face dramatic budgetary shortfalls.

BACKGROUND: The SRS program provides assistance to rural counties and school districts affected by the decline in revenue from timber harvests on federal lands. Historically, rural communities and schools have relied on a share of receipts from timber harvests to supplement local funding for education services and roads. During the 1980s, national policies substantially diminished the revenue-generating activity permitted in these forests. The resulting steep decline in timber sales decreased the revenues that rural counties and school districts received from these timber sales.

In response to this decline, SRS was enacted in 2000 (P.L. 106-393) to stabilize payments to counties and to compensate for lost revenues. In October 2008, SRS was reauthorized (P.L. 110-343) and amended to continue, on a sliding payment scale. SRS was reauthorized for FY 2013 (P.L. 113-40) and expired on September 30, 2013. On April 16, 2015, SRS was reauthorized retroactively (P.L. 114-10) for FY 2014. For FY 2014, SRS will provide \$285 million to 729 rural counties, parishes and boroughs across the nation. It is set to expire at the end of FY 2015.

The expiration of SRS will create dramatic budgetary shortfalls if Congress fails to renew the long-standing federal obligation to county governments. The enactment of a program to share revenues generated from the management of designated federal lands with forest counties and schools would ensure that students receive essential education services and that rural communities have funding for roads, conservation projects, search and rescue missions, and fire prevention programs.

KEY TALKING POINTS:

- The expiration of the Secure Rural Schools and Community Self-Determination (SRS) Act in 2014 will create dramatic budgetary shortfalls for 729 rural counties if Congress fails to renew this federal obligation to rural county governments
- New legislation should be enacted that provides payments to counties and promotes active natural resource management for the stability and well-being of forest counties and communities. NACo supports a forest trust model that would designate specific Forest Service land to be managed by the states on behalf

QUICK FACTS

- NACo is pursuing a long-term legislative solution, based on active forest management, to continue revenue sharing payments to counties
- The SRS program was enacted in 2000 to provide funding for counties and schools to compensate for steep reductions in revenues from timber harvests
- For FY 2014, the SRS program will provide \$285 million to 729 rural counties, parishes, and boroughs across the United States
- Historically (since 1908), the Forest Service provided counties and schools 25 percent of the revenues collected from management activities on the National Forest System

of counties and schools according to state land management practices and federal and state laws as they apply to state land.

- While the Senate and House of Representatives continue to discuss legislative solutions for funding the SRS program, NACo will continue to urge leadership in both houses and on both sides of the aisle to act in a spirit of bicameral and bipartisan cooperation to work together to pass a final legislative solution.

For further information, contact: Chris Marklund at 202.942.4207 or cmarklund@naco.org

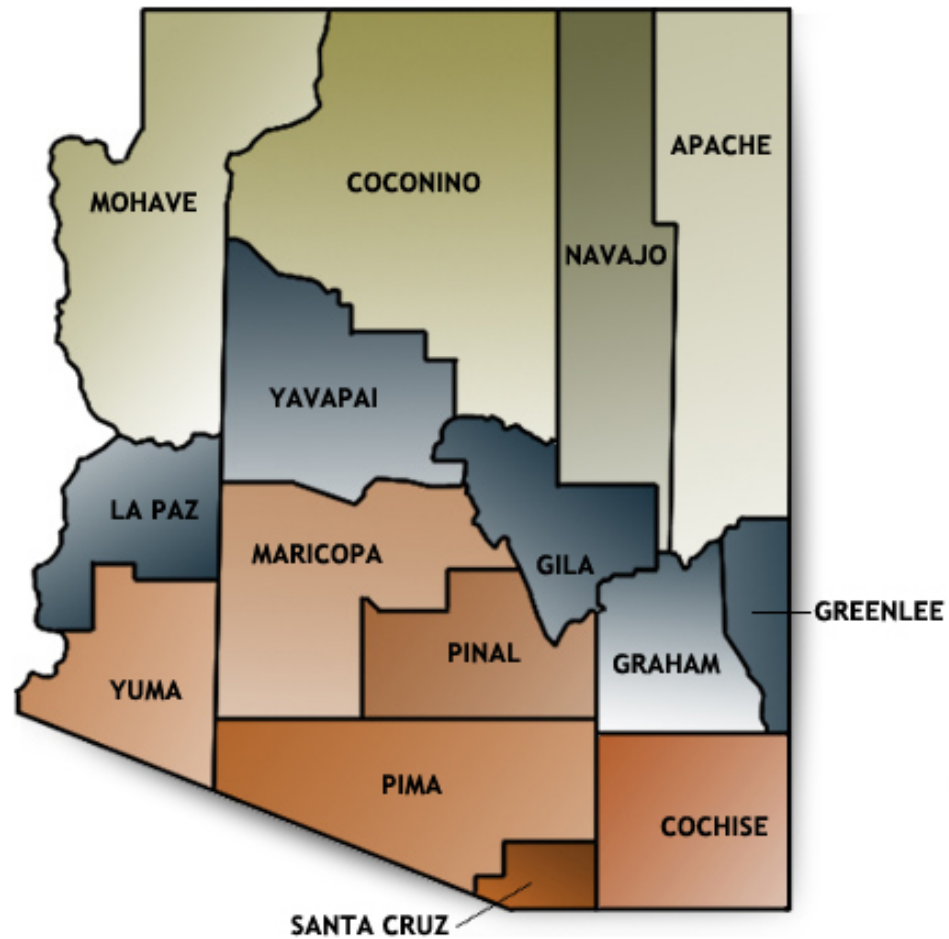
COMMITTEES OF JURISDICTION:

U.S. House Natural Resources Committee		U.S. Senate Energy & Natural Resources Committee
Majority: <i>Rob Bishop (R-Utah) – Chairman</i> Don Young (R-Alaska) Louie Gohmert (R-Texas) Doug Lamborn (R-Colo.) Rob Wittman (R-Va.) John Fleming (R-La.) Tom McClintock (R-Calif.) Glenn Thompson (R-Pa.) Cynthia Lummis (R-Wyo.) Dan Benishek (R-Mich.) Jeff Duncan (R-S.C.) Paul Gosar (R-Ariz.) Raul Labrador (R-Idaho) Doug LaMalfa (R-Calif.) Bradley Byrne (R-Ala.) Jeff Denham (R-Calif.) Paul Cook (R-Calif.) Bruce Westerman (R-Ark.) Garret Graves (R-La.) Dan Newhouse (R-Wash.) Ryan Zinke (R-Mont.) Jody Hice (R-Ga.) Amata Coleman Radewagen (R-AS) Tom MacArthur (R-N.J.) Alex Mooney (R-W.Va.) Crescent Hardy (R-Nev.)	Minority: <i>Raul Grijalva, (D-Ariz.) – Ranking Member</i> Grace Napolitano (D-Calif.) Madeleine Bordallo (D-Guam) Jim Costa (D-Calif.) Gregorio Kilili Camacho Sablan (D-Northern Mariana Islands) Niki Tsongas (D-Mass.) Pedro Pierluisi (D-P.R.) Jared Huffman (D-Calif.) Raul Ruiz (D-Calif.) Alan Lowenthal (D-Calif.) Matt Cartwright (D-Penn.) Don Beyer (D-Va.) Ruben Gallego (D-Ariz.) Norma Torres (D-Calif.) Debbie Dingell (D-Mich.) Mark Takai (D-Hawaii)	Majority: <i>Lisa Murkowski (R-Alaska) – Chairman</i> John Barrasso (R-Wyo.) Jim Risch (R-Idaho) Mike Lee (R-Utah) Jeff Flake (R-Ariz.) Bill Cassidy (R-La.) Cory Gardner (R-Colo.) Steve Daines (R-Mont.) Rob Portman (R-Ohio) John Hoeven (R-N.D.) Lamar Alexander (R-Tenn.) Shelley Moore Capito (R-W.V.) Minority: <i>Maria Cantwell (D-Wash.) – Ranking Member</i> Ron Wyden (D-Ore.) Barnard Sanders (D-Vt.) Debbie Stabenow (D-Mich.) Al Franken (D-Minn.) Joe Manchin III (D-W.V.) Martin Heinrich (D-N.M.) Mazie Hirono (D-Hawaii) Angus King (D-Maine) Elizabeth Warren (D-Mass.)



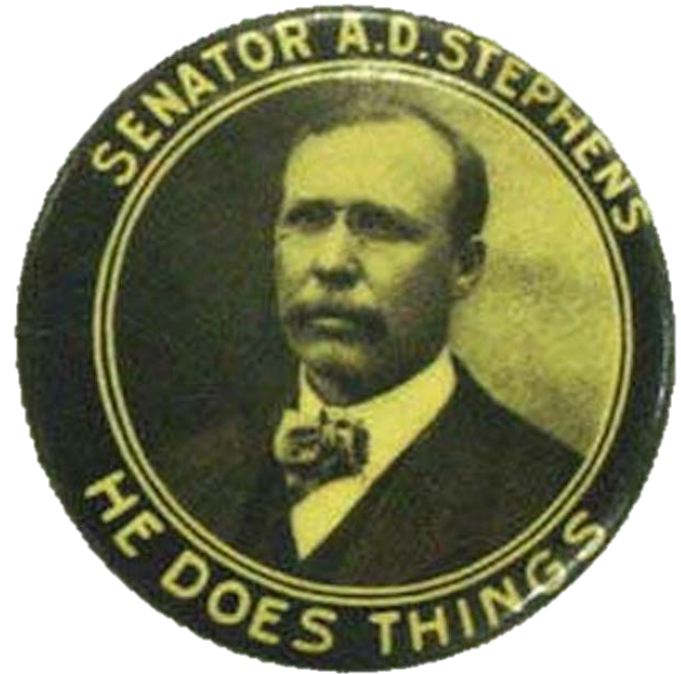
Secure Rural Schools (SRS)

Arizona Counties



Why Do Counties Matter?

- Counties, cities and towns are *political subdivisions* of the state, charged with implementing state law and policy on a *regional level*
- Unlike cities, counties do not have “home rule” (authority to act independently of the state), therefore, *counties only have powers and authorities delegated to them by the legislature and state constitution*
- Counties provide a mechanism for implementing state law with regional efficiency, including:
 - *State administrative services*, such as elections, property assessment and tax collection, and courts
 - *Essential local services* for 1.3 million Arizonans living in unincorporated areas (20% of state population)

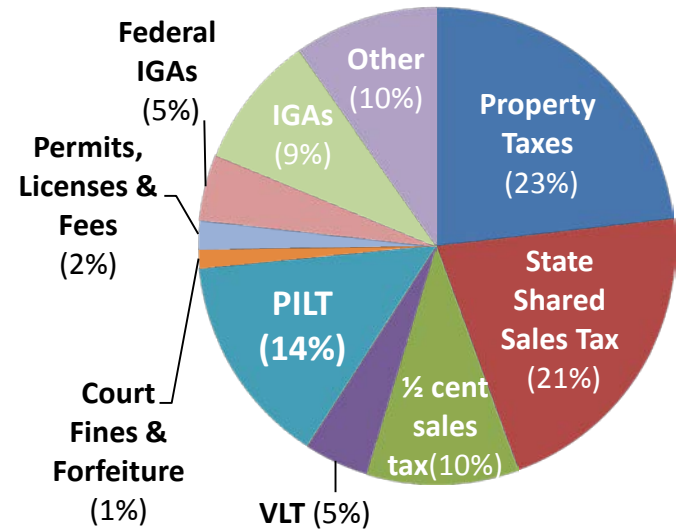


How are counties funded?

Counties are funded through a combination of local and state-shared revenue (sources in **blue** are statutorily capped)

- Local tax revenue
 - **Half-cent sales tax (excludes Maricopa)**
 - **Primary property tax**
 - Secondary property tax (for dedicated purposes & voter approved)
- State-shared revenue
 - Sales tax
 - Vehicle license tax
 - Highway User Revenue Fund (HURF) – dedicated to transportation
 - Over \$115.4M diverted from counties since 2008

Sample Revenue Sources*



* Graham County FY13 Budget



SECURE RURAL SCHOOLS (SRS)



History of SRS

The Contract between the federal government and rural America:

- 1891: Forest Reserve Act placed over 40 million acres in the Forest Reserves
- 1905: Forest Reserves renamed National Forests
- 1906: President Teddy Roosevelt proposed revenue sharing to promote multi-use forested lands
- 1908: Congress passes a 25% revenue sharing program to support roads and public schools

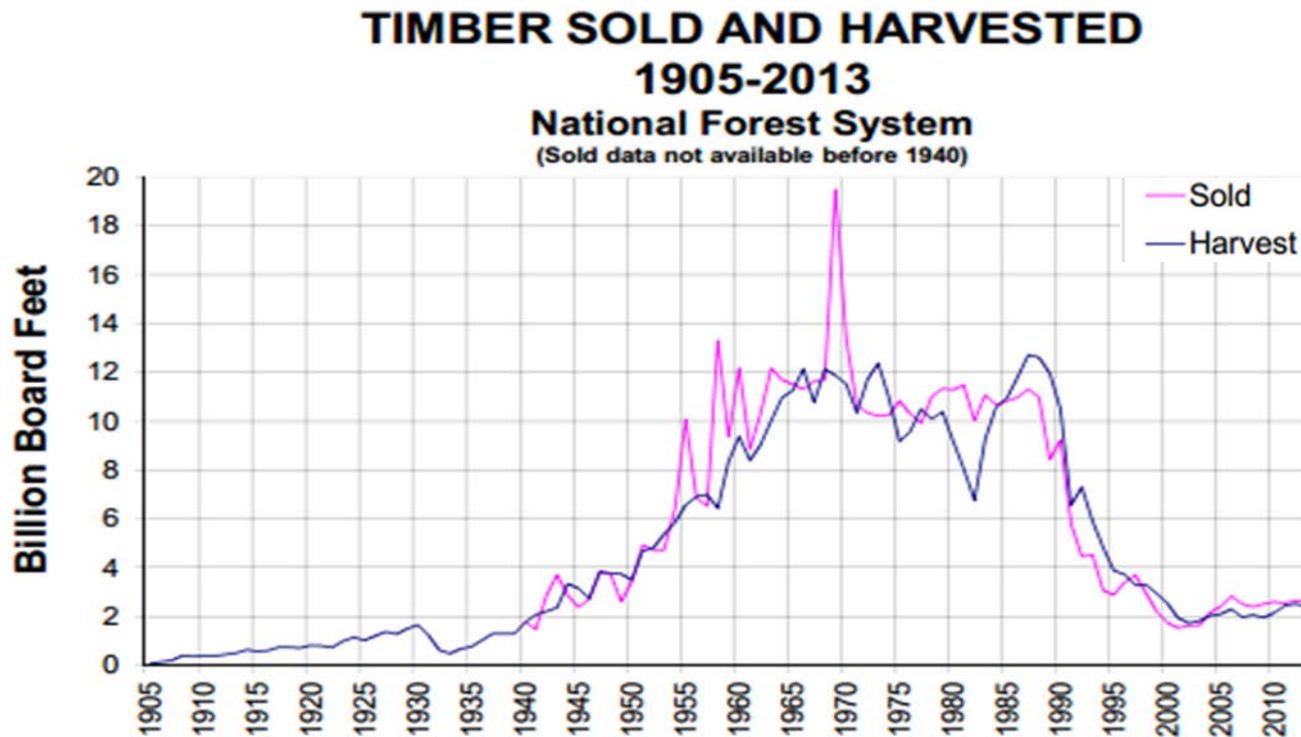


A PRACTICAL FORESTER
(A subject that had attention all through Mr.
Roosevelt's Presidency.)
From the Pioneer Press (St. Paul)



History of SRS

- Beginning in the 1980s policy changes led to diminishing timber sale revenue from National Forests
- By 1998 revenue from national forest activities and payments had declined by 70%



History of SRS

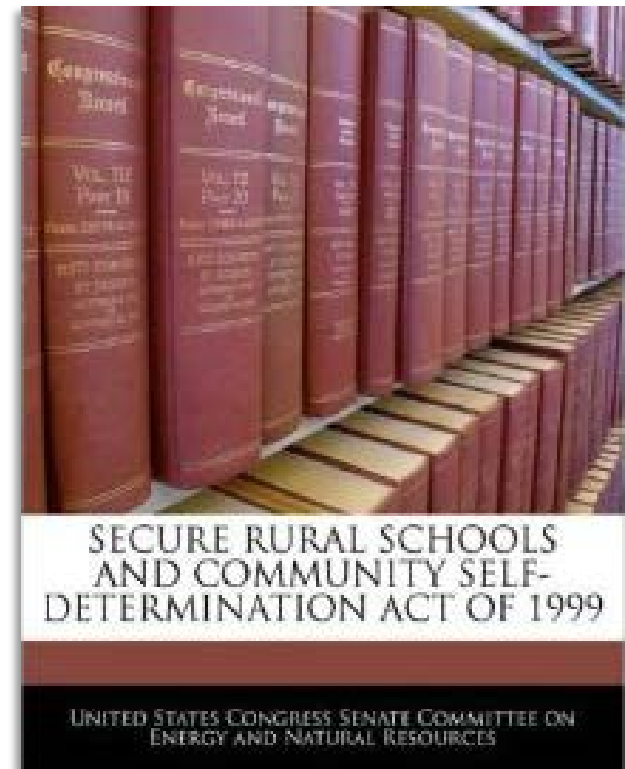
- 2000: The Secure Rural Schools and Community Self-Determination Act was signed into law (P.L. 106-393) – Transition to Title I, II, III funds
 - Authorized for FY2001-FY2006
- 2007: 1-year extension of SRS (P.L. 106-393)
- 2008: SRS reauthorized and amended (P.L. 110-343)
 - Authorized through FY2012
 - New Formula for Title I
 - Narrowed use of Title III funds
- 2012: Part of MAP-21, 1-year extension of SRS (P.L. 112-141)
- 2013: Part of Helium Stewardship Act, 1-year extension (P.L. 113-40)
- Not Reauthorized for FY2014



Why SRS Matters

The Purpose of The Secure Rural Schools and Community Self-Determination Act (SRS) is to:

- Stabilize and transition payments to county schools and roads from the declining and unreliable 25% payments and safety net payments
- Invest in the land and create employment opportunities
- Improve cooperative relationships among the people that use and care for federal lands



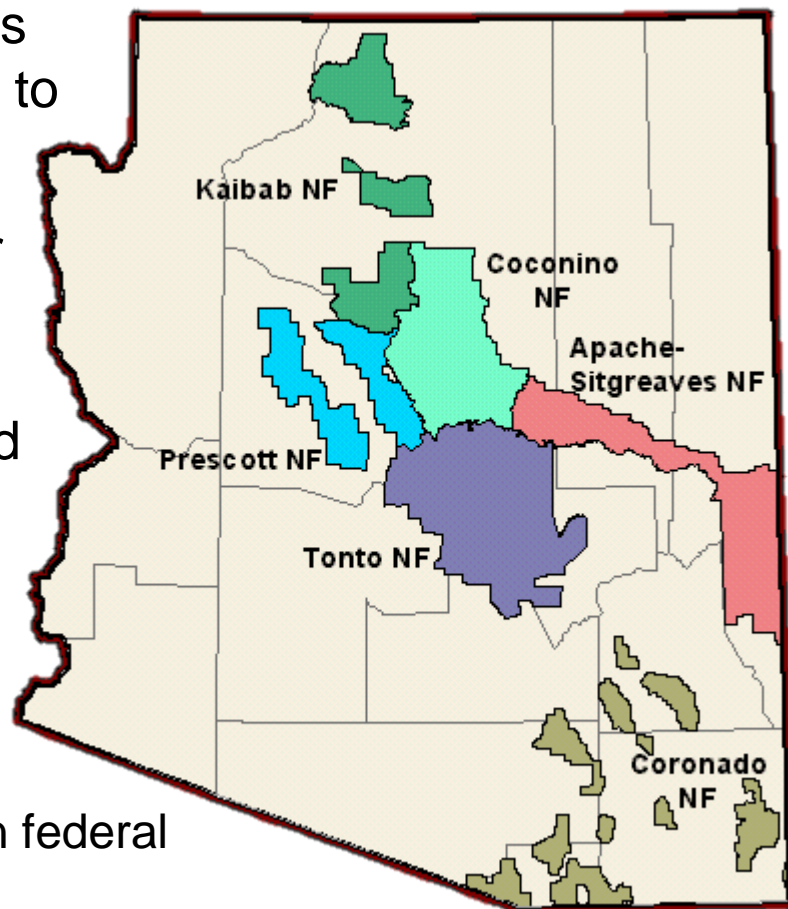
Prior to SRS, counties received 25 percent of Timber Sales which began due to federal action



How SRS Works

Payments are made under three separate Titles

- **Title I funds** (Secure Payment): for states and counties containing National Forests to help fund schools and roads
- **Title II funds** (Special Projects): used for the for protection, restoration, and enhancement of fish and wildlife habitat, and other resource objectives – Approved by Resource Advisory Committee (RAC)
- **Title III funds** (Specific Purpose): Funds may be used only for 3 purposes:
 - Firewise Communities program
 - Reimbursement for emergency services on federal land paid for by the county
 - Develop community wildfire protection plans (CWPPs)



Title I & Title III Funds

County	SFY12/FFY11 Title I & III Amounts Received	FFY11 Funds Retained in FFY12	FFY11 Funds Passed Through in FFY12
Apache County	\$902,505	\$0	\$902,505
Cochise County	\$383,553	\$191,776	\$191,777
Coconino County	\$3,667,506	\$2,271,056	\$1,396,450
Gila County	\$1,567,233	\$50,000	\$1,517,233
Graham County	\$633,536	\$50,000	\$583,536
Greenlee County	\$817,224	\$350,000	\$467,224
Maricopa County	\$488,307	\$488,307	\$0
Mohave County	\$10,969	\$6,581	\$4,388
Navajo County	\$1,187,632	\$25,000	\$1,162,632
Pima County	\$338,393	\$338,393	\$0
Pinal County	\$351,436	\$351,437	-\$1
Santa Cruz County	\$570,015	\$138,348	\$431,667
Yavapai County	\$2,371,517	\$299,847	\$2,071,670
Totals:	\$13,289,827	\$4,560,745	\$8,729,082



Title II Funds and RAC Projects

Arizona has 4 Resource Advisory Committees that approves projects. List below a just a few examples from each of them

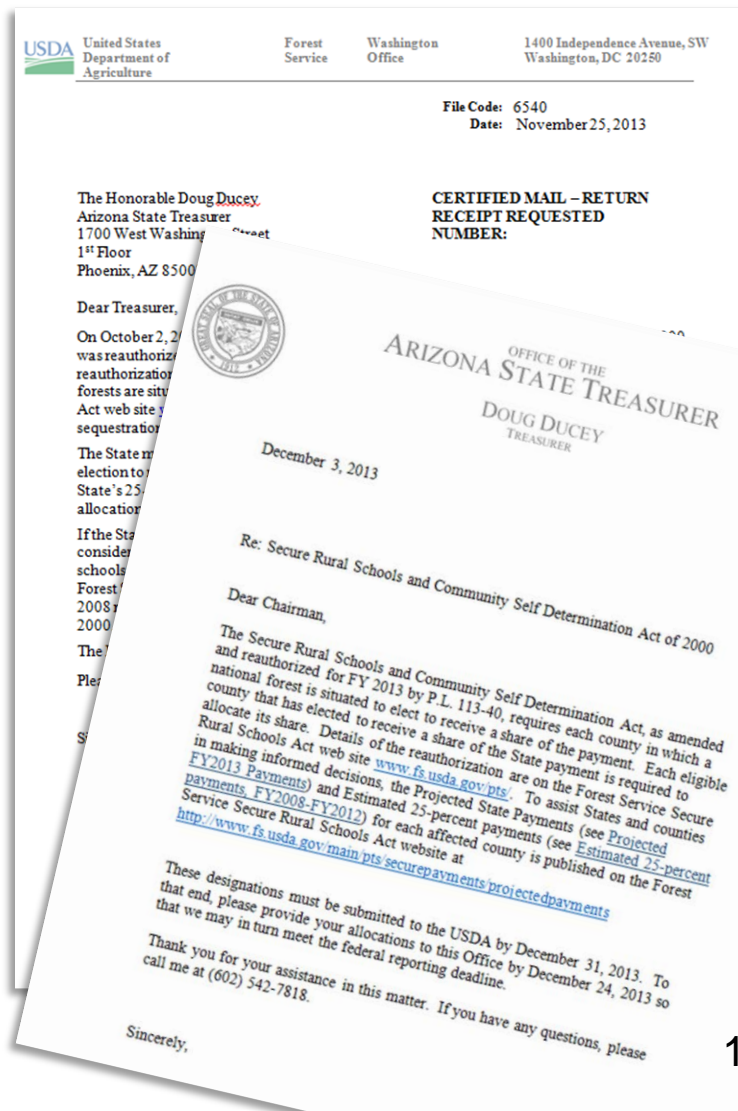
- Coconino RAC
 - Schultz Burn Rehabilitation Projects (\$497,175)
 - Mogollon Rim Watershed Enhancement (\$256,923)
- Eastern Arizona RAC
 - Forest Road 512 Surfacing Project – Young, AZ (\$361,535)
 - Blue River Tamarisk Removal (\$126,000)
- Southern Arizona RAC
 - Whitlow Ranch Flood Control Basin Restoration Project (\$181,000)
 - Horseshoe II Fire – Fence Reconstruction (\$31,050)
- Yavapai RAC
 - Crown King Road Improvement (\$78,750)
 - Highland Forest Health Improvement (\$89,275)



How SRS Works

Annual Payment

- Counties receive payment each year
- Payments are generally made in December
- Title I & Title III funds are paid to the state for distribution to counties
- Title II funds are held in a Forest Service account and are used to pay for approved projects within a county



How SRS Works

Fiscal Year 2008 payments

- \$477 million (Title I & III)
 - \$18.4 million to Arizona
- 41 States and Puerto Rico
- Redistributed to 729 Counties
 - 13 (out of 15) in Arizona

Additional \$52 million in Title II

- 306 counties in 31 states
- 108 National Forests
- 120 resource advisory committees

Fiscal Year 2012 payments

- \$291.4 million (Title I & III)
 - \$13.1 million to Arizona
- 41 States and Puerto Rico
- Redistributed to 729 Counties
 - 13 (out of 15) in Arizona

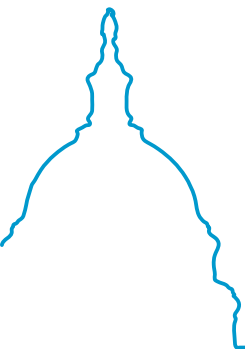
Additional \$31.9 million in Title II

- 302 counties in 29 states
- 130 National Forests
- 64 resource advisory committees



Questions?





WATERS *of the* U.S. (WOTUS) RULE

BACKGROUND

On June 29, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published their Definition of Waters of the U.S. Under the Clean Water Act (renamed the Clean Water Rule) in the Federal Register. It will become effective on August 28, 2015, 60 days after publication.

COUNTY INTEREST

Counties are charged with maintaining public safety infrastructure such as roads and roadside ditches, flood control channels, drainage conveyances, stormwater systems and green infrastructure. As co-regulators under the Clean Water Act, counties are not just another stakeholder in this discussion. Despite having provided detailed feedback and congressional testimony on multiple occasions regarding the potential impact of the proposed rule on counties, and despite repeated attempts to have a meaningful consultation process with the federal agencies, many issues remain unsolved. Despite assurances from the agencies that ditches are exempt, actual language of the rule remains unclear, meaning many county owned ditches may still fall under federal authority.

STATUS

On May 12, the U.S. House of Representatives passed the Regulatory Integrity Protection Act of 2015 (H.R. 1732) by a vote of 261-155. This bill would withdraw the final rule and require the agencies to restart the rule-making process, inclusive of state and local governments. On June 10, the U.S. Senate Committee on Environment and Public Works passed a similar measure, the Federal Water Quality Protection Act (S. 1140). Both the U.S. House of Representatives and the U.S. Senate's FY 2016 Interior, Environment, and Related Agencies appropriations bills contain language to stop the final "waters of the U.S." rule from being implemented. Congress must pass an appropriations bill by the end of the fiscal year on September 30, and it's likely that language will be included. However, President Obama has expressed opposition to both H.R. 1732 and the interior appropriations language and has threatened to veto these measures.

WHAT COUNTIES CAN DO:

While the rule is finalized, there are still several actions counties can take before (and after) the rule is implemented. These include:

- Contact your members of Congress, especially your Senators, and urge them to support any legislative vehicle that would stop the final rule until key issues are resolved.
- Send a letter to the U.S. Senate Committee on Environment and Public Works Chairman James Inhofe (R-Okla.) explaining how the rule will impact your county and why a legislative fix is needed.
- Write a letter to the editor or an op-ed for your local newspaper—NACo can provide you with examples

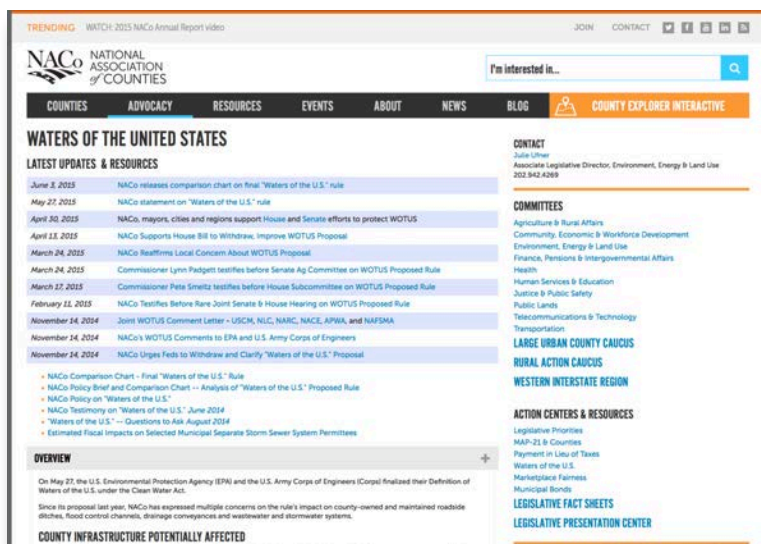
- Talk to other local and state government officials, including elected city and state representatives, and educate them about the potential impacts of the final rule. For example, the National Conference of State Legislatures will be holding their conference in early August and will be debating policy in support of S. 1140. Educate your state representatives about the impact of this rule.
- Plan site visits. Take your Congressional members (or their staff) to see the county's vast network of roadside and drainage ditches, flood control channels, stormwater features or wastewater recycling infrastructure to demonstrate how the final rule would impact your county.
- Urge your county policy and technical staff to engage with the Corps at the local/corps district level. In many cases, regional Corps staff will be the ones providing "on the ground interpretation" of the new regulation, and feedback of this type could:
 - (a) further inform forthcoming implementation guidance and
 - (b) provide opportunities for establishing indispensable working relationships between counties and the Corps.

RELEVANT COMMITTEES

- [Senate Environment and Public Works Committee](#)
- [Senate Appropriations Committee](#)
- [House Transportation and Infrastructure Committee](#)
- [House Appropriations Committee](#)

NACo RESOURCES

- To access the NACo policy brief on Waters of the U.S., click [here](#)
- To access the WOTUS information hub (which includes comments, letters and other resources), click [here](#)



FINAL “WATERS OF THE U.S.” RULE

ACTION NEEDED: Urge your Senators to support the Federal Water Quality Protection Act (S. 1140).

BACKGROUND: On June 29, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published their Definition of Waters of the U.S. Under the Clean Water Act (renamed the Clean Water Rule) in the *Federal Register*. It will become effective 60 days after publication on August 28.

Since its proposal last year, NACo has expressed multiple concerns on the rule’s impact on county-owned and maintained roadside ditches, bridges, flood control channels, drainage conveyances and wastewater and stormwater systems.

As co-regulators under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion. Despite having provided detailed feedback and congressional testimony on multiple occasions on the potential impact of the proposed rule on counties, and despite repeated attempts to have a meaningful consultation process with the federal agencies, many issues remain unresolved.

DESPITE ASSURANCES FROM THE AGENCIES THAT DITCHES ARE EXEMPT, ACTUAL LANGUAGE REMAINS UNCLEAR

While the final rule attempts to exempt certain ditches, many county owned ditches may still fall under federal authority.

According to the final rule, several types of ditches are now exempt:

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
- Ditches that do not flow, either directly or through another water, into traditional navigable and interstate waters, and territorial seas.

While this may seem to address county concerns about roadside and other types of ditches, a closer reading reveals greater ambiguity than clarification.

Under the final rule, the following types of ditches are jurisdictional:

- Roadside and other ditches that have flow year-round (perennial flow)
- Roadside and other ditches with intermittent flow (not continuous, irregular) that are a relocated tributary, or are excavated in a tributary, or drain wetlands
- Ditches, regardless of flow, that are excavated in or relocate a tributary

The final rule also newly defines the term “tributary,” and in doing so states that “a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches.”

QUICK FACTS

- Even non-federal waters are protected by state and local regulations — sometimes even more strictly than federal rules. As co-regulators under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion.
- While the final rule attempts to exempt certain ditches, many county owned ditches may still fall under federal authority.
- The final rule newly defines the term “tributary,” and in doing so states that “a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches.”

Since ditches can now be classified as tributaries, and the new definition of tributaries includes ditches, it remains unclear what ditches will actually be exempt under the new rule.

CONGRESSIONAL ACTION: On May 12, the U.S. House of Representatives passed the Regulatory Integrity Protection Act of 2015 (H.R. 1732) by a vote of 261-155. H.R. 1732 would withdraw the final rule and require the agencies to restart the rule-making process, inclusive of state and local governments.

However, it is unlikely the Senate will take up H.R. 1732 since they have their own bill. On June 10, the U.S. Senate Committee on Environment and Public Works passed the Federal Water Quality Protection Act (S. 1140). S. 1140 would also require the agencies to redo the “waters of the U.S.” rule-making process. Additionally, the bill includes a set of principles the agencies should consider when rewriting the rule, including the types of ditches that should be exempt. S. 1140 passed out of committee and is currently waiting for floor consideration.

Both the U.S. House of Representatives and the U.S. Senate FY 2016 Interior, Environment, and Related Agencies appropriations bills contains language to stop the final “waters of the U.S.” rule from being implemented.

NACo supports legislative efforts to stop and restart the “waters of the U.S.” rule-making process.

For more information on the final rule, please refer to the attached analysis chart.

For further information, contact: Julie Ufner at 202.942.4269 or jufner@naco.org

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
“Waters of the U.S.” (WOTUS) Definition	40 CFR 230.3(s) The term “waters of the United States” means:	Define “waters of the United States” for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean:	For purposes of the Clean Water Act, 33 U.S.C. 1251 <i>et. seq.</i> and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:	NOTE: This rule will be implemented on August 28—60 days after publication in the <u>Federal Register</u>
Traditional Navigable Waters	All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	NO CHANGE These waters are referred to as traditionally navigable waters of the U.S. For the purposes of CWA jurisdiction, waters are considered traditional navigable waters if: <ul style="list-style-type: none"> • They are subject to section 9 /10 of the 1899 Rivers and Harbors Appropriations Act • A federal court has determined the water body is navigable-in-fact under law • Waters currently used (or historically used) for commercial navigation, including commercial waterborne recreation (boat rentals, guided fishing trips, etc.)

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Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Interstate Waters	All interstate waters, including interstate “wetlands”;	(2) All interstate waters, including interstate wetlands;	(i) All interstate waters ¹ , including interstate wetlands;	NO CHANGE
Territorial Seas	The territorial seas ² ; and	(6) The territorial seas;	(iii) The territorial seas;	NO CHANGE
Impoundments	All impoundments of waters otherwise defined as waters of the U.S. under this definition;	(4) All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;	(iv) All impoundments of waters otherwise identified as “waters of the U.S.” under this section;	NO SIGNIFICANT CHANGE Impoundments such as berms, dikes, levees and dams may be considered jurisdictional because they are subject to “seepage”
Tributaries	Tributaries of waters for navigable and interstate, territorial seas and impoundments of waters	(5) All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;	(v) All tributaries, as defined, of navigable waters, interstate waters or territorial seas	NEW LANGUAGE The final rule provides, for the first time, the definition of a tributary: <ul style="list-style-type: none"> • A tributary has the physical indicators of a bed, bank and ordinary high water mark • A tributary contributes flow, directly or indirectly, to a WOTUS The rule states that “a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches” and <u>can flow perennially, intermittently or ephemeraly</u> Refer to tributary definition on

¹ Waters, such as lakes, ponds, streams, tributaries, etc.) are considered “interstate waters” if they flow across state boundaries, even if they are not considered “navigable” and do not connect to a WOTUS

² Territorial seas are defined as “the belt of the seas measured from the line of the ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles”

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Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Adjacent	Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.	7) All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;	(vi) All waters adjacent to navigable and interstate waters, territorial seas, impoundments and tributaries , including wetlands, ponds, lakes, oxbows, impoundments and similar waters;	<p>NEW LANGUAGE</p> <p>This is a significant change—current Corps regulations refer to “<i>wetlands adjacent to</i>” WOTUS. The final rule encompasses “<i>all waters adjacent</i>” to navigable and interstate waters, territorial seas and impoundments</p> <p>The entire water is adjacent if any part of the water is bordering, continuous or neighboring. These terms, including significant nexus, are further defined on pages 15-22 of this chart</p> <p>Adjacency is not limited to waters located laterally to navigable waters, interstate waters, impoundments, territorial seas and tributaries</p>
Regional Consideration Criteria	All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:	3) And on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial sea	<p>(vii) All waters, where they are determined, on a case-specific basis, to have a significant nexus to navigable waters, interstate waters and the territorial seas. These waters are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest navigable or interstate waters or territorial seas</p> <p>Waters identified in this paragraph shall not be combined with adjacent waters</p>	<p>NEW LANGUAGE</p> <p>Regional water features that have a connection to a WOTUS may be jurisdictional</p> <p>These water features will be aggregated together—it may be difficult to exempt one water feature if others are regulated</p> <p>More waters in a broader area will be analyzed together</p>

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Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Regional Consideration Criteria <i>(continued)</i>			<p>when performing a significant nexus analysis</p> <p>If waters identified in this section are also an adjacent water, they are considered an adjacent water and no case-specific significant nexus analysis is required</p> <ul style="list-style-type: none"> (A) Prairie potholes³ (B) Carolina bays and Delmarva bays⁴ (C) Pocosins⁵ (D) Western vernal pools⁶ (E) Texas coastal prairie wetlands⁷ 	<p>This definition is relevant for counties that own facilities and/or infrastructure near these regional water features</p> <p>It will be difficult to do any construction projects around these waters without getting a federal permit</p>
Commerce Clause Language	<p>(i) Which are or could be used by interstate or foreign travelers for recreation or other purposes; (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce</p>	<p>(i) through (iii) eliminated</p>	<p>(i) through (iii) eliminated</p>	<p>DELETED</p> <p>The agencies considered this section duplicative language</p>

³ Prairie potholes are primarily freshwater marshes found in the Upper Midwest (especially North Dakota, South Dakota, Wisconsin and Minnesota)

⁴ The Carolina bays (also called Delmarva bays) are ponded, depressions and wetlands found along the Atlantic seaboard

⁵ Pocosins are bog areas, with a shallow water table, that contain evergreen shrubs and trees. They can be found from Virginia to northern Florida

⁶ Western vernal pools are seasonal depression wetlands found on the West Coast and in the northeastern and Midwestern states

⁷ Texas coastal prairie wetlands are freshwater wetlands located along the Texas Gulf Coast

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Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Floodplain/ High Tide Line/ Ordinary High Water		<p>The proposed rule used the term “floodplain” to identify waters that would be near (adjacent) to a WOTUS to claim federal jurisdiction</p> <p>Floodplain, under the proposed rule, meant an area bordering inland or coastal waters that was formed by sediment preposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows</p> <p>The proposed rule definition relies heavily on “moderate to high water flows” rather than the Federal Emergency Management Agency’s (FEMA) flood plain definitional terms such as 100 year or 500 year floodplains</p>	<p>(viii) All waters⁸ located within a 100-year floodplain of navigable and interstate waters and territorial seas and all waters located within 4,000 feet of the high tide line or ordinary high water mark (OHWM) of navigable waters, interstate waters, territorial seas and impoundments where they are determined on a case-specific basis to have a significant nexus to navigable waters, interstate waters and/or territorial seas</p> <p>For waters determined to have a significant nexus, the entire water is a “water of the U.S.” if a portion is located within the 100-year floodplain of navigable or interstate waters or territorial seas or within 4,000 feet of the high tide line or ordinary high water mark</p> <p>Waters in this section shall not be combined with adjacent waters when performing a significant nexus analysis</p> <p>If waters identified in this paragraph are also an adjacent water, no case-specific significant nexus analysis is required</p>	<p>NEW LANGUAGE</p> <p>This language is broad and may have significant impact on county facilities and infrastructure in a 100-year floodplain or near a river, ocean, dam or interstate waters</p> <p>It may be problematic using the term “100-year floodplain” for jurisdictional purposes:</p> <ul style="list-style-type: none"> Not all areas of the country have 100-year floodplain maps In some parts of the country, the 100-year floodplain maps have not been updated—nor are they available The 100-year flood maps are constantly changing, and the process to revise can be challenging <p>The agencies’ Economic Analysis states “that a vast majority of the nation’s water features are located within 4,000 feet...” of a jurisdictional water. The agencies go on to state, “We believe, therefore, that very few waters will be located outside 4,000 feet and within a 100-year floodplain.”</p>

⁸ The agencies use the term “water,” “waters” and “waterbodies” in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows and other types of natural or man-made aquatic systems, identifiable by the water containing in these aquatic systems OR by their chemical, physical and biological indicators (i.e. proof that water had flowed in the conveyance, at some point)

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Floodplain/ High Tide Line/ Ordinary High Water <i>(continued)</i>				<p>QUESTION: Will this definition impact jurisdictional stormwater and wastewater recycling features built in wet areas, such as constructed wetlands and grassy and vegetated swales?</p> <p>QUESTION: If the “vast majority” of waters are located within 4,000 feet of a jurisdictional water, what types of waters features would not be regulated?</p> <p>QUESTION: Where did the term “4,000 feet” originate?</p>
WOTUS Exemptions	8) Waters of the United States do not include:	Waters excluded from the definition of “waters of the U.S.” include:	(2) The following are not “waters of the United States” even where they otherwise meet the definition of “waters of the U.S.”	N/A
Waste Treatment Exemption	Prior converted cropland or waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling points as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the U.S.	(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet CWA requirements	(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act	<p>REVISED LANGUAGE</p> <p>The final rule codifies 1986 and 1988 guidance preamble language</p> <p>Under the final rule, only those waste treatment systems designed to meet CWA requirements would be exempt but for waste treatment systems that were built to address non-CWA compliance issues, it is uncertain whether these systems would also be exempt</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Prior Converted Cropland Exemption	<i>(Refer above)</i>	(2) Prior converted cropland	(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the CWA, the final authority regarding CWA jurisdiction remains with EPA	EPA is the final decision-maker on what constitutes a prior converted cropland
Ditch Exemptions		<ul style="list-style-type: none"> Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow Ditches that do not contribute to flow, either directly or indirectly to a “water of the U.S.” 	<p>(iii) The following ditches <i>(are exempt)</i>:</p> <p>(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary</p> <p>(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands</p> <p>(C) Ditches that do not flow, either directly or through another water, into a navigable and interstate waters and territorial seas</p>	<p>NEW LANGUAGE</p> <p>The final rule proposes to exempt certain types of ditches. However, the language is likely to cause implementation issues</p> <p>The final rule specifically states that ditches are tributaries if they have:</p> <ul style="list-style-type: none"> A bed, banks and ordinary high water mark And connects, directly or indirectly, to a “waters of the U.S.” <p>The final rule and preamble states that tributaries can be natural, man-altered or man-made and includes rivers, streams, canals and ditches that flow perennially, intermittently and ephemerally</p> <p>Under the final rule, these types of ditches are clearly jurisdictional:</p> <ul style="list-style-type: none"> Roadside and other ditches that have flow year-round Roadside and other ditches with irregular flow (intermittent) that

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Ditch Exemptions <i>(continued)</i>				<ul style="list-style-type: none"> ○ are a relocated tributary, or are excavated in a tributary, or drain wetlands ○ Ditches, regardless of flow, that are excavated in or relocate a tributary <p>Counties can own hundreds, if not thousands, of miles of ditches. Also, roadside ditches, by necessity are constructed parallel to the road and sometimes cross wetlands and streams and could be located in a 100-year floodplain</p> <p>QUESTION: If part of a ditch lies within a 100-year floodplain, is the entire ditch considered a “water of the U.S.?”</p> <p>QUESTION: If a ditch can be a tributary and ditches are generally formed through excavation activities, what type of ditches would be exempt? How would the exemption be proven if the ditches were hand dug decades ago and no documentation exists?</p> <p>QUESTION: If data does not currently exist, who will have to pay for the data to be developed—the federal government or the permit applicant?</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Ditch Exemptions <i>(continued)</i>				<p>QUESTION: If a portion of the ditch is in a relocated tributary, would only that portion be considered jurisdictional or would the whole length of the ditch be regulated?</p> <p>QUESTION: Even if a ditch is exempt under this exclusion, will CWA’s recapture clause⁹ negate the exemption? Under what circumstances would normally exempt ditches be recaptured?</p> <p>QUESTION: For local governments applying for Section 404 permits, who would be responsible for proving the ditch is exempt—the federal or local government?</p> <p>QUESTION: If a ditch is considered jurisdictional, is it then subject to the same requirements as “navigable waters? These requirements include monitoring, inventorying all point source discharges, permitting, establishing use attainability and water quality standards and the development of Total Maximum Daily Loads (TMDLs).</p>

⁹ The “recapture clause” brings a normally exempt ditch back under federal jurisdiction if it constitutes a new use of the wetland and if the activity in the ditch would result in a “reduction in reach/impairment of flow or circulation” of “waters of the U.S.”

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Other Exemptions		<p>Additionally, the following features are exempted (from the “waters of the U.S.” definition):</p> <ol style="list-style-type: none"> (1) Would exclude artificial areas that revert to uplands if application of irrigation water ceases; (2) Artificial lakes and ponds used solely for stock watering, irrigation, settling basins, rice growing; (3) Artificial reflecting pools or swimming pools created by excavating and/or diking in dry land (4) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (5) Water-filled depressions created incidental to construction activity; 	<p>(iv) The following features (are not “waters of the U.S.”):</p> <ol style="list-style-type: none"> (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease; (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; (C) Artificial reflecting pools or swimming pools created in dry land; (D) Small ornamental waters created in dry land; (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; 	<p>MODIFIED LANGUAGE</p> <p>Adds the term “dry land” which is undefined in the final regulation—the final rule is even narrower than the proposal</p> <p>The agencies note that artificially created ponds can be used for multiple purposes, including farming, animal habitat, water retention, fire control ponds and recreation; many of these ponds are relevant to county governments. The agencies have stated that these types of ponds should <u>generally</u> be exempt</p> <p>However, even if these ponds are excluded as a WOTUS, the discharges from the pond to a WOTUS may be regulated under the CWA’s current National Pollution Discharge Elimination System (NPDES) Section 402 permit program</p> <p>It is important to note that while certain ditches and waters may seem to be exempt, they can also serve as a hydrological connection that the agencies may consider jurisdictional under a significant nexus analysis. In addition, these features may be regulated as a point source and regulated under</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Other Exemptions (continued)		<p>(6) Groundwater, including groundwater drained through subsurface drainage systems; and,</p> <p>(7) Gullies and rills and non-wetland swales</p>	<p><i>(groundwater section moved to section (v))</i></p> <p>(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and</p> <p>(G) Puddles</p>	<p>other CWA programs, such as Section 402</p> <p>The agencies tried to make it clear that ALL erosional features that are not considered a “tributary” would be excluded from federal permitting authority</p>
Groundwater Exemption		<i>(refer above to (F) Groundwater section)</i>	(v) Groundwater, including groundwater drained through subsurface drainage systems	<p>No change from current rules— Agencies have never interpreted WOTUS to include groundwater</p> <p>However, per the preamble¹⁰, the exclusion does not apply to surface expressions of groundwater—i.e. where groundwater emerges and becomes a base flow in streams or spring fed ponds</p>

¹⁰ Final rules include a preamble, which includes a summary of the rule, effective date and supplemental information. Preambles are legally non-binding.

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Stormwater and Wastewater Exemptions	N/A	N/A	<p>(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in <u>dry land</u>.</p> <p>(vii) Wastewater recycling structures constructed in <u>dry land</u>; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling</p>	<p>NEW LANGUAGE</p> <p>Stormwater features and wastewater structures built on <u>dry land</u> are exempt from WOTUS but some features, such as channelized or piped streams, would be jurisdictional</p> <p>But, the term “dry land” is undefined in the final regulation. This is relevant because counties may own stormwater features or wastewater structures that are located in wet areas</p> <p>A key element of the stormwater exclusion is whether the feature conveys, treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems “but have never been considered ‘waters of the U.S.’”</p> <p>The final rule states that if water is removed from one part of a tributary network and moved to another, such as in a aqueduct or canal, it would be regulated</p> <p>But, even if stormwater and wastewater infrastructure is granted an exemption, they may be regulated as a point source under CWA Section 402 permit program</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Stormwater and Wastewater Exemptions <i>(continued)</i>				<p>QUESTION: What kind of documentation must an applicant produce to demonstrate that the feature was constructed on dry land?</p> <p>QUESTION: If a portion of the stormwater system is within a 100-year floodplain—and is comprised of both dry and wet portions—is the whole system jurisdictional?</p> <p>QUESTIONS: For systems that have a combination of exempt and non-exempt features, how will the agencies handle competing permit requirements?</p> <p>QUESTION: Will the agencies institute an appeals process to challenge wet/dry land determinations?</p> <p>QUESTION: Will this exemption apply to infrastructure in coastal or low-lying areas?</p> <p>QUESTION: What if a facility uses an artificial swamp to improve water quality — i.e. treatment swamps — are these jurisdictional?</p> <p>QUESTION: Are grassy and vegetative swales jurisdictional?</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



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Stormwater and Wastewater Exemptions <i>(continued)</i>				<p>QUESTION: The EPA has recently stated that the onus will be on the federal agencies to prove that a ditch or other exclusions under the rule do not qualify for the exemption. However, the CWA Section 402 permit program, is delegated to the states. Which agency is responsible for making the <u>final</u> determination whether the features or facilities are built on dry land—the EPA, Corps or the states?</p> <p>QUESTION: Older facilities may have segments of their structures build on wet and dry areas. Even if the infrastructure is connected, will the portions built strictly on dry land be exempt, while the portions built on wet land are jurisdiction?</p> <p>QUESTION: The rule explains that some water features within a system, such as a storm sewer system or a water recycling system, might be defined as “waters of the U.S.,” because they were constructed or excavated in waters. Yet the CWA prohibits this type of treatment within “waters of the U.S.” How would these systems be affected by such a partial WOTUS designation, and how would local governments have to change their <u>systems to comply with the rule?</u></p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Stormwater and Wastewater Exemptions <i>(continued)</i>				<p>QUESTION: For facilities that are constructed in coastal or low-lying areas, in 100-year flood plains or “adjacent” to a WOTUS, qualify for this exemption?</p> <p>QUESTION: Under the final rule, if stormwater features or wastewater structures are on wet land, they are jurisdictional. However, if only part of the feature is in a 100-year floodplain, will the whole system then fall under federal regulation?</p> <p>QUESTION: Drinking water and other water delivery systems are not granted an exemption under the rule. Why were these systems not given an exemption?</p>
			<p>In this section, the following definitions apply to terms used in the final rule:</p>	
Adjacent Definition	<p>Under existing regulation for “adjacent wetlands,” only wetlands adjacent to a “water of the U.S.” are considered jurisdictional</p>	<p>Adjacent waters are defined as wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to “waters of the U.S.”</p>	<p>(i) The term <i>adjacent</i> means bordering, contiguous, or neighboring waters next to navigable and interstate waters, territorial seas and impoundments, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like</p>	<p>NEW DEFINITION</p> <p>The new definition of adjacency is broad—this may lead to confusion and inconsistency in the field</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Adjacent Definition <i>(continued)</i>	Adjacent means bordering, ordering, contiguous or neighboring	Waters, including wetlands, separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, etc. are “adjacent waters” are jurisdictional	<p>For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark</p> <p>Adjacency is not limited to waters located laterally in navigable and interstate waters, territorial seas, impoundments and tributaries</p> <p>Adjacent waters also include all waters that connect segments of navigable and interstate waters, territorial seas, impoundments and tributaries or are located at the head of a water identified as navigable and interstate waters, territorial seas, impoundments and tributaries of this section and are bordering, contiguous, or neighboring such water</p> <p>Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent</p>	<p>Adjacent waters include waters separated from other “waters of the U.S.” by constructed dikes or barriers</p> <p>Adjacency is not just limited to traditionally navigable and interstate waters, territorial seas, impoundments and tributaries</p> <p>The term “adjacent waters” is broad in scope. Ponds, wetlands, ditches, lakes and other types of nature or man-made aquatic systems may be jurisdictional if they are near to a WOTUS. This may have implications for counties that own infrastructure near these waters</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Neighboring Definition		<p>Neighboring is defined as:</p> <ul style="list-style-type: none"> Including waters located within the riparian area or floodplain of a “water of the U.S.” or waters with a confined surface or shallow subsurface hydrological connection¹² to a jurisdictional water; Water must be geographically proximate to the adjacent water; <p>Waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate</p>	<p>(ii) The term <i>neighboring</i> means:</p> <p>(A) All waters located within 100 feet of the ordinary high water mark of a water identified as navigable and interstate waters, territorial seas, impoundments and tributaries are jurisdiction. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;</p> <p>(B) All waters located within the 100-year floodplain of a navigable and interstate waters, territorial seas, impoundments and tributaries and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;</p> <p>(C) All waters located within 1,500 feet of the high tide line of navigable waters, interstate waters and territorial seas, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes</p>	<p>NEW DEFINITION Under the final rule, neighboring is defined for the first time</p> <p>Final rule eliminated the proposed rule’s language on shallow subsurface hydrological connection, which is helpful</p> <p>However, the final rule lays out specific parameters for jurisdiction within the 100-year floodplain and ordinary high water mark—and the implications to counties are broad</p> <p>First, if a county owns a non-exempt ditch that runs for miles and only a small portion of the ditch is in the 100-year floodplain, the whole length of the ditch—inside and outside the floodplain—may now be jurisdictional</p> <p>Second, the neighboring definition is broad and may have a significant impact on county facilities and infrastructure in a 100-year floodplain or near rivers, oceans, dams or other tributaries</p> <p>This definition may also impact jurisdictional stormwater and wastewater recycling features built in wet areas, such as constructed wetlands and grassy and vegetated swales</p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Tributary Definition	<p>Tributaries are considered a “water of the U.S.” under existing regulation.</p> <p>Agencies have stated they <i>generally</i> would not assert jurisdiction over ditches (including roadside ditches) excavated wholly in and draining only in uplands and do not carry a relatively permanent flow of water.</p>	<p>Tributaries include, natural and manmade waters, including wetlands, rivers, streams, lakes, ponds, impoundments, canals and ditches if they:</p> <ul style="list-style-type: none"> • Have a bed, bank, and ordinary high water mark (OHWM)⁶ <p>Contribute to flow, either directly or indirectly, to a “water of the U.S.” Would excludes ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow⁸</p>	<p>The terms <i>tributary</i> and <i>tributaries</i> each mean a water that contributes flow, either directly or through another water (including an impoundment) identified as navigable waters, interstate waters and/or territorial seas, that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark</p> <p>These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary</p> <p>A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section</p> <p>A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles,</p>	<p>NEW DEFINITION</p> <p>The final rule includes <i>for the first time</i> a regulatory definition of a tributary, which specifically defines ditches as jurisdictional tributaries unless specifically exempt</p> <p>Physical characteristics of a tributary include a bed, banks and ordinary high water mark¹¹. Additionally, a tributary contributes flow, directly or indirectly, to “waters of the U.S.”</p> <p>A tributary can be perennial, intermittent or ephemeral</p> <p>A water, that is considered a jurisdictional tributary, does not lose its status if there are manmade breaks – bridges, culverts, pipes, or dams – or natural breaks – wetlands, debris piles, boulder fields, streams underground – as long as there is a bed, bank, and OHWM identified upstream of the break. This is problematic for arid and semi-arid areas where banks of the tributary may disappear at times</p>

¹¹ NOTE: The term ordinary high water mark is problematic and inconsistently applied in the field. For more information, refer to page 19 of this chart

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Tributary Definition <i>(continued)</i>			<p>boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break</p> <p>A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the U.S. that does not meet the definition of tributary or through a non-jurisdictional water to a WOTUS</p>	<p>There is no limit on the length of the break as long as there are an upstream bed, banks and an ordinary high water mark</p> <p>Many county-owned ditches have a bed, bank and ordinary high water mark and flow, directly or indirectly to a WOTUS and may be classified as a tributary which may negate the ditch exemption</p>
Ordinary High Water Mark Definition	<p>Existing Corps regulations define ordinary high water mark as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e)</p>		<p>(vi) The term <i>ordinary high water mark</i> means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas</p>	<p>Note: Under current regulation, the term ordinary high water mark is ambiguous and applied inconsistently in the field</p> <p>Many of the ordinary high water mark physical indicators can occur whenever land may have water flowing across it, regardless of flow or duration</p> <p>The final rule bases many decisions on identifying the ordinary high water mark (OHWM). While this term has been in use for decades, guidance manuals on defining OHWM have been developed for only two parts of the country. The Corps recently stated that this term will be developed further as the rule is implemented</p>

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Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Ordinary High Water Mark Definition <i>(continued)</i>				<p>QUESTION: Counties and other permit applicants need much more certainty in understanding what the OHWM is and how it will be determined. How will counties and other agencies responsible for complying with and administering the CWA be engaged to better define this commonly used but inexact term?</p> <p>QUESTION: While guidance is being developed for most of the country, how will determinations of OHWM be made in the interim?</p> <p>QUESTION: Since the agencies relied on the science validated by the Science Advisory Board (SAB) in writing the rule, how was OHWM considered in that process—or was it weighed at all?</p>
Significant Nexus Definition		<p>The term “significant nexus” means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e. the watershed that drains to the nearest “water of the U.S.”) and significant affect the chemical, physical or biological integrity of the water to which they drain</p> <p>For an effect to be significant, must be more than speculative or insubstantial</p>	<p>(v) The term <i>significant nexus</i> means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, <u>or</u> biological integrity of a water identified as navigable waters, interstate waters or territorial seas</p> <p>The term “in the region” means the watershed that drains to the nearest</p>	<p>NEW DEFINITION</p> <p>The final rule’s significant nexus definition is based on Supreme Court Justice Kennedy’s “similarly situated waters” test</p> <p>The significant nexus standard is used to determine connection to “waters of the U.S.”</p> <p>The significant nexus definition used in the final rule diverges from</p>

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Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Significant Nexus Definition <i>(continued)</i>		<p>Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the U.S.” so they can be evaluated as a single landscape unit regarding their chemical, physical, or biological impact on a “water of the U.S.”</p>	<p>navigable waters, interstate waters or territorial sea</p> <p>For an effect to be significant, it must be more than speculative or insubstantial</p> <p>Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream navigable waters, interstate waters and territorial seas shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph</p> <p>A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest navigable water, interstate water or territorial seas</p> <p>Functions relevant to the significant nexus evaluation are the following: (A) Sediment trapping, (B) Nutrient recycling, (C) Pollutant trapping, transformation, filtering, and</p>	<p>Justice Kennedy’s decision. Justice Kennedy’s opinion included “chemical, physical <u>and</u> biological” to determine jurisdiction</p> <p>However, the final rule uses the “chemical, physical <u>or</u> biological” to determine jurisdiction</p> <p>This will allow the agencies to claim jurisdiction based on just one factor, rather than all three factors—chemical, physical and biological—and will broaden the types of waters that fall under federal jurisdiction</p> <p>QUESTION: Are all of these factors equally important or are some factors more important than others?</p>

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Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Significant Nexus Definition <i>(continued)</i>			transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species	
“Dry Land” Definition			The term is used but undefined in the final rule	<p>Several exclusions and exemptions use the phrase “dry land.” The agencies state that “dry land” refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like</p> <p>However, the final rule notes that a WOTUS is not considered “dry land” just because it lacks water at a given time. Similarly, an area remains “dry land” even if the land is wet</p> <p>The agencies note there is no agreed upon definition, given geographic and regional differences</p> <p>The agencies concluded that further clarity on this issue can be provided during implementation</p>



Public Lands Research Table of Contents

Public Lands Research	
USDA Analysis of PILT-Related Payments and Likely Property Tax Liability	
Headwaters: Realizing the Potential of PILT.....	
Headwaters: White Paper; County Payments, Jobs, & Forest Health.....	
CRS: PILT: Somewhat Simplified.....	
Report to Congress: Recommendations for Making Payments to States and Counties.....	
CRS: Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000	
SRS: Does It Make Rural Schools Secure?	
GAO Report: Revenue Sharing Payments to States and Counties	
CRS: LWCF: Overview, Funding History, and Issues	
Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the U.S.	
CRS Report: EPA & the Army Corps’ Rule to Define “Waters of the United States”	



United States
Department
of Agriculture

Forest Service

**Rocky Mountain
Research Station**

General Technical Report
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September 1999



An Analysis of PILT-Related Payments and Likely Property Tax Liability of Federal Resource Management Lands

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Abstract

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This report stems from Congressional concern over the equivalency between Federal payments to counties containing Federal resource management lands, the likely tax liability, and other county-level benefits and costs associated with those lands. Results indicate that the overall tax liability on Federal lands is almost three times the Federal payments. A survey of county executive officers indicates that the direct fiscal costs or benefits to county governments from Federal lands and programs are modest.

Keywords: revenue sharing, tax equivalency, PILT, payments to counties, Payments in Lieu of Taxes Act

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Research Summary

As part of the FY 1996 appropriation process, the United States Congress directed the USDI Bureau of Land Management (BLM) to provide information on (1) the equivalency between Federal payments on resource management lands and likely property taxes those lands could generate; (2) the benefits and costs to local governments resulting from the presence of Federal lands; and (3) recommendations for amending the Payments In Lieu of Taxes (PILT) legislation and related revenue-sharing programs. In September 1997, the BLM entered into an agreement with the USDA Forest Service's Rocky Mountain Research Station to provide tax equivalency and benefit-cost information. The Station assembled a six-person team of researchers, organized a seven-person Steering Committee to provide guidance on research direction and issues, and conducted the research in accordance with a study plan endorsed by the Steering Committee.

Tax equivalency information was developed through a coordinated effort involving the research team, county tax personnel, and agency land specialists. After selecting a nationwide random sample of 105 counties (25 from the East, 40 from the Interior West, 30 from the Pacific West, and 10 from Alaska), local tax assessors were contacted and the tax systems were studied and learned. (Note: Counties containing less than 500 entitlement acres were excluded from the sample.) We simulated agency property taxes after assessors developed appropriate tax categories (land-use classes), agency personnel allocated lands into those categories, and the assessors reviewed the allocations. Assessors also provided needed information on taxable values, tax rates, and tax procedures. Information on PILT and revenue-sharing payments was provided by the BLM.

Although we evaluated several versions of tax equivalency, the comparison between potential property taxes and (1) PILT payments or (2) PILT plus revenue-sharing (RS) payments (PILT+RS) are probably the most appropriate; both were expressed on a "per-acre" basis. Though many individual counties were tax equivalent in FY 1997, we found little evidence of aggregate tax equivalency. (Note: Many governmental units in Alaska have no property tax.) The listing below shows that, nationwide, potential taxes exceed PILT or PILT plus RS payments by \$1.31 and \$0.94 per acre, respectively:

	PILT versus Taxes	PILT+RS versus Taxes
East	-\$6.05	-\$5.40
Interior West	-0.57	-0.42
Pacific West	-3.32	-1.61
<u>Alaska</u>	<u>-0.66</u>	<u>-0.59</u>
United States	-1.31	-0.94

However, under the PILT versus Taxes version of equivalency, 51 percent of all counties are tax equivalent (i.e., $PILT \geq \text{property taxes}$), while under the PILT+RS version, about 62 percent are equivalent. If revenue-sharing payments were held constant but PILT were fully funded, Federal payments would be equivalent to taxes in about 69 percent of all counties. To generate an aggregate national tax equivalency, a fully funded PILT would have to be increased by a factor of almost 3-1/2 times; even then, 18 percent of the counties would still not be tax equivalent.

We assessed the locally perceived benefits and costs associated with Federal lands with a questionnaire administered to the Chief Executive Officer of each sampled county. The questionnaire was divided into three parts, responses to which were based on experience and professional judgement, NOT on a detailed examination of fiscal records or accounts. We received responses to about 76 percent of the questionnaires. For these types of responses, the median (middle) response is the best measure of the typical response.

Part A of the questionnaire sought information about costs imposed on county governments because of the presence of Federal lands and associated management programs. We found little indication of costs imposed. Nevertheless, Federal lands and programs mostly increased local costs for search and rescue, law enforcement, road construction and maintenance, and fire protection and control; but even for those areas of greatest importance, county officials judged the added costs to be "small." Recreation programs were most commonly identified as responsible for cost increases.

Part B of the questionnaire dealt with direct fiscal benefits (cost savings) to county governments associated with the presence of Federal lands and associated programs. Again, we found little indication of direct fiscal benefits. Of the 16 areas of potential fiscal benefits, "use of Federal lands" was rated the highest, but that rating was only "small"; the median rating for all other potential fiscal benefits was "none." (Note: Direct fiscal benefits to county government do not consider indirect fiscal benefits, such as those resulting from economic activity [e.g., timber and land] occurring on Federal lands.)

Part C of the questionnaire dealt with other benefits to communities and individuals in the county. Respondents were provided 21 areas of potential benefits and indicated that "places to hunt and fish," "places to recreate," and "recreational facilities" were the top benefits received by communities or individuals in the county; the median rating for those benefits was "moderate."

Research results seem to provide a basis for a number of conclusions regarding both the tax equivalency issue and the question of local fiscal benefits and costs derived from Federal ownership. Regarding property

tax equivalency: (1) in the aggregate, property taxes are substantially higher than either PILT or PILT plus RS payments, nationally and for regions in FY 1997; (2) the aggregate tax equivalency shortfall notwithstanding, about 62 percent of counties were property tax equivalent in FY 1997; (3) “across-the-board” increases in Federal payments to achieve aggregate equivalency are far more costly than if targeted increases were possible; and (4) under any version of tax equivalency, including that where PILT or RS payments were increased until Federal payments equaled property taxes nationally, some counties were still not tax equivalent.

Regarding local benefits and costs as perceived by local officials: (1) though there may be anecdotal evidence to the contrary, overall costs imposed on local governments were generally rated as “none” or “small,” and “search and rescue” was the top-rated cost item; (2) although specific instances may exist, widespread cost savings received by local governments would be difficult to document because direct fiscal benefits were generally rated as “none,” and “use of Federal lands” was the top-rated cost-savings item; and (3) although the magnitude of benefits to communities and individuals is not overwhelming, indications are that Federal lands and programs mainly help provide a pleasant place to live, enhance the quality of life, and affect lifestyle.

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This study could not have been accomplished without the active support and cooperation of our Steering Committee, agency lands and resource specialists, and county personnel. The Steering Committee did far more than could be expected and did it well. They traveled across the country to help design the study, argued issues of policy and procedure, and encouraged the research team when confidence waned. The Steering Committee included Dr. Gregory Alward (USDA-FS), Wendy Favinger (USDI-BLM), William Howell (USDI-BLM), Richard Phillips (USDA-FS), Michael Retzlaff (USDA-FS), and David Schmidt (Linn County, OR). Also, the land specialists and other professionals

from the several agencies were a credit to themselves and their agencies. They provided timely information in a competent manner, often in light of many conflicting demands on their time. Finally, county personnel were marvelous. Our questionnaire was directed to the Chief Executive Officer of each sampled county, a group of unquestionably busy individuals; yet nearly 80 percent took the time to respond. Tax-related information was obtained from persons in county tax organizations. We worked with assessors, appraisers, clerks, and more, often on a teleconference at the same time, and on several occasions. With a commitment to accuracy, attention to detail, and down-home cordiality, they made our job a pleasure. To all, thanks.

Contents

Introduction	1
Previous Studies	2
Methods	4
Assumptions and Limitations	4
Tax-Equivalency Phase	5
Data Collection	5
Data Analysis	6
Benefit-Cost Phase	7
The Questionnaire	7
Data Analysis	7
Results	8
Tax Equivalency	8
Taxable Value	9
The Tax Bill	10
Federal Payments	11
Equivalency	11
Benefits and Costs	15
Costs Imposed on Local Governments	16
Fiscal Benefits to Local Governments	17
Benefits to Communities and Individuals	19
Discussion	21
References	23

Introduction

Almost from the beginning of nationhood, the Federal government of the United States was acquiring, disposing, and retaining lands within its ever-evolving boundaries. According to Clawson (1972), some of the earliest examples of retaining land holdings in Federal ownership involved lighthouses and Coast Guard stations. Although major Federal reservations of public domain did not begin until the establishment of Yellowstone National Park in 1872, local government interest had already been perked. Could local jurisdictions treat reserved Federal lands as if they were private lands and subject to property taxation? Early in the 19th century, the United States Supreme Court answered “no,” holding that local governments could not tax Federal lands within their jurisdictions. Local governments then had a reason to be concerned about Federal retention of the public domain. Federal actions could affect local revenues.

Reservation of public domain for forest reserves in 1891 led to a change in the relationship between the Federal government and local jurisdictions. The Federal government began providing local governments with payments in lieu of (instead of) property taxes. The forests reserves of 1891 became the National Forests of 1905, and legislation passed in 1908 provided that the USDA Forest Service share 25 percent of its revenues (known as the 25-Percent Fund) with local governments. This was followed by legislation providing for additional revenue-sharing arrangements between other Federal agencies and local governments, including the Taylor Grazing Act of 1934, revenue sharing on wildlife refuges, and so on. According to Hibbard (1965), revenue sharing during the 19th century resulted from distributing proceeds from sale of the public domain. According to Clawson and Held (1957), revenue sharing during the 20th century resulted from sale of commodities from public lands.

Historically, interest in revenue sharing focused on property tax equivalency—how well revenue-sharing payments approximated property taxes if those lands were in private ownership. Studies commonly estimated the tax-generating capabilities of Federal lands and compared them to revenue-sharing payments plus “in-kind” payments. In-kind payments refer to activities undertaken by Federal agencies that might otherwise fall to local governments, such as constructing forest highways and controlling fires. The question of tax equivalency is inextricably linked to the magnitude of revenue-sharing payments, which varies with market outcomes—prices and output levels. Conditions of favorable prices and output levels promote tax equivalency, while low prices or output levels discourage equivalency. Moreover, fluctuation in price and output levels create a degree of uncer-

tainty for local governments relative to the dependability of revenue sharing as a source of funds to finance local government activities.

The desire for property tax equivalency and revenue dependability led local government to become interested in the nature of management practiced by Federal land-management agencies. Local governments had a vested interest in management outcomes, be they land allocations to the National Wilderness Preservation System, reauthorization of the Endangered Species Act, or implementation of the concept of ecosystem management. That local governments were too interested in management outcomes and that Federal revenue sharing was not a dependable revenue source was judged undesirable, at least by the Public Land Law Review Commission established by the U.S. Congress to look into these and related matters during the 1960's. In its report, “One-Third of the Nation's Land,” the Public Land Law Review Commission (1970) recommended revamping Federal revenue sharing with a systematic approach that coordinated various revenue-sharing programs in a way that promoted tax equivalency and funding stability.

The Payments in Lieu of Taxes (PILT) Act (31 USC 1601-1607) was passed in October 1976, thus promoting the Public Land Law Review Commission's recommendation of nearly a decade earlier. This Act became effective with fiscal year (FY) 1977 and is administered by the U.S. Department of the Interior's Bureau of Land Management (BLM). PILT held the promise of both stabilizing Federal payments to counties and improving prospects for tax equivalency (Schuster 1995). PILT has now become a significant part of Federal land payments, especially in the West (Schuster 1996). Now after 20 years of operation, the United States Congress directed the BLM to assess several aspects of PILT's performance (U.S. Congress 1996):

1. The extent to which payments under the PILT Act exceed the tax revenues that States and local governments would receive from entitlement lands (as defined in such Act) if such lands were taxed at the same rates as other lands;
2. The nature and extent of services provided by units of local government to visitors to entitlement lands, and the economic benefits resulting from the presence of such visitors;
3. Other economic benefits to communities in areas where Federal lands are located;
4. Recommendations concerning the feasibility and desirability of amending the PILT Act and other laws under which payments are made to local governments on the basis of the location of Federal lands and revenues derived from such lands....

The BLM entered into an agreement with the USDA Forest Service's Rocky Mountain Research Station to develop information needed to satisfy the first three congressional directives; recommendations are deferred to the BLM. In an attempt to provide a cohesive research framework, and after taking some interpretive liberties, this study addressed three topics:

1. Tax Equivalency: Compare Federal payments (PILT and resource-based, revenue-sharing payments) to local governments for entitlement lands, to property taxes those lands would generate if taxed at the same rate as other lands;

2. Costs: Describe the nature and extent of costs imposed on local governments by the presence of entitlement lands and associated management activities; and

3. Benefits: Describe the nature and extent of economic benefits accruing to local communities and individuals, resulting from the presence of entitlement lands and associated management activities.

Information on these topics was developed by a Forest Service research team working in conjunction with a Steering Committee of PILT experts. Focusing on FY 1997, information on tax equivalency came from a nationwide sample of 105 counties, involving the coordinated efforts of county tax specialists and agency land management personnel. Information on benefits and costs was derived through a questionnaire administered to the Chief Executive Officer for sampled counties. Although several types of local government receive PILT payments, they will be referred to collectively as "counties." Research design and methods were formulated to address the weaknesses and strengths identified in an analysis of previous studies. Research was conducted, data were analyzed, and a final report (USDA-FS 1999) was delivered to the BLM. This document has been adapted from that report.

Previous Studies

Long before the PILT Act was passed in 1976, concern was expressed about the level of the revenue-sharing (RS) programs as well as their stability (or dependability). In addition, there was a general feeling that such programs fell far short of compensating counties for the property tax losses. Local governments were concerned that not only were they losing tax revenue, but also that extra costs were being imposed on them due to the need to provide additional services to employees and visitors connected with Federal lands. It was also noted, however, that in addition to any extra costs imposed on local governments by the presence of Federal lands, local governments also receive many types of benefits from these

lands. Though many of these benefits (such as watershed and recreational values) are difficult to quantify, attempts were made to measure other, more tangible benefits. These benefits often took the form of "in-kind" contributions or services that "...could be reasonably expected to have been made by State, county, or other local governments in the absence of Federal expenditures" (Clawson and Held 1957).

In 1950, the National Education Association conducted a study (Committee on Tax Education and School Finance 1950) to estimate the value of all Federal holdings, including land, buildings, and dams. Estimated property taxes for these lands were calculated by local tax officials and compared to revenue-sharing payments. The fiscal problems caused by Federal land ownership were discussed, but no attempt was made to quantify the costs to the State and local governments. Results showed that Federal payments were about 31.4 percent of the estimated taxes. Several problems with this study were noted by Clawson and Held (1957). First, no restraints were placed on those estimating the taxes, and it was felt that local tax officials might have overestimated the taxes lost on Federal lands. Second, no account was taken of the value of in-kind contributions provided by the Federal government, such as fire protection or road construction.

In a 1955 and 1965 follow-up study, Williams (1955 and 1965) focused on counties containing National Forest land. Payments from the Forest Service's 25-Percent Fund for the year 1952 were compared to the property taxes that might be payable on such land if it were taxed as private property. This study also attempted to estimate the value of in-kind contributions. The 652 counties containing National Forest land were grouped into 34 strata based on location, and natural and economic characteristics. An average of four sample counties was selected from each stratum for a total of 135 counties. In each sampled county, Forest Service personnel contacted local assessment officials to gather information on assessment classes and the average assessed value per acre for each class. The National Forest land was then classified by Forest Service personnel into one of the local assessment classes, an estimated assessed value was computed, and taxes were calculated using local tax rates. In-kind contributions were estimated by looking at Forest Service expenditures on fire control, forest highways, and construction and maintenance of roads, trails, and structures.

Results showed 25-Percent Fund payments to be 58 percent of the estimated per-acre tax. However, when in-kind contributions were added to 25-Percent Fund payments, total benefits to counties were estimated to be 126 percent of the taxes. The 1965 followup report, using data for 1962, divided Forest Service holdings

into National Forests and National Grasslands. Twenty-five Percent Fund payments for 1962 again fell short of being tax equivalent, calculated to be 44 percent of the estimated per-acre tax for the National Forests and 63 percent for the National Grasslands. When in-kind contributions were added, total benefits exceeded the estimated taxes on the National Forests, with total benefits calculated to be 146 percent of the tax per acre. On the other hand, inclusion of in-kind benefits for the National Grasslands did not make up for the loss of taxes, with total benefits still accounting for only 81 percent of the tax per acre.

In 1964, the U.S. Congress established the Public Land Law Review Commission to review existing public laws and regulations and to recommend necessary revisions. One of the key topics addressed was the tax immunity of Federal lands and its impact on State and local governments. A series of studies conducted for the Public Land Law Review Commission by EBS Management Consultants (1968) analyzed 40 Federal statutes providing for compensation to States and/or local governments through revenue sharing and payments in lieu of taxes. These studies were primarily concerned with assessing the impact of Federal lands on the financial policies of State and local governments. Through case studies consisting of 5 States and 50 counties, several issues were addressed: (1) the costs or burdens to State and local governments from the presence of Federal lands, (2) in-kind benefits accruing to local governments because of Federal land, and (3) the difference between State and local government receipts from the various Federal land programs and the taxes "lost" due to the tax immunity of Federal lands. Potential tax revenue from Federal lands was estimated through cooperation of Federal agency field officers and local tax officials. Federal lands were grouped into land classes similar to those for comparable private land, and an assessed value for each class was derived. A value for quantifiable benefits such as land, construction materials, and roads was estimated by Federal agency field officers. Data on the burdens imposed on State and local governments by Federal land ownership were obtained from State and local county officials, but appropriate documentation by these officials had to be provided.

For 1966, it was estimated that revenue sharing and payments in lieu of taxes distributed \$131.1 million to State and local governments. Together with \$13.1 million of in-kind benefits, State and local governments received \$144.2 million in total benefits. Subtracting the \$55 million in estimated additional burdens caused by Federal ownership, it was estimated that State and local governments received an \$89.2 million benefit from the presence of Federal lands. However, for 17 of the 50 counties studied, burdens were greater than Federal payments plus in-kind

benefits, resulting in a net loss to the counties. The study also found revenue sharing programs to be rather arbitrary in nature, having little connection to the amount of revenue needed by a county, to Federal acreage, or to the loss of taxes due to Federal immunity.

The Public Land Law Review Commission concluded that the then-present system was too volatile and provided inadequate compensation (PLLRC 1970). The Commission recommended to Congress that a system of payments in lieu of taxes should be implemented to mitigate the direct and indirect burdens placed on State and local governments by Federal land. The Commission's 1970 proposal became a reality in 1976 when PILT was enacted as umbrella legislation covering several resource-based revenue-sharing programs and assuring a minimum payment level.

In the 2 decades since PILT was established, interest in the tax equivalency and revenue-sharing programs has continued to be a subject of debate and study. The General Accounting Office (U.S. Comptroller General 1979) reviewed Federal land payment programs in six Western States. The objective of the study was to assess inequities in the current programs and to examine alternative land payment programs. In the six States reviewed, the amount paid to State and local governments under the Federal land payment programs in FY 1977 exceeded by \$187.3 million (or \$1 per acre) the amount they would have received on a tax-equivalency basis. Despite these findings, due to the inequities found in the system, a full tax-equivalency program was recommended to replace the system of PILT and revenue-sharing programs.

Huebner and others (1985) compared the system of receipt sharing on National Forest System lands with an alternative, tax-equivalency program. The alternative program included a floor on tax-equivalency payments equal to each county's average 25-Percent Fund payment for 1977 to 1983. Forty counties in eight States were selected for analysis. Neither the counties nor the States were selected by statistical methods but rather chosen to compare east-to-west, north-to-south, differing payment levels, and States with different tax systems. National Forest System lands were classified and assessed in cooperation with local tax authorities. Tax equivalency values were determined with and without the floor. Counting both 25-Percent Fund payments and PILT payments, in 1983, revenue-sharing payments to the 40 counties amounted to \$56,178,260, estimated tax-equivalency payments without the floor were \$32,853,450, and payments with the floor were \$81,157,060. Almost half of the counties in the sample sustained a loss under tax equivalency when looking at both revenue sharing and PILT payments. Counties containing National

Forest land with an abundance of timber received the most money from revenue sharing and PILT. Counties where recreation, wildlife, and wilderness prevailed received the smallest amount. This trend was reversed for tax-equivalency payments. The authors concluded that the tax-equivalency proposal failed to produce many of the desired effects such as a more equitable distribution or eliminating the possibility of increasingly “overcompensating” a few counties.

A recent study of five Western States by the Bureau of Land Management (USDI-BLM 1992) found that Federal payments were greater than what these lands would command in property taxes. The value of the Federal lands was assessed by BLM field officers, realty specialists, and land appraisers. Property taxes on the Federal lands were calculated by comparing comparable tracts of private and public land. Real property tax revenues per acre for selected tracts of privately owned, unimproved land were collected by BLM field officers using public records. These values were then compared to tax information for the public land tracts gathered from State BLM officers. Overall, for FY 1991, PILT and revenue-sharing payments to State and local governments averaged \$0.296 per acre. For tracts of comparable privately owned land, estimated real property tax payments averaged \$0.098 per acre.

A critique of the BLM study by the National Association of Counties (NACO 1992) highlighted several problems. First, BLM officials did not contact local tax officials to request property tax information on comparable private property. The BLM, due to time constraints, had decided against making direct contact with State or local officials concerning the study. Second, the National Association of Counties felt that it was neither accurate nor fair to count revenue sharing and other Federal land payments. Because revenue sharing payments are earmarked for schools and roads, rather than for general county purposes, the National Association of Counties felt they should not be included. Third, in the State of Oregon, timberland, grazing land, and recreational land were grouped together as one classification. According to Oregon officials, only timberland was an accurate classification in Oregon tax law. Other criticisms by Oregon officials included too small of a sample size, use of the wrong private tax rate, and the exclusion of the severance tax on harvested timber. In addition, for several counties in Colorado, county officials felt that the BLM had attempted to “find the lowest possible tax liability” by classifying everything as grazing land or waste land.

Schmit and Rasker (1996), using the Interior Columbia River Basin as a case study, explored the relationship between resource extraction on public land and payments to counties (PILT and revenue

sharing). A tax-equivalency comparison was also done on lands that had recently been transferred into or out of Federal ownership. This comparison showed a great deal of variation among counties, with some counties receiving a great deal more revenue from Federal ownership than private ownership, and others receiving a great deal less.

Finally, a recent study by the General Accounting Office (GAO 1998) looked at the programs used by Federal agencies to compensate State and local governments for the loss in property tax revenue due to the tax-exempt status of Federal lands. Among the issues evaluated were the differences among the programs and the processes used by the States of California, Oregon, and Washington to distribute the Federal payments to local governments. They found distribution processes to be similar, but also found that, in some instances, the differences affected both the amount of revenue-sharing funds received by the counties and how these funds could be used. The General Accounting Office concluded that there were few Federal laws specifying how revenue-sharing funds were to be distributed to the counties, and that it is was State laws that controlled the actual amounts that counties received.

Methods

There were two distinct phases in this study. The Tax Equivalency phase compared Federal payments to local governments for entitlement lands to property taxes those lands would generate if taxed at the same rate as other lands. The Benefit-Cost phase described the nature and extent of costs and benefits to local governments and communities due to the presence of entitlement lands and associated management. Research design and policy decisions were made by the five-person research team (the authors) in conjunction with the seven-person Steering Committee, which included Forest Service and BLM economists along with a county commissioner. The following describes the assumptions and limitations of the study, and how we collected and analyzed data for the two phases.

Assumptions and Limitations

Several assumptions were needed to complete this study, either to limit the wide variety of complex situations with which we were to deal, or to keep this study's scope compatible with resources available to the research team or to county and agency cooperators. The assumptions were developed by the research team and discussed with and agreed to by the Steering Committee. As with all research results, study findings need to be interpreted in light of the assumptions.

Six of the most important assumptions made in this study are:

1. **Local Government**—This study focused on the units of local government eligible for PILT payments. In most cases, that was the general purpose, local government within the geographical subdivision is known as a county (parish in Louisiana, township in New England, or borough in Alaska); in FY 1997, that also included cities in “unorganized” areas of Alaska. In no case did the concept of local government include special-purpose governments within counties, such as independent school districts, fire districts, irrigation districts, and so on.

2. **Land Use**—This study assumed no change in land use. This decision was based on the impracticality of allowing a change in land use, including determining what that use would be. Wildlands commonly have several concurrent land uses. Land uses identified for this study were the “dominant” use, rather than the subordinate use; they also reflected uses that were “allowed” or permitted under current plans and regulations.

3. **Property and Values**—This study was limited to land and its value in its current use. It did not explicitly consider personal property or structures and improvements affixed to the land, even if Federally owned.

4. **Tax Rate**—When determining the tax bill for Federal lands, the taxable value was multiplied by the general county-wide tax rate (the mill rate), excluding tax rates for other special-purpose taxing jurisdictions within the county (e.g., independent school districts).

5. **Revenue-sharing Payments**—Although the Congressional direction to the BLM only called for a comparison between PILT and property taxes, this study additionally, but separately, reflected those revenue-sharing payments considered as “prior year payments” in PILT calculations, such as payments under the Taylor Grazing Act.

6. **Land Classification**—This study sought agreement between agency and county tax personnel on how agency lands would be treated within and among tax classes; if irreconcilable differences occurred, we deferred to the county’s classification.

Tax-Equivalency Phase

The tax-equivalency phase of this study took extra precautions to ensure that the likely property taxes generated from Federal lands were determined in accordance with the way local taxing authorities would make the assessment. In the case of special assessments (e.g., for timber or grazing), current land use had to be compatible with applicable statutory standards.

Data Collection—The focal point of this study was “entitlement” lands. According to the BLM (1997a):

...entitlement lands consist of lands in the National Forest System and the National Park System, lands administered by the Bureau of Land Management, and lands dedicated to the use of Federal water resource development projects. Also included are dredge disposal areas under the jurisdiction of the Army Corps of Engineers, National Wildlife Reserve Areas withdrawn from the public domain, inactive and semi-active Army installations used for non-industrial purposes, and certain lands donated to the United States Government by State and local governments.

Agencies administering entitlement lands include the USDA Forest Service; the USDI Bureau of Land Management, National Park Service, Bureau of Reclamation, and Fish and Wildlife Service; and the USDD Army, including the Corps of Engineers.

The sampling unit in this study was a county (parish, township, or borough) containing entitlement lands. The sampling frame was based on MASTREC.DB for FY 1997, a database used in PILT calculations and containing entitlement acreage totals for each county (USDI-BLM 1997b). Nationwide, 2,170 counties contain entitlement lands. Because we did not know the variability of the tax-related data, nor the cost and time to collect information from a sampled county, we could not calculate the optimal sample size needed. Accordingly, the research team had extensive discussions with Dr. Hans Zuuring (Professor of Forest Biometrics, University of Montana) about the sampling design and size. Our ultimate goal was to obtain information from the largest feasible sample, consistent with our time frame, the geographical distribution of entitlement lands, and the geographical distribution of PILT-receiving counties. In the end, it was decided to draw a stratified, random sample of 118 counties. Thirteen counties were later excluded from the tax-equivalency sample because they contained less than 500 acres of entitlement land, a restriction we adopted to avoid incurring costs with small paybacks.

The final tax-equivalency sample of 105 consisted of 40 counties from the Interior West, 30 counties from the Pacific West, 25 counties from the East, and 10 boroughs from Alaska. The East region included Minnesota, Nebraska, Kansas, Oklahoma, Texas, and all States to the east. The Pacific West included California, Oregon, Washington, and Hawaii. The Interior West contained all counties located between the Eastern and Pacific West regions. Counties were sampled by region to ensure that the distribution of sampled counties reflected the distribution of entitlement acres, PILT payments, and other revenue-sharing payments. States were grouped into regions based on logic and

custom: the public land States were assigned to the Western regions and then simply stratified into Pacific West and Interior West.

Originally, Alaska was sampled as part of the Pacific West. However, Alaska was found to be quite unlike other States in that several local governments in Alaska contain vast amounts of Federal land but do not use property taxes for financing. To illustrate, the North Slope Borough (not in our sample) contains over 46 million acres of entitlement lands, an amount of land slightly larger than North Dakota, and receives Federal payments of about 1 cent per acre, all of which exceeds the property tax of 0 cents per acre! With our sample of East counties totaling 522 thousand acres, the North Slope Borough alone contains nearly 10 times the acreage of our entire sampled East. Clearly, Alaska can affect overall and regional results. We thought it best to keep Alaska separate.

Determining the estimated tax bill for Federal entitlement lands required interaction of county tax specialists, agency personnel, and research team members. Knowledge of the property tax system and the specific land-use categories used by the counties was needed. To gain needed knowledge of the property tax system, we initially worked through the State offices responsible for oversight of the property tax and by accessing appropriate Internet sites. The specific land categories and in-depth knowledge of the standards or criteria used to assign land to each category were developed by teleconference with the county assessor or county appraiser. Once the classification systems were understood by the research team and agreed to by county tax personnel, data-collection forms outlining the land classes and instructions defining the land classes were developed and sent to the appropriate agency personnel for completion. In most cases, this amounted to two to three agency contacts per county; but in one case, almost a dozen agency persons were contacted for one county. Agency contact was restricted to those agencies managing at least 500 acres and accounting for at least 1 percent of the entitlement acres in the county. However, the excluded acres were included in the final calculations by assigning them the estimated county-wide value per acre for the included acres. Completed and returned data forms were reviewed by research team personnel for completeness and forwarded on to the county assessor for concurrence. If disagreement between agency and county personnel occurred, county and agency personnel along with the research team would work to rectify the difference. After agreement was achieved, county assessors provided the research team with average assessed values per acre for each land-use category and general county-wide tax rates applicable to FY 1997. (Note: we use the term "tax rate" rather than "mill rate," because tax rate seems to be more widely

used and understood. Whereas the mill rate is measured in terms of 1/1000th dollar, the tax rate, measured in 1/100th dollar, is a percentage.) With all needed information collected, the research team calculated the estimated tax value for the entitlement acres.

Data Analysis—The main hypothesis implied by the Congressional directive is whether Federal payments to counties are equivalent to the estimated tax payments (i.e., Federal payments \geq tax payments). Additionally, the payments to counties and estimated tax payments were statistically tested at the regional level (e.g., East, Interior West, Pacific West, and Alaska).

The equivalency of PILT (and PILT plus revenue-sharing) payments and the estimated taxes of the entitlement lands were statistically compared. This entailed comparing the PILT (or PILT plus revenue sharing) payments per acre to the taxable value of the entitlement lands per acre. The combined ratio estimators approach outlined by Cochran (1977) and Steel and Torrie (1980) was used to test equality of sample means. The statistical analysis consisted of estimating ratios (e.g., tax per acre) and their corresponding variances and calculating the following test statistic:

$$t = \frac{\hat{R}_1 - \hat{R}_2}{\sqrt{v(\hat{R}_1) + v(\hat{R}_2)}}$$

where: \hat{R}_1 and \hat{R}_2 are the estimated combined ratios and $v(\hat{R}_1)$ and $v(\hat{R}_2)$ are the corresponding variances.

This analysis was conducted on a regional and national level. Probability levels were determined.

Logistic regression analysis was used to statistically test the effect of county attributes on tax equivalence. If the difference between Federal payments and tax payments was positive (i.e., equivalent), tax equivalence was assigned a value of one. If the difference was negative, tax equivalence was assigned a value of zero. The logistic regression model is defined as follows:

$$\text{Logit}(Y) = B_0 + B_1 \cdot \text{TCR} + B_2 \cdot \text{ST} + B_3 \cdot \text{FP} + B_4 \cdot \text{PT} + B_5 \cdot \text{POP} + B_6 \cdot \text{TCA} + B_7 \cdot \text{AB} + B_8 \cdot \text{PA} + B_9 \cdot \text{ETV} + B_{10} \cdot \text{PD} + B_{11} \cdot \text{REG} + e_i$$

where: Y is the tax equivalency measure (0 or 1),

B_0 - B_{11} are regression parameters to be estimated,

TCR is total county revenue,

ST is the county 1998 sales tax percentage,

FP is percent 1997 Federal payments of 1992 county property tax,

PT is percent 1992 property tax of total 1992 county revenue,

POP is the 1996 county population,

TCA is total county acres,

AB is an indicator variable for A or B county designation, based on the FY 1997 PILT calculation,
 PA is percent entitlement acres of total county acres,
 ETV is percent entitlement taxable value of total county taxable value
 PD is the county 1996 population density, and
 REG is an indicator variable for region.

All PILT-related information came from PILT databases (USDI-BLM 1997b). County financial data came from the 1992 Census of Government (USDC-BOC 1997), while sales tax information was provided by the National Association of Counties (NACO 1998). Stepwise logistic regression analysis was used to estimate the model and determine which independent variables were statistically important. A significance level of $\alpha = 0.05$ was used to determine variable entry. If the region variable (REG) was found significant, region-specific models would be developed.

Benefit-Cost Phase

Determining the costs imposed by, or the benefits resulting from, the presence of entitlement lands and associated management activities could entail substantial research endeavors. They could easily involve in-depth analysis of fiscal records or rigorous comparisons of spending patterns. However, the language of the Congressional directive to the BLM suggests a lesser effort, an effort intended more to illuminate the issue rather than provide a definitive, quantitative analysis. Therefore, we addressed both topics through a questionnaire directed to county officials.

The Questionnaire—The questionnaire (available on request from the authors) used to assess costs and benefits of entitlement lands called for judgmental responses, as opposed to quantitative dollar estimates. In the questionnaire, we wanted to assess the nature and extent of costs and benefits but not necessarily their dollar magnitude. County officials were asked the importance of a series of cost or benefit items that were developed after talking to a sample of county officials and agency personnel to identify what they considered important. The draft questionnaire was edited and stylized by questionnaire specialists at the University of Montana's Bureau of Business and Economics Research. Because questionnaire results were to be used by the BLM to better understand its customers, the questionnaire carried the Office of Management and Budget approval number designated for that purpose. The final questionnaire had three parts: (1) direct fiscal costs, (2) direct fiscal benefits, and (3) general community benefits. The questionnaire was mailed to the Chief Executive Officer in the 118 counties initially sampled in the Tax Equivalency

phase; in most cases, that person was the chair-person of the county commissioners.

Data Analysis—The survey results were summarized to determine average responses for each question by region. Logistic regression was used to statistically analyze how the county responses were effected by county attributes (A-B designation, size of county, etc.).

Response to each part of the questionnaire involved a four-level scale, including "none," "small," "moderate," and "substantial." Initial analysis simply consisted of estimating the medians and means for all questions. The medians were used to rank the questions for relative importance, and the means were used to break ties. The summary tables produced from this analysis allowed quick determination as to which cost or benefit items were judged most important to the county.

Logistic regression analysis was used to statistically determine the affect of county attributes on questionnaire responses. The dependent variable was the questionnaire response. To estimate the logistic regression model, responses were collapsed from the original four-point scale to a two-point scale. The categories of "none" and "small" were merged and the categories of "moderate" and "substantial" were merged to form the two-point scale. The two-point scale served as the dependent variable in the logistic regression model. The logistic regression model allowed for the testing of the relationships between the county attributes (identified largely by the Steering Committee) and questionnaire response. The logistic regression model is defined as follows:

$$\text{Logit}(Y) = B_0 + B_1*TCR + B_2*ST + B_3*FP + B_4*PT + B_5*POP + B_6*TCA + B_7*AB + B_8*PA + B_9*ETV + B_{10}*PD + B_{11}*REG + B_{12}*AL + B_{13}*TE + e_i$$

where: Y is 0 for the none-small category and 1 for the moderate-substantial category,

B_0 - B_{13} are regression parameters to be estimated,

TCR is total county revenue,

ST is the county 1998 sales tax percentage,

FP is percent 1997 Federal payments of 1992 county property tax,

PT is percent 1992 property tax of total 1992 county revenue,

POP is the 1996 county population,

TCA is total county acres,

AB is an indicator variable for A or B county designation, based on the FY 1997 PILT calculation,

PA is percent entitlement acres of total county acres,

ETV is percent entitlement taxable value of

total county taxable value,
 PD is the county 1996 population density,
 REG is an indicator variable for region,
 AL is agency land distribution, and
 TE is tax equivalency (estimated Federal
 payments - estimated total tax).

Stepwise logistic regression analysis was used to estimate the model and determine which county attributes were statistically significant. A significance level of $\alpha = 0.05$ was used to determine variable entry into the model. One model was estimated for all regions combined. However, individual regional-level models were also investigated.

Results

This study developed information on the equivalency of Federal payments relative to likely property taxes, and on direct fiscal benefits and costs to local governments due to the presence of Federal lands and related management programs. Data were obtained from a nationwide sample of 105 counties, and involved coordinated efforts of study personnel, agency resource specialists, and county tax officials. Benefit and cost information was derived through a questionnaire administered to the Chief Executive Officer in each sampled county. All data and analyses focused on FY 1997.

According to PILT records, there were about 594.6 million acres of entitlement lands in FY 1997, contained in some 2,170 units of local government eligible for PILT payments. Our sample of 105 counties contained 73.1 million acres, about 12 percent of the total. As indicated earlier, we excluded counties with very small amounts of entitlement lands. Even then, sampled counties ranged from containing a low of 547 acres of entitlement lands to a high of about 6.4 million acres. As a percent of total land in the county, entitlement acres ranged from a low of 0.07 percent to almost 100 percent, averaging about 31 percent (fig. 1). County populations varied widely, from a low of 66 persons to a high of over 2.6 million.

Tax systems also varied widely. For example, as a percent of total county revenue, property taxes ranged from a low of 0 percent (for six sampled governments in Alaska without a property tax) to a high of almost 81 percent, averaging about 35 percent (fig. 2); in about 85 percent of the counties, property taxes accounted for 20 to 60 percent of county revenue. About half of the counties studied also levied a sales tax, and those ranged from a low of 0.13 percent ($\frac{1}{8}$ of a percent) to a high of 5.0 percent. Although we found the expected negative correlation between county reliance on property taxes for revenue and magnitude of the sales tax, the correlation was quite low (-0.104) and statistically

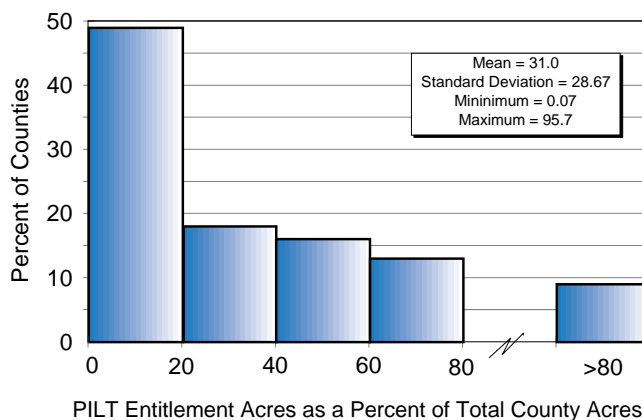


Figure 1—Distribution of counties: entitlement acres as percent of total county acres.

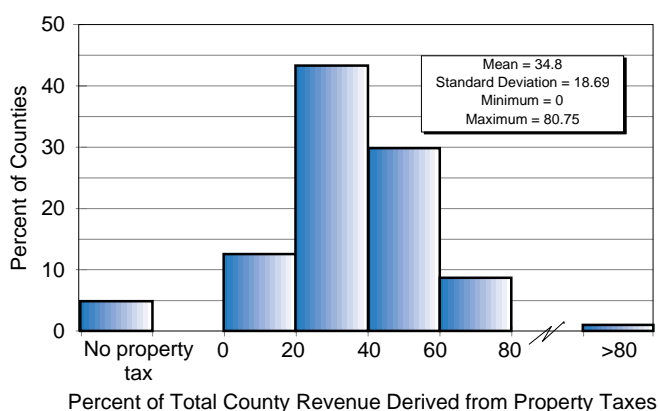


Figure 2—Distribution of counties: property tax as percent of total county revenue.

nonsignificant. Excluding the six counties without a property tax, Federal payments (i.e., PILT and revenue-sharing payments) ranged from a low of about 0 percent of property taxes to a high of over 300 percent. Within this backdrop of substantial variability, we assessed tax equivalency.

Tax Equivalency

In this study, tax equivalency is measured by the difference between the amount of Federal payments per acre of entitlement land and the amount of property-related taxes those lands would have generated, had they been taxed at the same rates as similar non-Federal lands, holding constant, current land use. If the Federal payments equaled or exceeded the taxes that would be generated, the payments are said to be equivalent. In the process of assessing equivalency, we found substantial variability. Some governmental units levy no property tax, others do so with a very high tax

rate. High tax rates, however, do not necessarily imply high taxes, because there is substantial variability in tax systems with regard to establishing taxable value. Some units focus exclusively on market value, while others use a complex system of preferential tax treatments. Local issues and concerns prompt these variations, which certainly frustrate analyses and comparisons.

Taxable Value—Early on, it became quite clear that taxation terminology is anything but uniform. Depending on the county and circumstance, assessed value, taxable value, highest and best-use value, along with market value may or may not mean the same thing. We adopted the term “taxable value,” referring to the value against which the tax calculation is made. Determining the taxable value for each agency’s lands in sampled counties constituted the bulk of work expended in this study. Contacts were made with each county’s tax assessor. We then developed a set of land-use classes and class definitions into which agency lands could be classified prior to determining taxable value. In some cases, State law controlled or influenced classes and definitions. For example, under North Dakota law, all nonresidential property was classified as either cropland or noncropland, and State officials specified per-acre values to be used in each county. In other cases, there were no State guidelines and counties were totally free to develop whatever classes were needed. This proved to be a problem in an Alaska jurisdiction where the existing property base consisted of urban, residential properties; there was no experience in taxing rural, wildland properties.

Preferential assessments were a major factor affecting taxable value. In many cases, a property’s market value is used as the basis for determining the tax. In other cases, social goals are reflected in preferential taxation for certain kinds of land uses. When this happens, the taxable value of a property may be only a small portion of its market value. Preferential taxation was common in our analysis of entitlement lands, involving open space, grazing, and riparian considerations. It also involved timber production, which has major implications for taxable values in California, Oregon, Washington, and Montana.

Preferential timber assessments affect taxable value in two ways. First, in most cases they involve replacement or modification of the ad valorem system, often through a two-part system that involves an annual bare-land tax and a tax on harvested timber. Although these systems are supposed to be revenue-neutral (affecting only the timing of tax payments), they seem to generate a substantial reduction in tax bills. Second, the general rule is that to receive preferential timber taxation, the timber must be available for harvest; it is not merely a matter of the land being forested. Hence, different parcels of an agency’s for-

ested lands within a county could be treated differently. In Oregon for instance, forested lands within designated wilderness areas, National Parks, and some National Wildlife Refuges are not available for timber harvest and are not eligible for preferential taxation. Consequently, those types of lands generally have to be treated under the original, ad valorem system and generate substantially higher taxable values than similar lands available for timber harvest. This aspect of preferential taxation clearly complicates and confuses comparisons of tax burdens among agencies.

Once a set of land-use classes and definitions was developed and approved by county tax personnel, that information was communicated to agency personnel with entitlement lands in the county. Following definitions provided, agency personnel assigned land holdings into the land-use classes. Most counties involved two to three agencies, and we only had to contact one or two individuals within each agency. In the extreme, one county contained entitlement lands from six agencies, where the Forest Service’s holdings involved four National Forests and eight Ranger Districts, the National Park Service involved multiple units, and so did the Fish and Wildlife Service. County tax personnel reviewed each agency’s allocation of land into tax classes; disagreements were resolved; county endorsement was secured. The last involvement of county tax personnel was to provide an estimate of the average taxable value per acre for each land-use class. Sometimes that value was readily available from other tax records; sometimes it was developed from information on comparable sales; and sometimes it was provided by State tax personnel (as in the case of timber taxation).

Overall, Federal entitlement lands in our sampled counties have an estimated taxable value of about \$16 billion (table 1). This represents about 2.4 percent of the total taxable value contained in those counties, which, of course, does not reflect the estimated Federal entitlement land values. On a county basis, the taxable value of entitlement lands relative to county taxable value ranged from essentially 0 percent (wealthy urban counties with little entitlement lands) to several hundred percent (rural counties dominated by Federal holdings). The Pacific West contained the most taxable value, accounting for 90 percent of total taxable value in sampled counties and 48 percent of the taxable value on entitlement lands. Alaska lies at the other extreme, accounting for less than 1 percent of the county taxable value, but 13 percent of the taxable value of entitlement lands. This is because many Alaska jurisdictions have very small amounts of private landholdings, but contain extensive acreages of entitlement lands. Our estimates of overall taxable values derives from the taxable value per acre, wherein

Table 1—FY 1997 tax characteristics of sampled entitlement lands, by region.

Region	Total county taxable value	Entitlement lands		
		Acres	Taxable value	Value per acre
East	\$16,638,717,742	580,813	\$774,940,649	\$1,334
Interior West	51,738,280,694	40,847,757	5,672,048,052	139
Pacific West	606,526,005,722	20,099,514	7,705,792,311	383
Alaska	489,055,560	14,147,770	2,045,157,881	145
Overall	\$675,392,059,718	75,675,854	\$15,915,316,586	\$210

the East leads with an average taxable value of \$1,334 per acre.

The Tax Bill—The amount of property taxes due a landowner is determined by multiplying taxable value by a tax rate. Two aspects are noteworthy. First, theoretically, this tax rate (in our case, a percent of taxable value) is calculated annually and reflects local government budget and total taxable value. Sometimes, however, tax rates are not calculated annually. They are prescribed by State law as when following property tax relief legislation. For example, as a consequence of Proposition 13, all California counties used a 1 percent tax rate in FY 1997.

Second, although the county government typically administers the property tax within a county, only a portion of the tax bill will reflect the county's government. That is, there may be several jurisdictions within a county authorized to levy property taxes, including a school district, fire district, irrigation district, etc. Although these are governments within a county, they are not the county's government and do not spend PILT payments. To keep our accounting straight, we focused exclusively on the county's government, that which is typically associated with a Board of County Commissioners.

We obtained the county-government-only tax rate for FY 1997 from the county assessors. In most cases, these rates were developed by the county in accordance with State guidelines. A county's tax rate is determined by dividing the total taxable value into the budget needed to be obtained. In FY 1997, over half of the sampled counties had tax rates of 1 percent or less, not counting counties with no property tax (fig. 3). County tax rates, for sampled counties with property taxes, averaged 1.57 percent (or 15.7 mills), ranging from a low of 0.11 percent (1.1 mills) to a high of 13.03 percent (130.3 mills). To illustrate, a tax bill of \$1,570 would result from a property with a taxable value of \$100,000 being taxed at a rate of 1.57 percent. Are property owners in a county with a tax rate of 10 percent taxed 5-times higher than an owner where the rate is 2 percent? Probably not. Other things equal,

the high tax rate may be used in a county where assessment procedures produce relatively low taxable values, and the low rate in counties producing higher taxable values.

One criticism of past studies is their failure to reflect the simulated taxable value associated with Federal holdings in the tax rate calculation. Other things equal, if Federal holdings were taxed and if their taxable value were included in the tax rate calculation, the tax rate ought to drop. We made those calculations by (1) determining the taxable value associated with the tax rate discussed above; (2) calculating the county budget implied by those taxable values and tax rates, and holding the budget constant; (3) adding the simulated taxable value from Federal holdings to the county's existing taxable value, while subtracting the Federal payments (PILT and revenue-sharing payments) lost if the lands were taxed; and (4) calculating a new tax rate. To our surprise, the tax rate did not always decrease. In fact, the average of the tax rates increased from 1.57 percent to 1.61 percent, with the tax rate in almost half of the sampled counties going up. Whether the new tax rate goes up or down depends on the estimated taxable value per acre for the Federal lands versus its current value in terms of Federal payments per acre. If the Federal lands

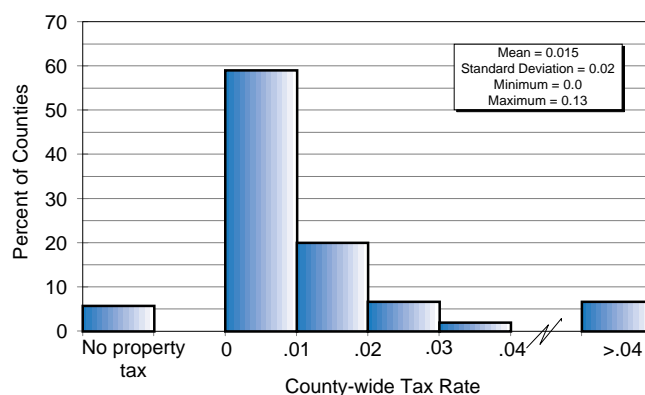
**Figure 3**—Distribution of counties: county-wide tax rate.

Table 2—Estimated FY 1997 taxes on sampled entitlement lands, by region.

Region	Property taxes		Timber	Total tax
	Tax 1 ^a	Tax 2 ^b	harvest tax	
East	\$3,837,048	\$3,441,915	\$0	\$3,837,048
Interior West	31,972,948	28,777,965	0	31,972,948
Pacific West	61,333,409	47,698,716	8,762,177	70,095,586
Alaska	10,133,728	979,497	0	10,133,728
Overall	\$107,277,132	\$80,898,093	\$8,762,177	\$116,039,310

^aTax 1 uses actual 1997 tax rates.

^bTax 2 uses 1997 tax rates adjusted to reflect inclusion of entitlement land values.

generated more Federal payments (e.g., PILT and revenue-sharing payments) than revenues if taxed, the county tax rate will increase; otherwise it will decrease.

The final part of the tax bill involved the tax on timber harvest. Not to be confused with a “severance” tax (Hall and others 1959), this tax is applicable to timber lands given preferential timber taxation in California, Oregon, and Washington, the annual bare-land tax portion being reflected as taxable value. To determine the timber harvest tax, State tax officials specify an expected stumpage price, depending on factors such as market conditions, species harvested, and location and difficulty of the sale. The actual tax is a percentage of harvest value, which is determined by multiplying harvest volumes by State-specified, expected stumpage price. All rates were obtained, along with timber harvest information needed to simulate the amount of taxes generated by the harvested timber. These amounts were added to the estimated FY 1997 property tax bill.

Federal entitlement lands in sampled counties would have produced about \$116 million dollars in tax receipts in FY 1997 (table 2). About 92 percent (\$107 million) of these receipts result from property tax revenues based on the tax rates applicable to that fiscal year. The remaining property tax receipts would have been generated through the tax on timber harvested on entitlement lands in California, Oregon, and Washington. Table 2 also shows that property tax revenues would have dropped by 18 percent, to \$80 million, if the taxation rate was calculated to reflect an influx of Federal taxable value (i.e., Tax 2). Information and analyses that follow will be oriented toward Tax 1, exclusively.

Federal Payments—For purpose of this study, Federal payments to counties consisted of PILT payments plus revenue-sharing payments used in PILT-payment calculations as specified in PILT legislation. This approach limits revenue-sharing payments to those received and controlled by the county government. It does not reflect revenue-sharing payments

received by State governments that may or may not be transmitted to the county (most notably from mineral leasing revenues). Neither does it reflect those revenue-sharing payments received by other governments within a county (most notably independent school districts). This limitation is particularly important to the 25-Percent Fund administered by the Forest Service. Although 25-Percent Fund payments may be used for schools and roads within a county, many county governments only provide for roads. Schools are financed through independent school districts, not controlled by the county government.

FY 1997 PILT payments were obtained from USDI-BLM records, and reflect a 53.33 percent proration of that allowed, needed because PILT appropriations fell short of the amount needed for full funding. Assuming prior-year payment information provided to PILT administrators is accurate, we obtained internal FY 1998 PILT records to determine the level of revenue-sharing payments received in FY 1997. Overall, we found that revenue-sharing payments were more than 3-times those of PILT payments in FY 1997 (table 3). This was especially true in the Pacific West where revenue-sharing payments exceeded PILT payments by almost 10-fold. Only in the Interior West region did PILT payments exceed those from revenue sharing. Overall, payments made to county governments in the Pacific West accounted for over 70 percent of the Federal payments identified.

Equivalency—This study developed a substantial amount of PILT- and tax-related information, and we were able to simulate several versions of tax equivalency. On a “per-acre” basis, Federal entitlement lands in the sampled counties would generate an average of \$1.48 per acre in tax revenues (table 4). In the several versions of Federal payments we evaluated, none were equivalent to the estimated property taxes. Overall, PILT payments amount to 17 cents per acre, only 11 percent of the tax bill; at 54 cents per acre, PILT plus current revenue sharing account for 36 percent of the tax; a fully funded PILT would account for 22 percent; and a fully funded PILT plus current revenue sharing

Table 3—Estimated FY 1997 Federal payments on sampled entitlement lands, by region.

Region	Revenue sharing	PILT payments	PILT + revenue sharing
East	\$376,404	\$322,729	\$699,133
Interior West	6,390,853	8,625,127	15,015,980
Pacific West	34,308,243	3,364,198	37,672,441
Alaska	929,717	795,976	1,725,693
Overall	\$42,005,217	\$13,108,030	\$55,113,247

Table 4—Estimated FY 1997 total tax and Federal payments per acre, by region.

Region	Total tax	Federal payments			
		PILT	PILT+ revenue sharing	PILT ^a	PILT ^a + revenue sharing
		<i>\$ per acre</i>			
East	\$6.61	\$0.56	\$1.20	\$1.04	\$1.69
Interior West	0.78	0.21	0.37	0.40	0.55
Pacific West	3.49	0.17	1.87	0.31	2.02
Alaska	0.72	0.06	0.12	0.11	0.17
United States	\$1.48	\$0.17	\$0.54	\$0.32	\$0.68

^a = Fully funded PILT.

Table 5—Results of statistical test of difference in per-acre estimates of tax versus Federal payments, by region.

Region	Tax versus PILT		Tax versus PILT + revenue sharing	
	t-value	P level	t-value	P level
East	2.17	0.04	1.94	0.06
Interior West	2.68	.01	1.90	.06
Pacific West	5.08	.01	2.20	.04
Alaska	3.75	.01	3.35	.01
Overall	3.22	0.01	1.74	0.08

Table 6—Estimated FY 1997 tax equivalency (Federal payments - total taxes) per acre, by Federal payment type, by region.

Region	PILT	PILT + revenue sharing	PILT ^a	PILT ^a + revenue sharing
	<i>\$ per acre</i>			
East	-6.05	-5.40	-5.56	-4.92
Interior West	-.57	-.42	-.39	-.23
Pacific West	-3.32	-1.61	-3.17	-1.47
Alaska	-.66	-.59	-.61	-.55
United States	-1.31	-.94	-1.17	-.80

^a = Fully-funded PILT.

would account for 46 percent of the tax bill, in the aggregate. On a per-acre basis, the East region dominates both taxes and PILT-related amounts, averaging \$6.61 per acre in taxes and 56 cents per acre in PILT payments. However, when revenue-sharing payments are added to PILT payments, the Pacific West dominates; this is because of the high level of revenue-sharing payments received by Pacific West counties (see table 3). By all measures, government units in the Alaska region have the lowest level of taxes or Federal payments per acre of entitlement lands.

Information shown in table 4 resulted from a sample-based, statistical estimation process. But before the equivalency issue can be reliably assessed, it must be determined if the regional estimates of tax per acre and Federal payments per acre are statistically different. We conducted two sets of statistical tests, one comparing our estimates of tax per acre to PILT per acre and the other comparing our estimates of tax per acre to Federal payments (= PILT + Revenue Sharing) per acre. In all cases, estimates of taxes per acre and payments per acre are statistically different (table 5). Consider our Pacific West estimates of \$3.49 tax per acre and \$1.87 per acre PILT plus revenue-sharing payments per acre (table 4); statistical test results (t -value = 2.20) indicate that there is a 96 percent chance (= $1.0 - P$ level of 0.04) that the estimates are different. In the case of Alaska, there is virtually a 100 percent chance (= $1.0 - P$ level of <0.01) that our estimates of \$0.72 tax per acre and \$0.06 PILT payments per acre (table 4) are different. Statistical test results reflect the closeness of our per-acre estimates, the variability of the data, and the sample size. Too small of sample sizes will often fail to detect statistical differences. However, because our analyses detected statistical differences, our sample size of 105 seems to have been adequate. Consequently, we can confidently use our estimates of tax per acre and payments per acre to assess tax equivalency at both the regional and national levels.

Estimates of taxes per acre and Federal payments per acre from table 4 reflect several versions of tax equivalency (Federal payments – total property taxes) in table 6. Overall, no version is equivalent, meaning that estimated property taxes always exceeded Federal payments. Deficiencies ranged from –80 cents per acre to –\$1.31 per acre. Predictably, the most equivalent version of tax equivalency is under a fully funded FY 1997 PILT and revenue sharing, followed by FY 1997 PILT and revenue sharing, followed by a fully funded FY 1997 PILT, and lastly by FY 1997 PILT only. This general pattern of best and worst tax equivalency is followed by each region. However, the middle positions switch, depending on the region. In the Pacific West, the second-best equivalency situation is with FY 1997 PILT and revenue sharing; but in the

Interior West, second-best is with a fully-funded PILT and no revenue sharing. These intermediate position results simply reflect that the Pacific West receives relatively more revenue-sharing payments relative to PILT payments, and the Interior West receives relatively more PILT payments.

Tax equivalency information in table 6 can also be used to estimate the budget required to achieve overall tax equivalency. For example, under a fully funded PILT, there would still be an overall equivalency deficit of \$1.17 per acre. In FY 1997, PILT payments totaled about \$113 million, but that was only 53.33 percent of the authorized payment. A fully fund PILT would cost about \$212 million, \$99 million more than was available. But even when fully funded, it would cost an additional \$696 million (= 1.17×595 million acres) to make PILT payments equivalent to total taxes on the 595 million acres of entitlement lands. The total cost would be \$908 million, \$113 million in the original FY 1997 PILT payments, plus an additional \$795 million (\$99 million to achieve full funding plus \$696 million to achieve equivalency).

Even though overall or regional Federal payments may not be equivalent to taxes in the aggregate, they are equivalent for many individual government units. For example, based on the PILT plus revenue sharing version of tax equivalency, almost 62 percent of government units receive Federal payments equal to or exceeding property taxes (table 7). PILT payments alone are equivalent to property taxes in 51 percent of the government units. If PILT were fully funded and revenue-sharing payments remained as they were in FY 1997, almost 69 percent of the governments would be tax equivalent. Under all versions of tax equivalency, the Pacific West has the lowest percentage of counties equivalent, averaging just over 30 percent for the situations studied. However, regions that fare the best varies with the situation, although Alaska tends to be the highest, averaging just under 70 percent.

Results from tables 6 and 7 may seem inconsistent. Consider the tax equivalency version involving PILT plus revenue sharing. Table 6 indicates that, overall, there is a tax equivalency deficiency of \$0.94 per acre. Table 7, however, indicates that, overall, tax equivalency was found in 62 percent of the counties. Moreover, counties that are tax equivalent contain more entitlement acres than the counties that are not tax equivalent. These seemingly inconsistent results are reconcilable because the tax and Federal payment attributes of tax-equivalent counties are so different from those not equivalent (table 8). In addition to most of the counties being tax equivalent, about 58 percent of the entitlement acres are contained in tax-equivalent counties, with Alaska ranging to almost three-fourths. However, tax-equivalent counties account for

Table 7—Percent of tax equivalent counties, by Federal payment type, by region.

Region	PILT	PILT + revenue sharing	PILT ^a	PILT ^a + revenue sharing
----- <i>percent</i> -----				
East	44.0	48.0	68.0	68.0
Interior West	57.5	62.5	70.0	75.0
Pacific West	10.0	43.3	23.3	50.0
Alaska	60.0	70.0	70.0	70.0
United States	51.0	61.7	63.4	69.2

^a= Fully-funded PILT.**Table 8**—Distribution of tax and Federal payment attributes by tax equivalent and not tax equivalent counties, by region.

Region	Entitlement acres	Total taxes	PILT + revenue sharing
----- percent -----			
Tax equivalent counties			
East	45.8	1.5	61.9
Interior West	51.6	6.5	53.0
Pacific West	42.8	9.9	72.0
Alaska	73.7	5.2	72.2
United States	58.2	6.2	63.3
Counties not tax equivalent			
East	54.3	98.5	38.1
Interior West	48.4	93.5	47.0
Pacific West	57.2	90.1	28.0
Alaska	26.3	94.8	27.8
United States	41.8	93.8	36.7

Table 9—Characteristics of logistic regression model of FY 1997 tax equivalency (Federal payments—total tax).

Variable description	Characteristic		Relative importance
	Coefficient	P value ^a	
1. Total county revenue	—	—	—
2. Sales tax percentage	—	—	—
3. Percent Federal payments of property tax	0.2796	0.002	0.2412
4. Percent property tax of total county revenue	-.0305	.094	-.0766
5. 1996 county population	—	—	—
6. Total county acres	—	—	—
7. A/B county designation	—	—	—
8. Percent entitlement acres of total county acres	—	—	—
9. Percent entitlement taxable value of total county taxable value	-.4649	.002	-.2390
10. Population density	-4.4721	.063	-.1031
11. Region	—	—	—

^aSignificant at 0.10.

only 6 percent of the tax bill, while accounting for 63 percent of the Federal payments. Nonequivalent counties account for about 94 percent of the tax bill, ranging to a high of over 98 percent in the East. Tax-equivalent counties may account for 58 percent of the acres, but the average tax bill on those acres is a mere \$0.24 per acre, as opposed to an average tax bill of \$3.02 per acre for the nonequivalent counties.

It may be very costly to change Federal payments to a level where all governments receive payments equivalent to property taxes. Consider the version of equivalency portrayed in table 6 under a fully funded PILT and current revenue sharing, with an overall shortfall of 80 cents per acre. To generate overall tax equivalency (i.e., no shortfall), the fully funded PILT would have to be increased by a factor of 3.5. Similarly, the same thing could be accomplished by holding PILT payments constant at full funding and increasing revenue sharing payments by a factor of almost 3.2. Although either approach could generate overall tax equivalency, not all government units would be equivalent. With the three-fold increase in PILT, about 82 percent of the units could be made equivalent, meaning that 18 percent would still not be equivalent; with the three-fold increase in revenue-sharing payments, about 77 percent would be equivalent. PILT payments must be increased more than revenue-sharing payments because they play a smaller role in Federal land payments. Under these versions of equivalency, Interior West governments fare the best, and Pacific West governments fare the worst.

The problem with “across the board” increases in PILT or revenue-sharing payments is that all counties are made better off, not just the ones below tax equivalency. For example, we estimate that Federal payments (PILT plus revenue sharing) are already equivalent to property taxes in 62 percent of counties. Full funding of PILT (roughly doubling PILT) would make an additional 7 percent of the counties equivalent, bringing the overall to 69 percent. To make the 7 percent tax equivalent, the 62 percent originally equivalent are made even better off. As mentioned, starting from a fully funded PILT, revenue-sharing payments would have to be increased by almost 3.2 to generate overall tax equivalency, and even then 23 percent of the counties would still not be tax equivalent. If additional funds could be distributed to the nonequivalent counties only, revenue-sharing payments would only have to be about doubled (over a fully funded PILT) to achieve overall tax equivalency, and all counties would be tax equivalent.

We looked into the question of why Federal payments to some government units are equivalent to property taxes and not for others. We sought general answers, not unit-specific explanations. Focusing on the PILT plus revenue-sharing version of tax equiva-

lency, we coded each county as being equivalent or not, and then built statistical models (logistic regression) designed to assess the importance of several explanatory variables in promoting (the likelihood of) tax equivalency. Not knowing which explanatory variables would be most useful, we identified about a dozen candidate variables that fell into three broad categories: (1) those depicting the county's tax system, (2) those depicting the importance of Federal lands in the county, and (3) those depicting the size of the county.

The model we built correctly predicted tax equivalency in about 87 percent of the counties in our sample (table 9), an outstanding result. The final model selected contained four independent variables, and regional designation was never even tentatively viable (which is why region-specific models were not built). Variables depicting the importance of Federal entitlement lands in the county (variable 3 and 9) seemed to be the most influential, followed by population density (variable 10) and the importance of property taxes in county financing (variable 4). Consider variable 3: the likelihood of tax equivalency increases as Federal payments (PILT plus revenue sharing) increase as a percentage of county property taxes. This is possibly the case of a timber-rich (to generate Federal payments) but sparsely populated county (to keep the tax base low). In the case of variable 9, however, the likelihood of tax equivalency decreases as the taxable value of Federal lands increases relative to the property tax base (as possibly in the case of a county where National Parks or National Forests dominate).

Benefits and Costs

Part of the BLM's directive from Congress was to assess the costs imposed on local governments by the presence of Federal land and the benefits that counties receive from such land. We addressed these topics through a questionnaire (available on request from the authors) directed to the Chief Executive Officer of the sampled counties. One hundred and eighteen questionnaires were sent, asking county officials to assess the magnitude of a series of cost and benefit items on a scale ranging from None to Substantial. For each item, respondents were also asked to identify the Federal program (timber, recreation, etc.) most responsible for the costs or benefits (from a list of 10 programs). Ninety questionnaires were returned, for an overall response rate of 76 percent.

The questionnaire consisted of three sections: (1) direct fiscal costs to the county government, (2) direct fiscal benefits to the county government, and (3) benefits to communities and individuals within the county. For each section, questionnaire topics were ranked based on the median response with the

Table 10—Characteristics of responses to questions regarding cost-imposing items (fiscal costs to county governments).

Cost-imposing item	Median rating	Mean rating	Distribution of responses				Primary program(s)
			None (1)	Small (2)	Moderate (3)	Substantial (4)	
			----- percent -----				
Search and rescue	2	2.35	25	35	21	19	Recreation
Law enforcement	2	2.29	21	41	25	13	Recreation
Road maintenance	2	2.24	27	33	29	11	Recreation
Fire protection and control	2	2.15	28	37	26	9	Fire
Road construction	2	2.02	35	35	21	9	Recreation
Judicial and legal	2	1.87	32	51	15	2	Recreation
Animal control	2	1.70	47	39	12	2	Recreation
Sewage and solid waste	1.5	1.63	50	42	3	5	Recreation
Public welfare	1	1.65	56	29	9	6	Recreation
Water supply	1	1.63	60	24	9	7	Water
Correctional facilities	1	1.62	51	37	11	1	Recreation
Health services	1	1.56	55	36	8	1	Recreation
Education	1	1.48	67	22	8	4	General
Hazardous waste	1	1.41	63	34	3	0	General

mean response used to break ties. For numerical analyses, the response of None was quantified as 1, Small as 2, Moderate as 3, and Substantial as 4. Additionally, the most important questionnaire topics from each section were analyzed in more detail, using analysis of variance to determine statistical importance and difference. Once the top-ranked questionnaire items were identified, we used logistic regression to statistically analyze how the responses were affected by 13 county attributes. These attributes were: (1) total county revenue, (2) sales tax percentage, (3) percent Federal payments of property tax, (4) percent property tax of total county revenue, (5) 1996 county population, (6) total county acres, (7) A/B county designation, (8) percent entitlement acres of total county acres, (9) percent entitlement taxable value of total county taxable value, (10) population density, (11) region (East, Interior West, Pacific West, or Alaska), (12) agency land distribution, and (13) tax equivalency (based on Federal payments – total property taxes).

Costs Imposed on Local Governments—The first section of the questionnaire listed 14 potential county-cost items along with space where the county official could specify any additional cost items. County officials specified (using their best professional judgment) the portion of their county's total expenditures on the item that could be attributed to Federal entitlement lands or associated management activities. Officials also identified the Federal management program(s) most associated with that cost item. For this first section only, general guidelines were given regarding the magnitude of the cost increase associated with the response categories: None (0 percent), Small (less than 10 percent), Moderate (10 to 50 percent), and Substantial (more than 50 percent).

We found little indication that the presence of Federal lands imposes extra costs on counties. Table 10 lists the cost items, ranked by the median and mean responses, the distribution of the responses into the four categories, and the primary program most often associated with the cost item. Over half (8 out of 14) of the cost items had a median response of Small, meaning that less than 10 percent of the county's expenditures on that item were attributed to Federal entitlement lands and activities. The remaining six items had a median rating of None. However, for the top three cost items (Search and Rescue, Law Enforcement, and Road Maintenance), more than 10 percent of the respondents indicated that Federal entitlement lands and associated management activities were responsible for greater than 50 percent of these expenditures. More than 25 percent of respondents indicated Federal lands and activities were responsible for 10 to 50 percent of the expenditures on these items.

Recreation programs were most commonly identified as the management program responsible for cost increases, with two-thirds of the cost items attributed to Recreation. The other items were attributed to Fire programs, Water, and the General presence of Federal agency or entitlement lands. Four counties specified other cost items where they felt Federal lands had a substantial impact on costs; two listed county "weed control" costs, one listed "hazardous materials," and another county listed expenses for the "coroner."

Analysis of variance results indicated that the ratings for the top five cost items could not be distinguished from each other but were higher than the rest. We used logistic regression (contrasting None and Small versus Moderate and Substantial) to determine if the responses to the top five cost items were affected by any of 12 county attributes. In most cases (80

percent), county attributes had no detectable (statistically significant) effect on the rating of cost items (table 11), but in 20 percent of the cases, one of the county attributes had a statistically significant effect on the questionnaire response. (Note: In the cases of significant effect, table 11 contains a "Yes," and the direction of the effect is given in parenthesis along with additional information.)

Table 11 can be evaluated "by cost item" or "by county attribute." Using the "by cost item" approach for Law Enforcement, Region was the only county attribute that had a significant effect on the rating, and that was because responses from the Interior West tended to indicate a higher (+) cost imposed by Federal lands and programs than did other regions. No other county attribute had a consistent, systematic effect on the rating for Law Enforcement. However, four county attributes affected the rating on Fire Protection and Control, including Region (attribute 11) and Total County Acres (attribute 6). The rating on Search and Rescue was related to the percent of entitlement acres in the county (attribute 8) and Agency Land Distribution (attribute 12), where table 11 shows Yes (-) FWS, indicating that the effect was in the negative direction for Fish and Wildlife Service lands. In other words, counties with a larger percentage of Fish and Wildlife Service lands were more likely to respond None or Small than they were to respond Moderate or Substantial. Two county attributes affected the rating for Road Maintenance costs, including the percentage of a county's total revenue

made up by property taxes (attribute 4). In this case, counties that depend more on property tax as a revenue source were more likely to respond that Federal land had little or no impact on road maintenance costs. Finally, the Road Construction rating, which was affected by three county attributes, was the only one to be affected by the Tax Equivalency variable (attribute 13). Counties with a larger difference between Federal payments and estimated per acre taxes were more likely to answer that Federal lands had a Moderate or Substantial impact on the county's road construction expenditures.

Using the "by county attribute" approach, we can assess the extent to which a particular attribute influences costs imposed on county governments. For example, Region (attribute 11) is most influential, affecting the rating on three cost items, Law Enforcement, Road Maintenance, and Fire Protection and Control. In all cases, counties in the Interior West indicated a higher cost imposed than did other regions. Several county attributes affected one or two cost items, and four attributes had no effect on ratings for any cost item. Interestingly, whether a county is an A or B county had no effect on ratings, although the dependency B counties have on Federal lands may have already been reflected in another attribute, such as the percent of entitlement acres.

Fiscal Benefits to Local Governments—The second part of the questionnaire dealt with direct fiscal benefits to county governments. Respondents were given a list of 16 potential Federally-provided

Table 11—County attributes having a statistically significant effect on questionnaire responses regarding direct fiscal costs imposed on county governments, by cost-imposing item.

County attribute	Search and rescue	Law enforcement	Road maintenance	Fire protection and control	Road construction
1. Total county revenue	No	No	No	No	No
2. Sales tax percentage	No	No	No	No	No
3. Percent Federal payments of property tax	No	No	No	Yes(-)	No
4. Percent property tax of total county revenue	No	No	Yes(-)	No	No
5. 1996 county population	No	No	No	No	No
6. Total county acres	No	No	No	Yes(+)	Yes(+)
7. A/B county designation	No	No	No	No	No
8. Percent entitlement acres of total county acres	Yes (+)	No	No	No	No
9. Percent entitlement tax value of total county tax value	No	No	No	Yes(+)	Yes(+)
10. Population density	No	No	No	No	No
11. Region	No	Yes(+) Interior	Yes(+) Interior	Yes(+) Interior	No
12. Agency land distribution	Yes (-) FWS	No	No	No	No
13. Tax equivalency	No	No	No	No	Yes(+)

Table 12—Characteristics of responses to questions regarding cost-saving items (fiscal benefits to county governments).

Cost-saving item	Median rating	Mean rating	Distribution of responses				Primary program(s)
			None (1)	Small (2)	Moderate (3)	Substantial (4)	
----- percent -----							
Use of Federal land	2	1.85	47	31	13	9	Recreation
Fire protection and control	1	1.76	60	12	21	7	Fire
Data and information	1	1.68	58	20	17	5	Fire
Road maintenance	1	1.64	55	32	7	6	General
Road construction	1	1.64	58	26	10	6	Timber, general
Technical expertise	1	1.60	51	39	9	1	General
Law enforcement	1	1.58	55	37	3	5	General
Environmental education	1	1.49	62	30	6	2	General
Water improvements	1	1.46	66	25	5	4	Water
Use of Federal employees	1	1.45	68	22	8	2	General
Use of Federal facilities	1	1.44	67	26	4	3	General
Insect and disease control	1	1.37	75	14	10	1	Timber
Training opportunities	1	1.35	71	24	4	1	General
Construction materials	1	1.35	74	20	4	2	General
Weed control	1	1.30	78	15	6	1	Grazing
Use of Federal equipment	1	1.24	77	22	1	0	General

Table 13—County attributes having a statistically significant effect on questionnaire responses regarding direct fiscal benefits received by county governments, by cost saving item.

County attribute	Use of Federal land	Fire protection and control	Data and information	Road maintenance	Road construction
1. Total county revenue	No	No	No	No	No
2. Sales tax percentage	No	No	No	No	No
3. Percent Federal payments of property tax	No	No	No	No	No
4. Percent property tax of total county revenue	No	No	Yes(-)	No	No
5. 1996 county population	No	No	No	No	No
6. Total county acres	No	No	Yes(-)	Yes(-)	Yes(-)
7. A/B county designation	No	No	No	No	No
8. Percent entitlement acres of total county acres	No	Yes(+)	No	No	No
9. Percent entitlement tax value of total city tax value	No	Yes(-)	No	No	No
10. Population density	No	No	No	No	Yes(-)
11. Region	No	Yes(+)	Yes(+)	Yes(+)	No
		Interior	Interior	Interior	
12. Agency land distribution	No	Yes (+)	Yes(+)	Yes(+)	Yes(+)
		FS	BLM	FS	FS,FWS
13. Tax equivalency	No	No	No	No	No

goods and services (along with an “Other” category). They were asked to indicate the magnitude of any “cost saving” to their county government due to the good or service being provided by the Federal agency at a reduced cost or for free. Respondents were also asked to indicate the Federal management program associated with the benefit item.

We found little indication that the presence of Federal lands in a county had any direct fiscal benefits (table 12). Only one Federally-provided good or service (Use of Federal Land) had a median rating as high as Small. The rest of the potential cost-saving items had a median rating of None. For over half of the items, the primary Federal program associated with the benefit item was the General presence of Federal agency or entitlement lands. Unlike the cost-imposed section, which identified the recreation program as associated with several cost items, the only direct fiscal benefit associated with Recreation programs was Use of Federal land. The only benefit listed under the Other category was “emergency preparedness,” which was ranked as providing a substantial cost savings to that particular county’s government.

We determined that the top five questionnaire items in the cost-savings section of the questionnaire were indistinguishable from each other, but significantly different from the rest of the questionnaire responses. These five questions were analyzed in detail and the results are shown in table 13. For the top-rated benefit item, Use of Federal land, none of the 12 county attributes analyzed had any significant effect on how the question was answered. For Fire Protection and Control, four variables were found to significantly affect the responses. Percent of entitlement lands in the county (attribute 8), Region (attribute 11), and Agency Land Distribution (attribute 12) all had a positive effect on the responses, while Percent entitlement taxable value of total county taxable value (attribute 9) had a negative effect.

Concerning the Data and Information question, Region (attribute 11) had a significant effect as did the percent of property tax, Total County Acres, and Agency Land Distribution (attributes 4, 6, and 12). Larger counties and counties more reliant on property taxes as a revenue source were less likely to perceive data/information as a moderate or substantial benefit. Counties with a large percentage of BLM land and Interior counties were more likely to respond that Federally provided Data and Information provided Moderate or Substantial cost savings.

The rating for Road Maintenance was affected by three county attributes including Total County Acres, Region, and Agency Land Distribution (attributes 6, 11, and 12). Large counties were less likely to feel that Federally provided road maintenance was an important cost savings for their government, while counties

with a large percentage of BLM land were more likely to perceive road maintenance as a Moderate or Substantial benefit. As with Road Maintenance, larger counties (attribute 6) were less likely to perceive Federally provided Road Construction as a benefit as were counties with a high population density (attribute 10). However, counties with large percentages of Forest Service or Fish and Wildlife Service land (attribute 12) were more likely to perceive Federally provided road construction as a cost savings for their government.

The county attribute having the greatest effect on the county’s perception of fiscal benefits was Agency Land Distribution (attribute 12), affecting the rating of four of the five benefit items. The only other county attribute affecting more than one item was Region (attribute 11), with counties in the Interior West indicating greater cost savings from Federally provided Fire Protection, Data and information, and Road Maintenance than other regions.

Benefits to Communities and Individuals—

The last section of the questionnaire dealt with a broader range of benefits than did the previous section, which only focused on fiscal benefits to the county government. This part of the questionnaire was more concerned with general benefits to people and communities in the county. The format consisted of 24 potential benefit items, and response followed the same pattern as before.

The responses to this portion of the survey (table 14) indicate that county officials perceive benefits to people and communities to be of higher magnitude than direct fiscal benefits or costs accruing to the county’s government. Unlike the low-rated responses in the previous sections, three of the benefit items in this section received a median rating of Moderate. All three of these items (Places to Hunt and Fish, Places to Recreate, Recreational Facilities) were associated with recreation programs. Of the remaining 21 items, 18 received a median rating of Small, but only three had a median response of None. As far as the primary programs associated with the benefit items, 42 percent of the items were associated with the General presence of Federal lands, 25 percent with Recreation, and the remainder went to Water, Grazing, Timber, Power, and Fire suppression.

Ratings for the top three benefit items were significantly different from the rest and were singled out for further analysis. Table 15 shows the three benefit items and the significant effects associated with them. Counties with a relatively large percentage of entitlement acres (attribute 7) were more likely to respond that Places to Hunt and Fish along with Places to Recreate provided a Moderate or Substantial benefit to the community. Region was also an important factor in the responses to these two questions, with counties

Table 14—Characteristics of responses to questions regarding benefits received by communities and individuals.

Benefit item	Median rating	Mean rating	Distribution of responses				Primary program(s)
			None (1)	Small (2)	Moderate (3)	Substantial (4)	
			----- percent -----				
Places to hunt and fish	3	3.08	13	14	24	49	Recreation
Places to recreate	3	2.97	16	12	32	40	Recreation
Recreational facilities	3	2.76	19	16	34	31	Recreation
Watershed protection	2.5	2.33	27	23	41	9	Water
Aesthetic setting	2	2.42	29	23	27	21	Recreation
Road network	2	2.31	31	24	29	16	Recreation
Lifestyle base	2	2.30	31	26	25	18	Recreation
Ecosystem protection	2	2.26	27	26	41	6	Grazing
Data and Information	2	2.07	36	31	22	11	General
Employment opportunities	2	2.05	26	51	15	8	Timber, general
Agency as economic base	2	2.04	41	24	25	10	General
Gathering forest products	2	2.02	38	31	21	10	Timber
Fire protection and control	2	2.00	47	21	17	15	Fire
Community stability	2	2.00	39	29	26	6	General
Permanent ground cover	2	1.93	45	28	16	11	Timber
Grants and agreements	2	1.86	41	40	13	7	General
Education programs	2	1.86	38	43	14	5	General
Increased property values	2	1.85	46	32	13	9	General
Civic leadership and service	2	1.77	45	36	15	4	General
Law enforcement	2	1.72	49	36	9	6	General
Water improvements	1.5	1.89	50	21	19	10	Water
Work force diversity	1	1.74	53	29	10	8	General
Support industrial base	1	1.64	58	24	14	4	Timber
Electric power	1	1.46	71	16	10	4	Power

Table 15—County attributes having a statistically significant effect on questionnaire responses regarding benefits received by communities and individuals, by benefit item.

County attribute	Places to hunt and fish	Places to recreate	Recreational facilities
1. Total county revenue	No	No	No
2. Sales tax percentage	No	No	No
3. Percent Federal payments of property tax	No	No	No
4. Percent property tax of total county revenue	No	No	No
5. 1996 county population	No	No	No
6. Total county acres	No	Yes(+)	No
7. A/B county designation	No	No	No
8. Percent entitlement acres of total county acres	Yes (+)	Yes (+)	No
9. Percent entitlement tax value of total city tax value	No	No	No
10. Population density	No	No	No
11. Region	Yes(-) Pacific West	Yes(-) Pacific West	No
12. Agency land distribution	No	No	No
13. Tax equivalency	No	No	No

in the Pacific West being less likely than counties in the East to perceive Places to Hunt and Fish or Places to Recreate as a Moderate or Substantial benefit to their community. Finally, larger counties (attribute 5) were more likely to perceive that Places to Recreate provided a Moderate or Substantial benefit to their community. None of the variables were found to have a significant effect on the question regarding Recreational Facilities.

Discussion

The United States Congress asked the USDI Bureau of Land Management to address several PILT-related topics. First, it wanted to know “the extent to which payments under the PILT Act exceed the tax revenues that States and local governments would receive from entitlement lands ... if such lands were taxed at the same rates as other lands” (U.S. Congress 1996). Based on this analysis, the simple response to this question is that, overall, PILT payments do not exceed tax revenues. In fact, overall, PILT payments are about \$1.31 per acre of entitlement land less than the amount of property taxes those lands would generate if taxed at the same rate as other lands. In some regions, this shortfall is far greater (as in the East and Pacific West), while it is only half that amount in Alaska and the Interior West. But even with this shortfall, about 51 percent of the counties are tax equivalent. If PILT-related revenue-sharing payments were added to the equivalency computation, the shortfall drops to \$0.94 per acre, and about 62 percent of the counties are equivalent. Under a fully funded PILT plus revenue-sharing payments, the equivalency shortfall drops to \$0.80 per acre, and 69 percent of the counties would be equivalent, but full funding would add about \$99 million to the \$113 million already allocated for FY 1997. To achieve overall equivalency, another \$696 million would have to be added to the fully funded PILT, and even then 18 percent of the counties would not be equivalent. If additional funding could be variably distributed, overall equivalency could be achieved at substantially less expense. This is because any “across-the-board” increase in either PILT or revenue-sharing payments would (unnecessarily) increase payments to counties that were already tax equivalent.

Congress also wanted to know about the “nature and extent of services provided by units of local governments ... and the economic benefits resulting,” along with other “economic benefits to communities” (U.S. Congress 1996). These issues were addressed by a questionnaire directed to 118 county Chief Executive Officers. Although we did not conduct an accounting-level inquiry as to the magnitude of costs imposed and direct fiscal benefits received by local governments,

the magnitudes are probably small. Even for the item felt most costly (Search and Rescue), fully 25 percent of the counties indicated that there was no additional cost imposed. In addition to Search and Rescue, county officials indicated that the presence of entitlement lands and associated programs appeared to add costs to Law Enforcement, Road Maintenance, Fire Protection and Control, and Road Construction. Most officials linked cost increases to Federal recreation programs. As with costs imposed, cost savings to local governments are also infrequent. Except for local government's Use of Federal Land, the majority of county officials indicated there was no cost saving for any other type of cost. However, the majority of county officials indicated that their community receives moderate or substantial benefits from recreational aspects of entitlement lands—Places to Hunt and Fish, Places to Recreate, and Recreational Facilities.

Our research was clearly directed toward addressing the questions raised by Congress. But in the process of understanding those topics, we came to some additional realizations pertinent to this type of research:

1. **Tax Rates**—After reviewing the literature, we thought it a mistake to not recalculate the tax rate, so as to reflect the additional taxable value of entitlement lands. We thought the initial (the rate used in FY 1997) tax rate would always be too high, and thus overstate the Federal tax bill on entitlement lands. This is not necessarily so. Whether the tax rate goes up or down depends on the amount of taxes the land could generate versus the amount of PILT and revenue-sharing payments the county would forego. Many tracts of entitlement lands produce more Federal payments than they would taxes. On balance, entitlement lands would generate about 25 percent less taxes when the “correct” tax rate is used, compared to the initial tax rate.

2. **Agency Comparisons**—When we began this study, it seemed possible to compare the taxable value of lands administered by several resource management agencies. We discovered, however, that State and local procedures are so controlling that comparisons between agencies are almost meaningless. For example, consider two identical tracts of timbered land in a State that provides preferential timber taxation; one tract is administered by an agency where timber harvest is permitted and the other by an agency where harvest is not permitted (and hence not eligible for preferential taxation). It is entirely possible for the tract that cannot be harvested to have taxable value of \$2,000 per acre and the other tract of \$200 per acre because of the preferential timber tax treatment.

3. **Differences in Tax Systems**—Throughout this study, we struggled with the implications of the wide variation in property tax systems. Some locations had

no property tax, while others had property taxes along with a sales tax, liquor tax, and so on. Some locations had substantial local discretion, while State law and procedures controlled others. However, we came to the realization that variation in tax systems does not complicate our jobs; in fact, it is irrelevant to our job. The Congressional directive to the BLM (U.S. Congress 1996) clearly focuses on “tax revenues ... from entitlement lands...” Our job was to focus on land and land taxes, to compare the amount of PILT and revenue-sharing payments produced by entitlement lands to what they would have generated if taxed as other lands. The Congressional question is one of equivalence between Federal land payments and likely property tax on entitlement lands, and does not involve sales taxes paid by agencies or their employees, user fees, or other county-financing considerations.

4. Tax Equivalency—At some point in the past, property taxes were the dominant, if not the exclusive, instrument of county finance. Under that circumstance, a comparison between Federal payments (e.g., PILT plus revenue sharing) and likely property taxes provided an accurate portrayal of overall tax equivalency. But over the years, the supremacy of property taxes has eroded. Other forms of financing were expanded and developed. Today, counties are financed through a wide range of instruments, sometimes not even including the property tax. Under this circumstance, the comparison between Federal payments and likely property taxes may not accurately depict overall tax equivalency. A comprehensive study of overall tax equivalency would involve far more than likely property taxes on Federal entitlement lands.

5. County Government—Any study of tax equivalency must address the question of what it is that taxes are supposed to be equivalent to. In this study, the Congressional directive to the BLM clearly focused on payments made under the PILT Act. Indeed, the Act specifically states that payments will be made to “units of local government,” meaning “a county, parish, township, municipality, borough...below the State which is a unit of general government....” Though we termed them all “counties,” this study focused on counties, parishes, townships, and boroughs. Accordingly, we set out to determine the relationship between Federal payments to county government and the amount of property taxes payable to the county government. Yet, within the geographical boundary of a county there are numerous other “governments” (beyond the “county government”) authorized to levy property taxes—cities, rural fire districts, school districts, etc. This study focused equivalence on county government, not governments within the county.

This study attempted to avoid known mistakes of past research in the matter of property tax equivalency. Nevertheless, our own procedures introduced

several deficiencies that limit the authority of our results:

1. Study Assumptions—We made two assumptions that necessarily tended toward understating the estimated tax bill on entitlement lands: (1) land would be taxed in its current use, and (2) valuation would reflect land and natural resources, not structures and improvements. Depending on the amount of acreage and value differentials involved, these deficiencies may be more conceptual than real. In many rural circumstances, the value of structures, improvements, or a small acreage with a high potential use is dwarfed by the vast surrounding wildlands. In more urban settings or where very valuable special uses are involved (e.g., dam/hydro-electric generation facilities), the assumption may be more influential. Although the assumptions tended to understate taxable values, we had no realistic option to the assumption.

2. PILT-related Information—This study relied heavily on databases associated with administering the PILT program. In several instances, we uncovered discrepancies ranging from minor to quite substantial. For instance, a minor discrepancy occurred when we found that jurisdiction over a particular tract of entitlement land had transferred 10 to 15 years earlier from one PILT-relevant Federal agency to another. In this instance, results were not effected because we simply dealt with the new agency. However, a major discrepancy occurred when we found a situation where the amount of entitlement land attributed to a PILT-relevant Federal agency was too high, by an enormous amount. These discrepancies suggest internal audit procedures.

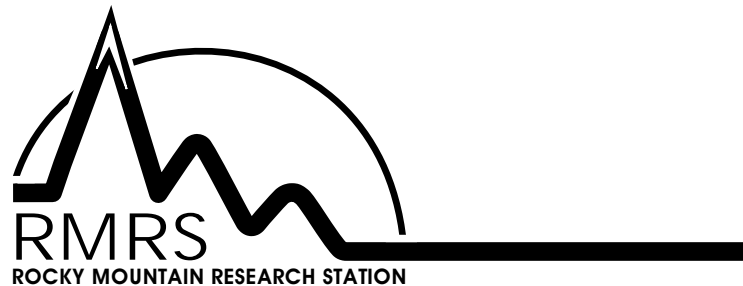
3. Study Procedures—Study procedures are always a compromise between the desired and the possible. One of the most important procedural compromises involved the valuation process. In reality, if a tract of land is to become part of a county’s tax base, a site-specific appraisal is conducted. This could involve several person-hours for a few-acre parcel. This study estimated the taxable value on over 75 million acres of entitlement lands, with parcel size ranging from a few acres to several million acres. Consequently, we had to adopt a type of “mass appraisal” process that relied on county records, average tax rates, and expert judgments. We do not understand how our less-indepth procedures affected results. However, there was no realistic alternative.

Earlier, reference was made to several questions asked BLM by the United States Congress, questions pertaining to tax equivalency and benefits and costs to local governments. In the fourth question, the BLM was asked to make “recommendations concerning the feasibility and desirability of amending the PILT Act and other laws under which payments are made to

local governments...in order to provide assistance to local governments that is more uniform and consistent and less subject to fluctuations” (U.S. Congress 1996). The research reported here was intended to address tax equivalency, benefits and costs to local governments, and to provide the BLM a basis for those recommendations.

References

- Clawson, Marion. 1972. America's land and its uses. Baltimore: The Johns Hopkins Press. 166 p.
- Clawson, Marion; Held, Burnell. 1957. The Federal lands: their use and management. Lincoln: University of Chicago Press. 501 p.
- Cochran, William G. 1977. Sampling techniques, 3rd ed. New York: John Wiley & Sons. 428 p.
- Committee on Tax Education and School Finance. 1950. Status and fiscal significance of Federal lands in the eleven Western States. Washington, DC: National Education Association of the United States. Quoted in Clawson and Held. 1957. The Federal lands: 316-21, 323.
- EBS Management Consultants Inc. 1968. Revenue sharing and payments in lieu of taxes on the public lands. Volume I-IV. PB195195. Washington DC.
- General Accounting Office (GAO). 1998. Land management agencies: revenue sharing payments to States and counties. Report to the Honorable Vic Fazio, House of Representatives. RCED-98-261. Washington DC: General Accounting Office. 72 p.
- Hall, Clifford R., Nelson, Alf Z., Williams, Ellis T. 1959. The difference between a forest yield tax and a forest severance tax. *Journal of Forestry*. 57(1): 38-39.
- Hibbard, Benjamin H. 1965. A history of the public land policies. Madison: University of Wisconsin Press. 579 p.
- Huebner, Anne E.; Hickman, Clifford A.; Kaiser, H. Fred. 1985. A tax equivalency study on National Forest System lands in the United States. FS 396. U.S. Department of Agriculture, Forest Service. 50 p.
- National Association of Counties (NACO). 1992. Memo to Senator Pete V. Domenici from Larry Naake, Executive Director of NACO in Response to BLM study: Comparison of PILT Payments to Real Property Tax Collection for Selected Tracts—FY 1991. National Association of Counties (NACO). 1998. Unpublished NACO administrative records from the State tax guide. On file at: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Missoula, MT.
- Public Land Law Review Commission (PLLRC). 1970. Tax immunity. Chapter 14 in: One third of the nation's land: A report to the President and to the Congress. Washington, DC. 239 p.
- Schmidt, Lara; Rasker, Ray. 1996. Federal land payment programs in the Columbia River Basin. Washington, DC: The Wilderness Society. 53 p.
- Schuster, Ervin G. 1995. PILT—its purpose and performance. *Journal of Forestry*. 93(8): 31-35.
- Schuster, Ervin G. 1996. Revenue sharing and resource management in Western States. *Western Journal of Applied Forestry*. 11(1): 20-24.
- Steel, Robert G. D.; Torrie, James H. 1980. Principles and procedures of statistics: a biometrical approach. New York: McGraw-Hill Book Company. 633 p.
- U.S. Comptroller General. 1979. Alternatives for achieving greater equities in Federal land payment programs: report to the Congress. Washington, DC: General Accounting Office. 59 p.
- U.S. Congress House Committee on Appropriations. 1996. Committee report—Department of the Interior and Related Agencies Appropriations Bill. 104th Cong., 1st sess. House Rpt. 104-173.
- U.S. Department of Agriculture, Forest Service (USDA-FS). 1999. An analysis of PILT-related payments and likely property tax liability of Federal resource management lands. Unpublished paper on file at: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Missoula, MT. 56 p. + appendix.
- U.S. Department of Commerce, Bureau of Census (USDC-BOC). 1997. Unpublished BOC records for the 1992 Census of Government. On file at: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Missoula, MT.
- U.S. Department of the Interior, Bureau of Land Management (USDI-BLM). 1997a. Payments in lieu of taxes—fiscal year 1997. Unpublished report. Washington, DC: Bureau of Land Management, U.S. Department of the Interior. 230 p.
- U.S. Department of the Interior, Bureau of Land Management (USDI-BLM). 1997b. Unpublished BLM administrative records,



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Realizing the Potential of PILT: How Combining SRS & PILT Can Benefit Counties, Target Economic Assistance, and Save Federal Dollars

Headwaters Economics | **UPDATED March 2013**

Summary

If the expired Secure Rural Schools and Community Self-Determination Act (SRS) is not reauthorized, many counties, especially rural ones, will face significant revenue shortfalls, harming local school, road, and county budgets, and limiting options for economic development.

We propose a single payment that combines SRS, revenue sharing, and Payments in Lieu of Taxes (PILT). This single payment approach has three goals: providing fair and predictable payments to counties, targeting payments to where they have the most economic benefit, and reducing the need for federal appropriations over time.

To achieve these goals, the proposal maintains the decoupling between county payments and volatile commodity receipts by extending federal appropriations, adjusting for economic performance and opportunity, and raising the population limit in PILT based on the presence of protected public lands. Taken together, these reforms help ensure that rural counties maintain sustainable payment levels, even if future appropriations decline.

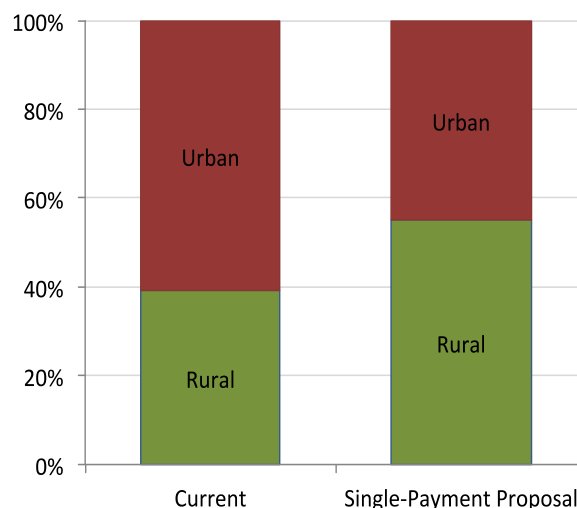
Three Reform Principles:

- Provide fair and stable compensation by maintaining the decoupling between payments and commodity receipts.
- Target payments to where they have more economic benefit.
- Reduce the cost to federal taxpayers.

How a Single Payment Might Work:

- Eliminate agency-based payments in favor of a single payment program.
- Adjust the PILT formula based on historic payments and economic needs, and raises the population limit based on acres of protected public lands.

Shifting Payments from Urban to Rural
Counties



Outcomes:

A single payment plan avoids lower and more uncertain payments that will occur if federal appropriations are not extended. It also targets payments using criteria and incentives that reflect the changing economic importance of public lands. In doing so, it provides room to increase public land revenue and lower appropriations while supporting collaborative efforts aimed at balancing timber supply with recreation, restoration, and conservation goals on public lands.

A National View—Shifting Payments to Rural Counties

With SRS expired and the current PILT formula in effect, the balance of payments will shift from rural counties to urban counties as total appropriations and payment levels decline. This is because SRS, particularly reforms in 2008, attempted to address economic needs and changing economic opportunities by directing higher payments to largely rural counties with relatively poor economic performance. By comparison, the PILT formula preferences counties with larger populations, which also tend to have higher levels of income and larger, more diverse economies.

This situation can be avoided by combining the reforms in the SRS formula with a single PILT payment. The single PILT payment would:

1. Combine SRS and revenue sharing payments into a new PILT formula.
2. Provide stable and predictable payments by maintaining the decoupling between county distributions and the funding source.
3. Benefit rural counties by raising the population cap based on acres of protected public lands.
4. Target payments to counties that have the greatest economic needs.

These reforms direct payments to rural counties where payments play the largest role in supporting rural economic opportunity. Table 1 compares the single payment proposal with current and estimated payments. The single payment proposal reflects the new PILT formula and a reduction of about \$45 million from FY 2011 payment amounts.

Table 1: National comparison of current SRS and PILT, estimated revenue sharing payments, and a Single Payment proposal.

	Metropolitan Share	Micropolitan Share	Rural Share	Total
Current (SRS and PILT FY2011)	\$214.9 28%	\$238.7 31%	\$317.4 41%	\$771.0
SRS Expires (Estimated Revenue Sharing and PILT FY2011)	\$158.0 30%	\$162.6 31%	\$202.2 39%	\$522.8
Single Payment	\$137.0 19%	\$213.7 30%	\$372.3 51%	\$726.0

The map that follows shows how county-by-county distributions of a single payment change from FY 2011 payment distributions. For example, payments are shifted away from metropolitan areas, including the Puget Sound metropolitan region in Washington, the Wasatch Front in Utah, and Phoenix and Tucson in Arizona to rural areas in central Idaho, southern Utah, and coastal Oregon, among others.

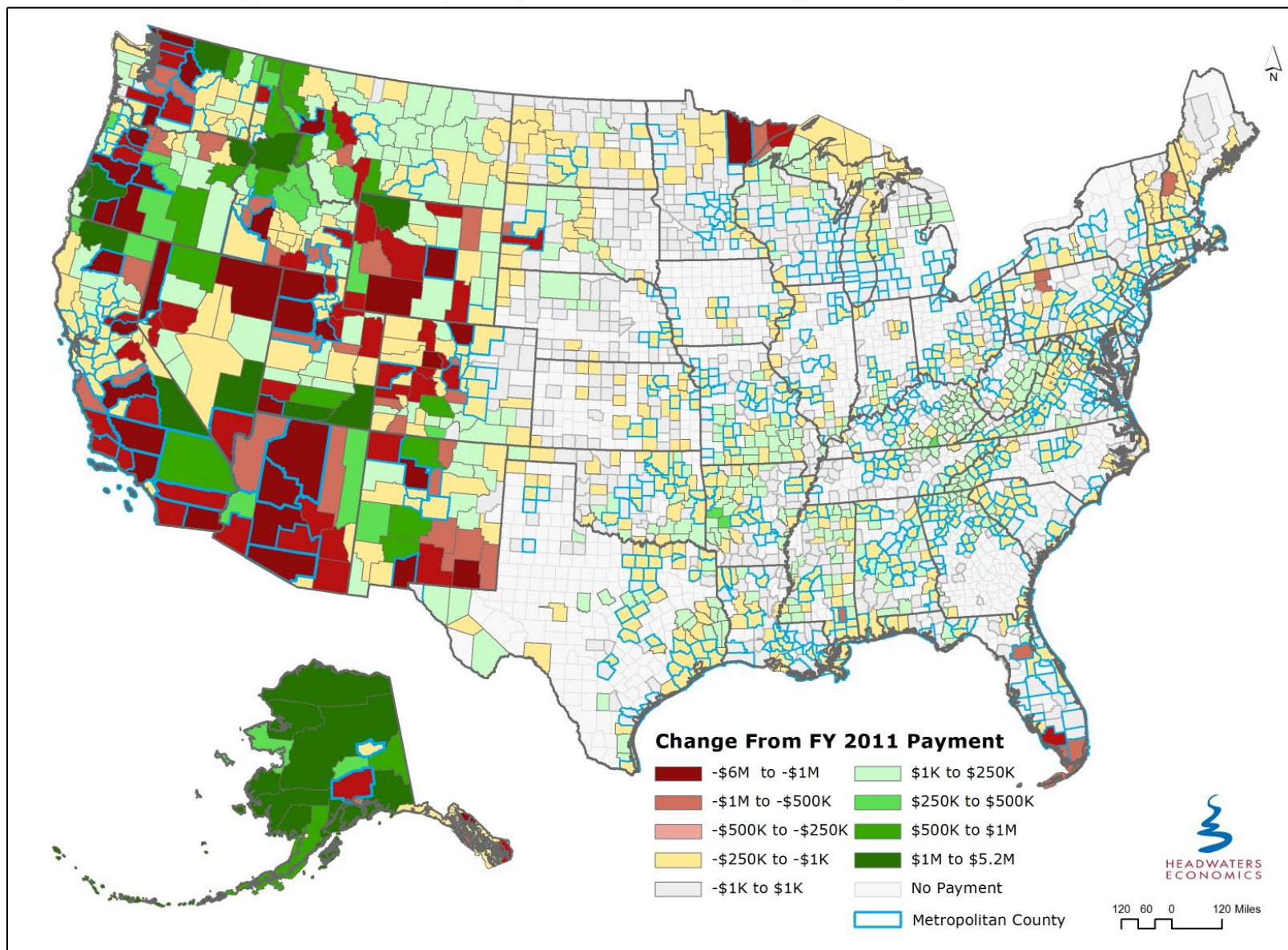
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All County Payments Research: See the Headwaters Economics web page for the latest research and analysis: <http://headwaterseconomics.org/land/county-payments-research/>.

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Change in County Payments with Single Payment Reforms



A White Paper by



County Payments, Jobs, and Forest Health

Ideas for Reforming the Secure Rural Schools and Community Self-Determination Act (SRS) and Payments in Lieu of Taxes (PILT)

December 2010

County Payments, Jobs, and Forest Health

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ABOUT HEADWATERS ECONOMICS

Headwaters Economics is an independent, nonprofit research group whose mission is to improve community development and land management decisions in the West.

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TABLE OF CONTENTS

	<u>Page</u>
EXECUTIVE SUMMARY	1
I. INTRODUCTION AND PURPOSE	3
II. WHY REFORM IDEAS ARE URGENTLY NEEDED	5
III. IMPORTANT CONTEXT: POLICY AND ECONOMIC BACKGROUND	7
IV. OPTIONS FOR REFORM OF COUNTY PAYMENTS	16
IDEA 1: END SRS TRANSITION PAYMENTS	20
IDEA 2: EXTEND SRS TRANSITION PAYMENTS	24
IDEA 3: EXPAND REVENUE SHARING PAYMENTS	26
IDEA 4: REFORM SRS PAYMENTS WITH A NEW DISTRIBUTION FORMULA	34
4 a: Give Preferential Assistance to Counties with the Greatest Need	34
4 b: Control Federal Costs by Reducing Development in Wildfire-Prone Areas	42
4 c: Link Payments to the Value of Ecosystem Services Provided by Federal Public Lands	48
4 d: Distribute Higher Payments to Counties with Protected Public Lands	52
IDEA 5: IMPLEMENT TAX EQUIVALENCY PAYMENTS	59
V. IDEAS FOR FUNDING FEDERAL LAND PAYMENTS	63
IDEA 1: RETURN TO COMMODITY RECEIPTS	65
IDEA 2: CONTINUE DIRECT APPROPRIATIONS	66
IDEA 3: UTILIZE IMPROVEMENTS TO FOREST HEALTH	67
IDEA 4: ENACT NEW FEES OR TAXES	69
IDEA 5: SELL PUBLIC LANDS	70
VI: CONCLUSIONS: THE DIFFICULTIES AND OPPORTUNITIES OF COUNTY PAYMENT REFORM	71
Appendix A: Federal Land Payment Programs Discussed	73
Appendix B: Methods Used to Calculate Economic Need	77
Appendix C: Methods Used to Estimate the Value of Land and Watershed Health	81
Appendix D: Payments in Lieu of Taxes (PILT)	92
Appendix E: Data Sources Used in Maps	93

LIST OF FIGURES

	<u>Page</u>
Figure 1	Key Developments in the History of County Payments 9
Figure 2	How Are Federal Lands Payments Distributed Today? 17
Figure 3	How Important Are Federal Land Payments? 18
Figure 4	How Will Payments Change if SRS Expires and Counties Receive Revenue Sharing Payments (25% Fund and O&C 50% Payments)? 21
Figure 5	The Value of Ecosystem Services Produced by Stewardship Contracts and Forest Legacy Roads and Trails Spending in FY 2009 29
Figure 6	How Will Forest Service Payments Change if SRS Expires and the 25% Fund is Reformed to Include the Value of Activities that Produce Ecosystem Service Products? 31
Figure 7	How Will Forest Service Payments Change if SRS Expires and the 25% Fund is Reformed to Include the Value of Ecosystem Service Products? 32
Figure 8	Counties Ranked by Economic Performance 37
Figure 9	County Economic Performance and Timber Dependency 38
Figure 10	SRS Title II Payments Compared to County Economic Performance 39
Figure 11	How Will SRS Payments Change if the SRS Formula Adjusts for Economic Performance? 40
Figure 12	How Will SRS Payments Change if the SRS Formula Adjusts for Ecosystem Service Values? 50
Figure 13	Where Are Protected Federal Public Lands? 56
Figure 14	Where Are Federal Public Lands That Have Potential to Gain Protected Status? 57
Figure 15	Economic Value of Forest Health Produced by Forest Stewardship and Restoration in FY 2009: Wildfire Risk Mitigation and Noxious Weed Control 90
Figure 16	Economic Value of Recreation Produced by Forest Stewardship and Restoration in FY 2009: Forest Road and Trail Construction and Maintenance 90
Figure 17	Economic Value of Watershed Health Produced by Forest Stewardship and Restoration in FY 2009: Riparian Restoration, Erosion Control, and Watershed Improvements 91
Figure 18	Economic Value of Carbon Sequestration Produced by Forest Stewardship and Restoration in FY 2009: Reforestation and Decommissioning Logging Roads 91

EXECUTIVE SUMMARY

County governments are compensated for the tax-exempt status of federal public lands within their boundaries. These payments are important, at times constituting a significant portion of county and school budgets. They also affect how public lands are managed, in turn influencing the kind of economic opportunities available to counties.

The current laws and appropriations that regulate how and the level at which counties should be compensated—the Secure Rural Schools and Community Self-Determination Act (SRS) and the appropriation for the Payments in Lieu of Taxes (PILT) program—are about to expire and Congress is looking for alternative ideas. This paper explores eight options:

1. Let SRS expire and return to commodity revenue sharing, where county payments are tied to timber harvest levels and other resource extraction on public lands.
2. Retain SRS with no substantive changes.
3. Let SRS expire and return to a revenue sharing system based on an expanded definition of “gross receipts” that counts the value of increases in forest health, such as watershed restoration and wildlife habitat improvements.
4. Retain SRS payments and change the distribution formula to give proportionately higher payments to counties based on:
 - a. Economic need and development potential.
 - b. Control of wildfire costs by curtaining home-building on fire-prone lands.
 - c. Increases in the value of forest health by public lands.
 - d. The proportion of federal lands in protected status.
5. Replace SRS, commodity revenue sharing, and PILT with a tax equivalency program, paying counties the equivalent of what they would be paid in taxes if the land were privately owned.

This paper explores the pros and cons of each option and evaluates each in terms of whether it would provide stable and predictable compensation to counties, create job opportunities in line with today’s economy, and improve forest health. Where possible, color-coded maps are provided to illustrate the concept and to show their impact on counties under each idea.

Over the past 100 years, Congress has reformed and expanded federal land payments to counties, with each change reflecting new economic conditions and changing values of public lands. Forest Service and Bureau of Land Management lands are valuable beyond their raw material (timber, minerals, grazing) contributions. Public lands provide scenic vistas and recreational opportunities and a number of “ecosystem services” such as clean water and wildlife habitat. These lands also attract people and their businesses that locate in adjacent communities because of the amenities and for quality of life reasons. Each idea was therefore also evaluated in terms of whether it would provide incentives for county governments to support activities such as stewardship contracting and ecological restoration that could create jobs and increase the wide variety of values (including commodity development) associated with public lands.

Over its current four-year authorization (FY 2008-2011), SRS will provide an annual average of \$433 million to counties and schools. PILT payments have cost taxpayers more than \$350 million in each of

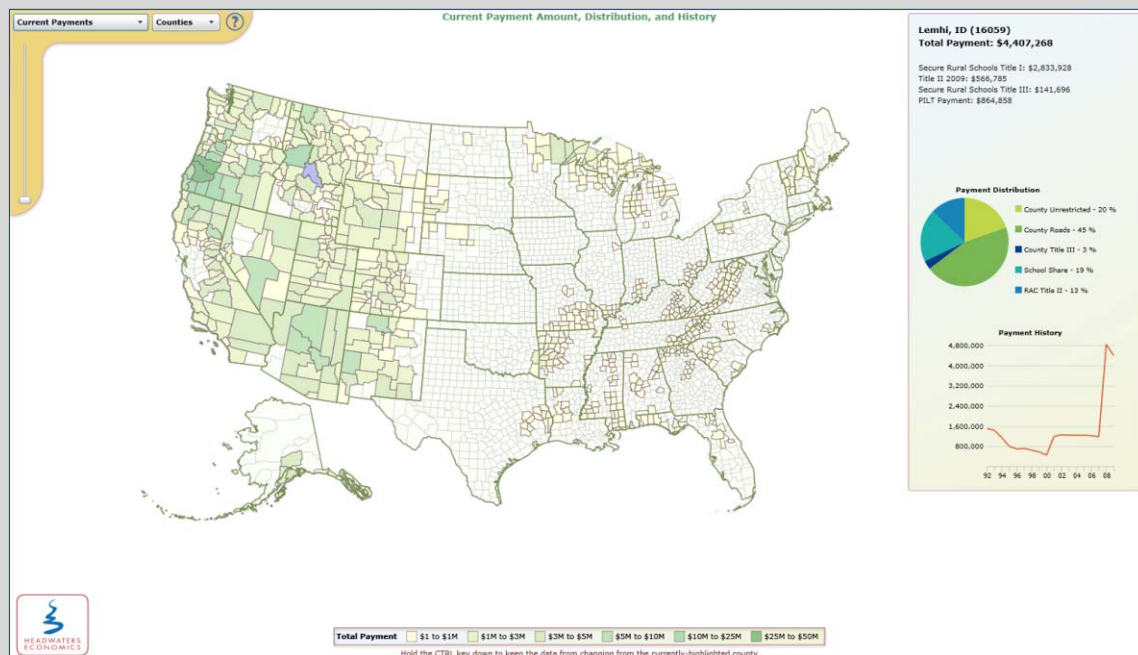
the last three years (FY 2008-2010). To extend these programs, or to replace them with new ideas, Congress will have to appropriate money from the general treasury or find other funding sources. Although not its main focus, this paper also offers five options for how Congress can fund future county payments.

Headwaters Economics presents the policy options for consideration and discussion in the spirit of determining how to best provide counties with stable and predictable compensation while reinforcing today's economic and land-health goals. We do not advocate for one idea over another and it is possible that several ideas could be implemented concurrently, especially if Congress seeks to strengthen current economic and policy goals already incorporated into the SRS formula.

Interactive Mapping Tool

Headwaters Economics has created an interactive mapping tool that displays key concepts and how a county (or state or Congressional district, where available) would be affected by ideas suggested in this paper.

Example



Whenever a concept or reform idea is available through the interactive web site, it is indicated as:



To see the effect on individual areas, see the interactive maps on:

www.headwaterseconomics.org/countypayments

I. INTRODUCTION AND PURPOSE

The purpose of this white paper is to offer ideas for how to reform the various ways counties are compensated for the tax-exempt status of federal lands. The cost of these programs, their impact, and their future viability are of great interest to Congress and county governments.

We hope the ideas and analysis in this paper help pave the way for a system that is fair to the taxpayer and local governments, and that leads to improvements in economic development and forest health. Although not the primary purpose of this paper, we also outline ideas for how to fund county payments programs.

Counties with Forest Service and Bureau of Land Management (BLM) lands have over the years been compensated in a number of different ways. Financial compensation provided through the various Forest Service programs, as well as the BLM's Oregon and California Railroad Lands (O&C) programs, and Payment in Lieu of Taxes (PILT) program, can constitute a significant portion of county budgets and can play an important role in determining how public lands are managed and the economic opportunities available to counties.

We review how and why these compensation programs have changed over time, examine the current payment systems, and offer alternative ideas for how these compensation programs can be distributed and funded. For each we discuss the pros and cons of the idea and offer an analysis (including color-coded maps) of which counties would come out ahead or behind when compared to current payment programs.

Key themes throughout the paper are incentives and outcomes. Properly designed compensation programs should provide predictable and stable funding to county governments. They should also create economic opportunity, and improve forest health.

The timing is right to present new ideas and to contrast these with lessons learned from current and past county compensation systems. One reason the timing is right is that if the Secure Rural Schools and Community Self-Determination Act (SRS) is not reauthorized, payments to counties will revert back to commodity sharing, such as the Forest Service's 25% Fund, which links payments to levels of commodity development on public lands. This creates an incentive for local governments to pressure Forest Service managers towards increasingly higher levels of timber harvests. It also makes the payments more volatile and less predictable as timber harvests decline or ebb and flow with market conditions. In 2000, the SRS law severed the link between commodity extraction and county payments. However, SRS is not permanently authorized and future funding is uncertain.

The pending sunset of SRS is generating two broad responses: either pressure to extend SRS payments or fresh calls to increase logging and sell public lands to fund payments. This paper discusses a possible third response—defining a new model for county payments that offers counties stable and predictable compensation while reinforcing today's economic opportunities and improving forest health.

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The next section offers important insight into why reform ideas are needed. A discussion of the history of various payments programs and changes in the economy and public values follows, setting the stage for an analysis of eight ideas for reforming the county payments systems.

What is the Secure Rural Schools and Community Self-Determination Act (SRS)?

Congress passed SRS in 2000 to provide optional assistance to states and counties whose revenue sharing payments (Forest Service 25% Fund and BLM O&C 50% payments) declined from the 1980s through the 1990s. SRS guarantees each eligible county a payment equal to the highest three years of revenue sharing payments between 1986 and 1999. SRS also added two new titles to help counties diversify their economies beyond commodity extraction and help pay for services directly related to public lands, including emergency services and community wildfire preparedness.

SRS is organized into three titles:

Title I: *Optional Payments for State and Counties.* Title I payments replace revenue sharing payments and must be used to fund county roads and schools.

Title II: *Funding for Special Projects on Public Land.* Newly formed Resource Advisory Committees (RACs) make recommendations for special projects on public lands, including infrastructure projects, restoration, and stewardship activities. Title II dollars are intended to create new kinds of forest jobs in timber dependent communities, helping them diversify job opportunities and improve forest health.

Title III: *County Funding for Special Projects.* Title III funds county projects related to wildfire preparedness (such as community wildfire protection plans) and reimburse counties for costs associated with emergency services on public lands.

SRS payments from the Forest Service and the BLM totaled \$562 million in FY2009. Title I made up 85 percent of the total payment (\$478 million), Title II made up 9 percent (\$53 million), and Title III made up 5 percent (\$32 million). SRS payments are set to transition down from a high of \$623 million in FY 2008 to an estimated low of \$378 million in 2011.

Lands eligible for SRS payments include all Forest Service lands and the Oregon and California lands (O&C) managed by the BLM in Oregon. The total SRS payment in FY2009 includes payments made to counties as compensation for Forest Service and BLM O&C lands. Of the total SRS payment in FY2009, 17 percent (\$95 million) was made to compensate 18 counties in Oregon for the BLM O&C lands in their jurisdictions. The rest of the SRS payment (83 percent, \$467 million) was made to counties as compensation for Forest Service lands within their jurisdictions.

II. WHY REFORM IDEAS ARE URGENTLY NEEDED

County payments offer perhaps the most important policy opportunity to achieve today's economic and forest health goals for federally managed public lands.

During the past century, Congress has shown a commitment to providing stable and predictable compensation to counties for non-taxable federal lands. At the same time, federal land payments have a significant bearing on how public lands are managed and the kinds of economic opportunities available to counties. Congress has also demonstrated a continuing desire to adapt county payments to changing economic conditions and forest health management goals.

The passage of PILT in 1976 and the SRS in 2000 both ensured higher and more consistent compensation. The SRS Act also decoupled payments from commodity receipts, dampening pressure for logging to pay for local government services, while Title II of SRS provided new resources for stewardship and restoration projects. In 2008, Congress added new economic needs criteria to SRS, providing proportionally higher payments to counties with lower per-capita incomes.

The SRS program will sunset in FY 2011, however, and PILT funding is scheduled to end after FY 2012. Failing to reauthorize SRS will result in lower payments to many counties. In addition, county payments will revert to a revenue sharing model that has historically put pressure on the agencies to manage forests for commodity production over stewardship, restoration, and conservation goals.

While there is little support or desire to allow federal land payments to end entirely, reauthorization of SRS is uncertain for at least two reasons:

1. The SRS program was not intended as a long-term entitlement.¹
2. Concern over tight federal budgets and increased deficits.

Over its current four-year authorization (FY 2008-2011), SRS will provide an annual average of \$433 million to counties and schools. PILT payments have cost taxpayers more than \$350 million in each of the last three years (FY 2008-2010). Current proposals to extend SRS either offer little advice on where to secure future funding or propose to fund payments through increased logging or by selling off public lands.

For new county payment reform ideas to be successful they must achieve the goals of providing predictable and stable payments while supporting public land management goals and improving forest health.

Equally important, county payments should reflect broader economic trends. Today, with some important exceptions, timber-related industries have been shrinking and truly timber-dependent communities are the exception rather than the rule across the country. This is partly due to changes in the industry, such as the decline in demand for wood products and increased mechanization, but also is largely due to diversification and growth away from commodity production, with the bulk of economic activity now coming from services-related sectors.

¹ It was meant to help “transition” counties from dependence on public land commodity production, and to give counties time to develop other sources of funding in light of declining timber receipts. Title II of SRS was intended to aid this transition by creating new jobs not related to commodity production, i.e., economic activity that would lead to growth and a more diverse revenue stream.

As the economy evolves, the public view of the economic contribution of public lands also changes. For the more diversified counties, the economic value of public lands is becoming less tied to the extraction of raw materials, and more to their ability to attract people—businesses, entrepreneurs, and retirees—who want to live near public lands for recreation and quality of life reasons.² To meet these changing circumstances future county payments must be flexible enough encompass timber production while also enhancing the value of public forests and creating new economic opportunities, especially for rural communities.

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We begin this white paper with a policy history of county payments, pointing to the key programs and ideas that led to the current system. We also discuss the economic transformation that has taken place in rural America, and highlight current economic opportunities around public lands.

Next, we highlight eight options for reforming how counties are compensated for the tax-exempt status of federal lands. We describe how each idea will work, how it will affect counties, and whether the idea contributes to predictable and stable payments, economic opportunity, and forest health. For each idea we also show how the funding formula would change, with a simplified version of the formula in the body of the paper, with more detailed descriptions offered in the appendices.

Headwaters Economics presents the policy options for consideration and discussion in the spirit of determining how to best reform county payments. It is possible that several ideas will be implemented concurrently, especially if Congress seeks to strengthen current economic and policy goals, such as fairness for counties along with economic or social needs and improved forest health.

Finally, the paper briefly summarizes five funding alternatives to help offset the cost of the federal lands payment program, ranging from continued congressional appropriations to potential new revenue streams.

² Johnson, J. D., R. Rasker, et al. (1995). "The role of economic and quality of life values in rural business location." *Journal of Rural Studies* 11(4): 405-416. Beyers, W. and D. Lindahl (1996). "Lone eagles and high fliers in the rural producer services." *Rural Development Perspectives* 11: 2-10. Mathur, V. K., S. H. Stein, et al. (2005). "Do amenities matter in attracting knowledge workers for regional economic development?*" *Papers in Regional Science* 84(2): 251-269. McGranahan, D. A. (1999). "Natural Amenities Drive Rural Population Change." USDA ERS. Washington, D.C. Haas, W. H., W. J. Serow, et al. (2002). "The Baby Boom, Amenity Retirement Migration, and Retirement Communities: Will the Golden Age of Retirement Continue?" *Research on Aging* 24(1): 150-164.

III. IMPORTANT CONTEXT: POLICY AND ECONOMIC BACKGROUND

In this section we show that compensation for the tax-exempt status of federal lands has been flexible over time, changing to reflect changing values toward public lands and economic conditions. For example, the current SRS law offers various ways to reward stewardship and restoration activities, as well as wildfire preparedness and education. SRS also distributes a proportionally higher share of payments going to counties with lower per capita income. These elements of the current law mean that Congress has already considered and approved modifying county payments so that they reward activities that improve forest health, create jobs, and recognize the need to assist some counties more than others.

Key Developments in the History of County Payments

Congress Has Repeatedly Reformed County Payments to Respond to Changing Needs

The history of county payments is summarized in Figure 1, which shows the fluctuating value of federal reimbursements to counties along with the dates of landmark reforms. These reforms, made by Congress to respond to changing economic and political conditions, demonstrate the long-term flexibility of the program. Today, with the pending sunset of SRS in 2011 and the need to re-appropriate PILT after 2012, Congress again is poised to consider and possibly implement reforms to county payments that reflect changing public values and the opportunity to promote economic and forest health.

For a detailed explanation of the county payment programs addressed in this paper, see Appendix A.

Payments Were Originally Linked to Commodity Receipts

The policy origin of Forest Service payments to counties is clear: as compensation for public ownership of the Forest Reserves, the federal government initiated payments to counties in lieu of paying property taxes.³ These payments were funded from commercial receipts generated on public lands, and counties could use the payments to fund roads and schools.⁴

The policy goals behind the revenue sharing payments are less clear. According to Ross Gorte at the Congressional Research Service, there is no discussion in the federal register as to why payments were funded with commodity receipts, or why the level was set initially at 10 percent in 1906 and raised to 25 percent in 2008. Gorte points out that the government did not have many other revenue options—the federal income tax was not initiated until 1913.⁵ Whatever the reason, it is likely that receipt-based payments were an easy choice as linking payments to commodity extraction reinforced federal policy at the time to use federal land resources to grow the nation's economy.⁶

³ Act of May 23, 1908, Pub. L. No. 60-136 (the Twenty-Five Percent Payment).

⁴ Federal legislation mandated payments fund county roads and schools, but left to states how to allocate these funds between these two services. See Congressional Research Service Memorandum, Forest Service Revenue-Sharing Payments: Distribution System. November 19, 1999. Ross Gorte. (Available from Headwaters Economics).

⁵ Gorte, Ross W. Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000. Congressional Research Service (CRS-R41303). June 2010. Washington, D.C.

⁶ Wilkinson, Charles. 1992. *Crossing the Next Meridian: Land, Water, and the Future of the West*. Island Press, Washington, D.C.

In 1937, the Bureau of Land Management (BLM) began sharing commercial receipts generated on the Oregon and California Railroad Grant Lands (O&C) with counties and schools along the same model as the Forest Service.⁷

The value of initial Forest Service and BLM O&C revenue sharing payments was insignificant to most counties for the first 30 years.⁸ From 1908 to 1942, payments, in real terms, averaged less than \$10 million nation-wide. After WWII, when commodities from the National Forests and BLM O&C lands helped to fuel the nation's housing boom, revenue sharing payments provided significant funding to counties. From 1945 to 1980, payments averaged \$278 million, reaching a high of \$792 million in 1977.

Reforms Were Made to Increase Stability and Predictability

After the war, many counties, particularly in the Pacific Northwest, grew to depend on timber for jobs and income, and payments to counties supported significant portions of local school and county budgets. As payments became more important, the use of commodity receipts as a funding source started to show its weaknesses. Volatility in commodity extraction in the 1960s and 1970s made it difficult for local government to plan for and provide quality public services consistently on an annual basis. Concerns about stability and predictability eventually led Congress, in 1976, to pass Payments in Lieu of Taxes (PILT) in addition to the existing revenue sharing payments.

The PILT formula establishes a ceiling (or maximum) payment for each county based on the number of eligible federal acres in the county and a maximum per-acre payment. The ceiling payment is reduced by the amount of revenue sharing payments the county received in the previous year. This formula guarantees that if a county's revenue sharing payments decline, PILT will increase by a proportional amount in the next year (and vice-versa; if revenue sharing payments increase PILT declines in the following year).⁹

The PILT authorization is capped in some counties by a population threshold, and for these counties, the PILT formula will not compensate for declining revenue sharing payments (the PILT payment is already at the ceiling and cannot rise). (For an explanation of the relationship between SRS and PILT, see Appendix D).

⁷ The main difference is that the county government share of payments is not restricted to roads but can be used for any governmental purpose. See: O&C Lands Act, Pub. L. No. 74-405, tit. II(a) (1937). .

⁸Revenue sharing payments are estimated from historic timber cut and sold reports from the Forest Service at the national level. Source: USDA Forest Service.

⁹ Schuster, Ervin G. 1995. "PILT--its purpose and performance." *Journal of Forestry*. 93(8):31-35 and Corn, M. Lynne. 2008. *PILT (Payments in Lieu of Taxes): Somewhat Simplified*. Congressional Research Service (CRS) Report RL-31392.

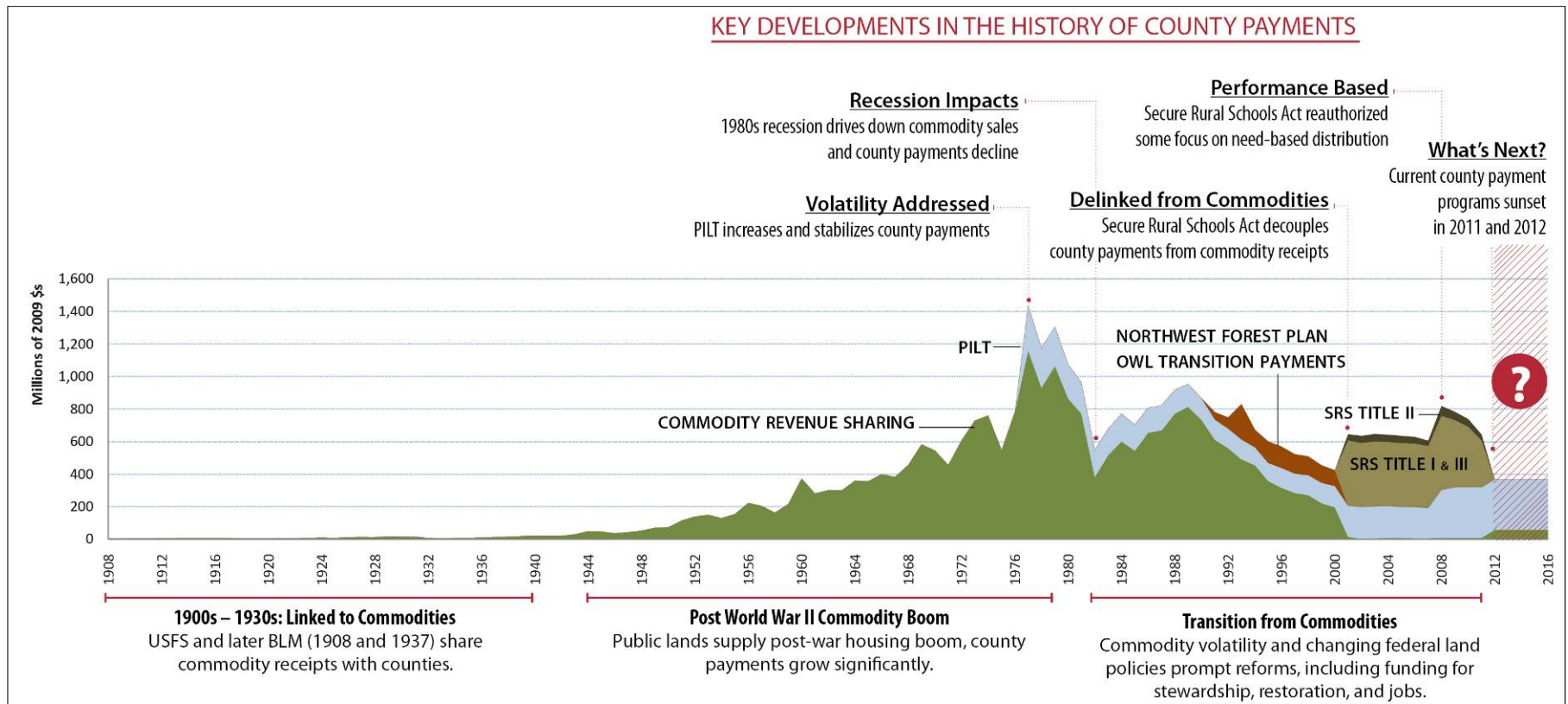


Figure 1
Key Developments in the History of County Payments.

Federal revenue sharing payments to counties and schools from the Forest Service and the BLM O&C lands were quite small, in real terms, until after the WWII, when the economic and housing boom greatly increased demand for timber from federal lands. As payments became important, payment volatility became a major concern, eventually resulting in the passage of PILT in 1976, which increased and stabilized payments. Subsequently, economic factors and changing attitudes about public land management led to steep declines in revenue sharing payments. “Transition-payments” began in the Pacific Northwest with the passage of the Northwest Forest Plan, and were extended to the rest of the country in 2001 by the Secure Rural Schools and Community Self-Determination Act (SRS). SRS also ushered in new funding intended to create jobs and improve forest health (Title II and Title III). Further reforms to SRS in 2008 weighted payments in part on the relative economic needs, with proportionately higher payments going to counties with lower per capita income. The pending sunset of SRS in 2011 and the need to re-appropriate PILT after 2012 is creating uncertainty about the future of county payments.

Payments Have Been Decoupled from Commodity Receipts

More recently, changing economic conditions along with new goals for public land management slowed the pace of logging on federal land, lowering revenue sharing payments to counties by more than 90 percent in some areas.¹⁰ The Northwest Forest Plan that set new management goals for forests in the Pacific Northwest included the first “transition payments” to counties—a recognition that changing management goals that reduce resource extraction also reduce local government payments. The so-called “spotted owl” payments decoupled the link between extraction and county compensation by guaranteeing a stable, albeit declining, annual payment.

The decline in timber receipts felt most acutely in the Pacific Northwest was also occurring across the rest of the National Forests. In 2000, Congress passed the Secure Rural Schools and Community Self-Determination Act (SRS) that effectively extended transition payments to the rest of the country.¹¹ Initially authorized for six years, SRS provided optional payments equal to 85 percent of the highest three years of revenue sharing payments between 1986 and 1999.¹²

In SRS, Congress ended the reliance of most counties on commodity receipt-based payments that were unlikely to return to historic highs. Decoupling payments from commodity receipts reduced the importance of producing commodities in order to generate revenue for county payments. It also opened the possibility for new collaborative efforts to address restoration, stewardship, and conservation goals on public lands.

- Title I of SRS covers the payments delivered to counties and schools. In FY2009 Title I payments totaled \$562 million nation-wide, representing 85 percent of total payments.

SRS Promotes Economic Opportunity and Forest Health

In Title II of SRS, Congress also provided public land managers and communities with limited but important resources for collaboration and on-the-ground work such as stewardship and restoration projects that create jobs and improve forest health (counties that receive more than \$100,000 from SRS must allocate 15-to-20% between Title II and Title III).

Title II dollars are retained by the federal government and spent on public lands activities following the recommendations of Resource Advisory Committees (RACs). Title II can fund infrastructure, restoration, stewardship, and other projects on public lands. Title II is the first time the county payments program set aside funding for the direct purpose of creating economic opportunities in counties that have public lands.

¹⁰ *Ibid.*, Gorte.

¹¹ Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393. Payment information is available from the Forest Service website at <http://www.fs.fed.us/srs/> (last accessed 11/22/10).

¹² Under Section 102(a) and 103(a), states eligible to receive Forest Service and/or BLM revenue sharing payments can elect to receive either (1) the Twenty-Five Percent (Forest Service) or Fifty Percent (BLM) Payment or (2) the “full payment amount,” calculated as the average of the three highest yearly revenue sharing payments from FY 1986 to FY 1999. The SRS payment was tied to the average of the three highest historical payments to each *state* as a means of further reducing the volatility of timber receipts at the county level. Under the 2000 version of the SRS Act, funding for payments to states and counties is derived from revenues, fees, penalties, or miscellaneous receipts received by the federal government from activities of the Forest Service on National Forest land, and the Bureau of Land Management on revested and reconveyed grant lands (lands returned to federal ownership). Pub. L. No. 106-393, §§ 102(b)(3), 103(b)(2). To the extent of any shortfall, payments are derived from Treasury funds not otherwise appropriated.

The funds are also used to improve forest health, aiding in transitioning counties away from dependence on commodities by creating new jobs in restoration and forest stewardship.

- In FY2009 Title II payments totaled \$53 million nation-wide, or just 9 percent of total SRS payments. Title II shows potential, but funding levels and other barriers have limited the scale and influence of Title II projects.

Wildfire Preparedness, Improving Public Safety, and Reducing Future Taxpayer Costs

Title III of SRS represents another important reform: it makes explicit for the first time the links between federal lands and the direct demands those lands create for county services and wildland fire safety and costs. Title III funds can be used on special county projects including reimbursement for emergency services provided on federal lands and funding for community fire plans and fire-wise activities.

- In FY2009 Title III payments totaled \$32 million nation-wide, or 5 percent of total SRS payments.

One other important reform to SRS included Title III payments, which now explicitly link public lands and demands for county services, particularly private development and wildland fire safety and costs.

The abnormally harsh fire season in 2000, described as the worst fire season in the United States since 1910, likely influenced Congress to include funding for wildfire preparedness in Title III.¹³ Whereas the 2000 legislation provided funding for projects in six broad areas, the 2008 reauthorization limits funding to projects in three specific areas, two of which are concerned with wildfire preparedness. Funds can be used to:

1. Implement the Firewise Communities program, which seeks to provide education and assistance to homeowners to help them guard against personal and property damage from wildfires.
2. Develop community wildfire protection plans in coordination with the Secretary of Agriculture or Interior.
3. Reimburse counties for search and rescue and other emergency services.

While Titles II and III of SRS provide funding for stewardship, restoration, collaborative efforts and wildfire preparedness, the funding levels have been small, with the bulk of the payments going to Title I (85 percent of payments in FY 2009).

¹³ U.S. Fire Administration, 2000 Wildland Fire Season, <http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i2-508.pdf> (last accessed 3/16/2010).

SRS Reforms in 2008 Adjust Payments Based on Economic Need

Congress made important reforms in 2008 that adjust the SRS distribution formula based on the per-capita personal income in each eligible county. The goal was to direct relatively higher payments to counties with low per-capita personal income who needed assistance the most. Reforming the distribution formula based on economic need reflects a desire to make payments to counties that need them most.

Two other mechanisms were incorporated into the 2008 reauthorization to achieve a more equitable distribution of payments nation-wide, based on more general concerns about the distribution of payments: the SRS “base share” formula was reformed to include the total acres of federal lands along with historic revenue sharing payments, and certain “covered states” – California, Louisiana, Oregon, Pennsylvania, South Carolina, South Dakota, Texas and Washington – are given “transition payments” which are pegged to the sums paid to states and counties in 2006 under the SRS Act as then implemented.¹⁴

The 2008 reauthorization of SRS provided a significant temporary increase in transition funding, making payments close to historic highs (on a national level, only payments in the years 1977 to 1980 exceeded the FY 2009 payment levels in real terms). In essence, the two latter reforms (not based on economic need) had the effect of distributing the increased appropriation more broadly to all states eligible to receive payments.¹⁵

How the Current SRS Payment Formula Works

The existing SRS formula is described in an eight-page technical document.¹⁶ At its simplest, payments are based on two factors: a base payment considering historic timber receipts and acres of Forest Service and BLM land which is adjusted by per capita personal income.

$$\text{County Payment} = \text{Base Payment} / \text{Per Capita Income Adjustment}.$$

The formula’s complexity derives mainly from the base payment calculation. Each county’s payment is based partially on historic timber receipts and partially on the number of acres of federal land within the county’s boundaries. A county’s payment is also dependent on how many of their peers opt into the SRS payment formula. The fewer counties that elect to receive SRS payments (opting to receive their revenue sharing payment instead), the higher the SRS payment to each county will be, and vice-versa.

The PILT funding formula is slightly less complex, but still difficult to predict from year to year. In addition, Congress has not always fully funded the PILT program. The most important aspect of the PILT formula is how it interacts with SRS payments. The formula authorizes a maximum payment based on the number eligible federal acres within each county. This full payment is reduced by the amount of revenue sharing payments from the previous year and is subject to a population cap. In other words, PILT will make up some or all of the difference if Forest Service revenue sharing payments decline. A minimum base payment covers counties whose entitlement falls below a per-acre threshold after revenue sharing payments are subtracted and the population cap is determined.

¹⁴ U.S. Forest Service, Title I-Secure Payments for State and Counties Containing Federal Land. Pub. L. No. 110-343, tit.VI, § 103. <http://www.fs.fed.us/srs/Title-I.shtml> (last accessed 11/22/10).

¹⁵ It is unclear from the legislative history why certain states were selected to be “covered states,” but concerns over equitable distribution of payments likely played a role in California, Oregon, and Washington being included. A political motivation also lay behind expanding the number of states receiving higher SRS payments as it may increase the likelihood of future authorizations.

¹⁶ The formula is described in a technical document titled “Calculating Payments” on the Secure Rural Schools website: <http://www.fs.fed.us/srs/docs/calculations.pdf> (last accessed 11/22/10).

The Current Policy Opportunity

SRS is authorized through 2011 and PILT funding is uncertain after 2012. If SRS fails to be reauthorized, counties will again receive a revenue sharing payment based on the value of commodity receipts. This will occur because the Forest Service 25% Fund and BLM O&C revenue sharing payments are permanently authorized and have a dedicated funding source in the form of commodity receipts.

The sunset of SRS will have several consequences. For most counties, revenue sharing payments will be lower than current SRS transition payments.¹⁷ In addition, the sunset of SRS will eliminate Title II funding for restoration and stewardship projects, while linking future funding to commodity receipts will provide incentive for increased timber harvests rather than other forest health activities on public lands.¹⁸

Importantly, while decreased commodity payments will be partially or fully offset by PILT payments, there is a lag of one-to-two years before counties will see higher PILT payments.

Some states also include the school share of SRS payments in state equalization funding formulas, distribution the benefits across schools statewide, but also attenuating the losses.¹⁹ As the deadline for reauthorization approaches, reform ideas are starting to emerge as counties and states push for reauthorization and look for funding. Later sections of this paper more fully explore the policy

¹⁷ Several efforts have been made to estimate the impact of SRS payments expiring. For example, Oregon's governor established a Task Force in 2007 to study the impact on services provided by counties and the state in the eventuality that SRS is not reauthorized (at the time, the Task Force was studying the potential impact before the SRS 2008 reauthorization). The Task Force found that the 33 counties that receive SRS payments faced a loss of \$210 million annually, equal to 20 % of discretionary general fund or road fund budgets in the 24 hardest hit counties. See: Gaid, Dawn Marie, 2009. Changing Federal County Payments and Rural Oregon Counties: Analysis of Policy Impacts and Responses from Loss of Secure Rural Schools Funding in Selected Oregon Counties. Working Paper 09-04, Oregon State University Rural Studies Program, Corvallis.

¹⁸ The potential sunset of SRS already has prompted some counties to take action to support increased timber harvests. The Forest Service uses a seven-year rolling average used to calculate revenue sharing payments and what happens this year will affect a county's revenue sharing payment in 2012 if SRS is not reauthorized or funds are not appropriated. In Montana, for example, counties like Beaverhead are opposing legislation that Senator Jon Tester has proposed because it will undertake commercial harvests through stewardship contracts, which are not counted towards a county's rolling average of commodity revenues.

¹⁸ See Nick Gevock. Montanan's Views Differ Sharply. Mtstandard.com. 12/17/2009. http://www.mtstandard.com/news/state-and-regional/article_dca3bdf0-5428-5a85-8822-28aae9a8f2e8.html and Beaverhead County Commissioners Guest Opinion, "Commissioners Express Concerns Over Forest Act" Mtstandard.com. 10/14/2009. http://www.mtstandard.com/news/opinion/article_fa37da46-4494-5a68-bc16-567520862e53.html (last accessed 11/22/10).

¹⁹ In California, where SRS payments are not included in state equalization formulas, affected school districts would lose the entire amount of the reduction in SRS payments. In Oregon, where SRS payments for schools go to the state and are then redistributed to local school districts along with all other revenue for schools based on a state equalization formula, affected school districts would be insulated from most of the decline in SRS payments. To put the case of funding for Oregon schools in perspective, it is useful to know that SRS payments make up a small portion of the Oregon school budget and that SRS payments are currently paid on a declining annual basis. In FY 2009, SRS payments to schools in Oregon amounted to \$25 million, which was about 1% of the \$3 billion State School Fund budget for 2009-2010. Because of declining SRS payments, this revenue will return less than \$15 million to Oregon schools by FY 2011. If SRS is not renewed and federal land payments revert to revenue sharing based on commodity production, we estimate Oregon's schools would receive between \$4 and \$5 million—or about 0.13% of the current State School Fund. The important point here is that schools that have federal lands will not experience significant declines in funding because of changes in Forest Service payments..

consequences of ending or extending the SRS program, while also introducing a number of new reform ideas that will change incentives to focus on current economic opportunities and forest health goals.

The Changing Economic Role of Public Lands

Economic Transformation Away from Commodities

In the last thirty years rural counties, where county payments are relatively important, have seen a dramatic shift in their economy and many areas are now significantly less reliant on timber harvesting and related wood products manufacturing to supply jobs and generate personal income. In other words, the economy of the West has changed significantly since revenue sharing programs were developed.

To get a sense of how significant this transformation has been, consider that commodity-related sectors that include farming, ranching, forestry, lumber and wood products manufacturing, hard rock mining, and fossil fuel development created less than 3 percent of all new jobs from 1990 to 2008 in the West. By 2008, these sectors combined were roughly 3 percent of all jobs in the West and 7 percent of all jobs in the non-metropolitan, or rural, West.²⁰

Recent trends for timber-related employment (industries involved in the growing and harvesting of trees; sawmills and paper mills; and wood products manufacturing) are more severe. From 1998 to 2007, private timber-related jobs in the non-metropolitan West shrank from 77,862 to 63,459, an 18.5 percent decline. By 2007, on the eve of the most recent recession, which exacerbated losses, timber-related employment was 2.5 percent of all private wage and salary jobs and 0.8 percent of all proprietors (the self-employed).²¹

By comparison, from 1998 to 2007, non-timber sectors added over 400,000 new jobs in the nonmetropolitan West, a 20.5 percent increase. Most of these jobs were in services-related sectors and more than half of this growth came from relatively high-wage professional and technical services and health care sectors.²² Along with this growth and diversification in employment, the tax base also has grown and diversified.

The impact of these economic transformations has been beneficial for some counties, but less so for others. In public lands counties where there is also an educated workforce and convenient transportation connections to major population centers many have been able to diversify and promote the scenery, recreational opportunities and other, “non-commodity” values of public lands as a way to attract entrepreneurs, retirees, and other migrants.²³ Yet for others, particularly in the rural, isolated counties,

²⁰ U.S. Department of Commerce. 2010. Bureau of Economic Analysis, Regional Economic Information System, Washington, D.C. The West is defined as the 11 continental western states.

²¹ U.S. Department of Commerce. 2010. Census Bureau, County Business Patterns and Non-employer Statistics, Washington, D.C.

²² U.S. Department of Commerce. 2010. Census Bureau, County Business Patterns, and Bureau of Economic Analysis, Regional Economic Information System, Washington, D.C.

²³ McGranahan, D.A., et al. (2010). “The Rural Growth Trifecta: Outdoor Amenities, Creative Class and Entrepreneurial Context.” *Journal of Economic Geography* pp 1-29. Lorah, P., R. Southwick, et al. (2003). “Environmental Protection, Population Change, and Economic Development in the Rural Western United States.” *Population and Environment* 24(3): 255-272. McGranahan, D. A. (1999). “Natural Amenities Drive Rural Population Change.” E. R. S. U.S. Department of Agriculture. Washington, D.C. Haas, W. H., W. J. Serow, et al. (2002). “The Baby Boom, Amenity Retirement Migration, and Retirement Communities: Will the Golden Age of Retirement Continue?” *Research on Aging* 24(1): 150-164. Johnson, J. D., R. Rasker, et al. (1995). “The role of economic and quality of life values in rural business location.” *Journal of Rural Studies* 11(4): 405-416. Beyers, W.

this transformation has not been as successful. Many timber-dependent counties were among the hardest hit during the most recent recession, and had some of the highest unemployment rates in the country.

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The history of the various county payments systems, the evolution that has taken place in the economy, and the change in the way the public values Forest Service and BLM lands all have a bearing on options the options Congress has available for reforming how county governments are compensated for the tax-exempt status of federal public lands within their boundaries. There are number of exciting opportunities.

The next section offers—and analyzes the effect of—eight ideas. This is followed by a discussion of five ways in which Congress could fund county payments.

and D. Lindahl (1996). “Lone eagles and high fliers in the rural producer services.” *Rural Development Perspectives* 11: 2-10. Mathur, V. K., S. H. Stein, et al. (2005). “Do amenities matter in attracting knowledge workers for regional economic development?*.” *Papers in Regional Science*, 84(2): 251-269. McGranahan, D. A. (1999). “Natural Amenities Drive Rural Population Change.” USDA ERS. Washington, D.C. Haas, W. H., W. J. Serow, et al. (2002). “The Baby Boom, Amenity Retirement Migration, and Retirement Communities: Will the Golden Age of Retirement Continue?” *Research on Aging*, 24(1): 150-164.

IV. OPTIONS FOR REFORM OF COUNTY PAYMENTS

The previous section showed that, through the SRS law, Congress has recognized the importance of rewarding activities that improve forest health, create jobs, and recognize the need to assist some counties more than others.

In this section we offer eight ideas for reforming how counties can be compensated for the tax-exempt status of federal lands. The pros and cons of each idea are evaluated, based on three criteria:

1. Provide stable and predictable compensation to counties;
2. Create job opportunities in line with today's economy; and
3. Improve forest health.

For each idea we explain how it would work, how the payment distribution formula would change, and the pros and cons of the idea. Where possible, we show through color-coded maps how counties would be affected by the proposed idea.

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Two figures help put the proposed reform ideas into perspective:

Figure 2 (next page) shows how current federal land payments (FY 2009) from the Forest Service, BLM, and PILT are distributed to state and local governments across the U.S. (The darker the green, the higher the payment to the county).

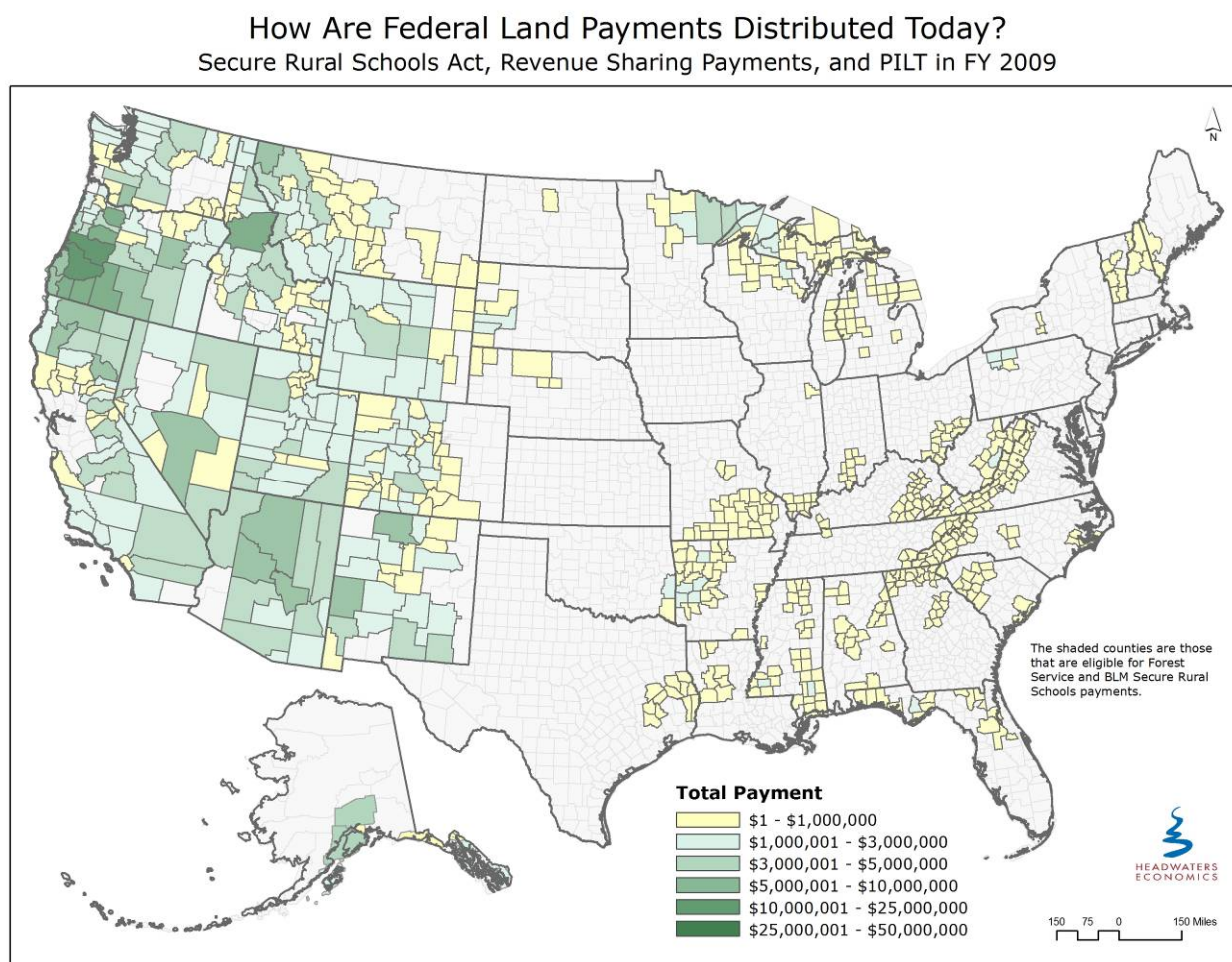
Figure 2 illustrates that some eligible counties, particularly in northern California, Oregon, central Idaho, northwest Montana and northern Arizona received proportionately higher levels of payments.

Collectively, Oregon counties received the highest payments in FY 2009 from all sources, (SRS, BLM O&C, 25% Fund and PILT) totaling \$242.8 million. This was followed by California (\$88.2 million), Idaho (\$62.2 million), and Montana (\$51.8 million).

Some individual counties receive substantial payments. For example, in FY 2009 Douglas County, Oregon received \$43.5 million from all sources, which is more than was received the same year by the states of Alaska, Wyoming, and Nevada (with less than \$34 million each), as well as all of the non-western states.

Oregon counties have received relatively high payments in part because the SRS formula is based on payments from past timber harvest levels, and Oregon harvested significant volumes of high value timber relative to other states. It also means that ideas for reform of county payments that are based on overall forest health are still likely to direct relatively high payments to Oregon because of the state's significant forest resources and restoration needs.

Figure 2

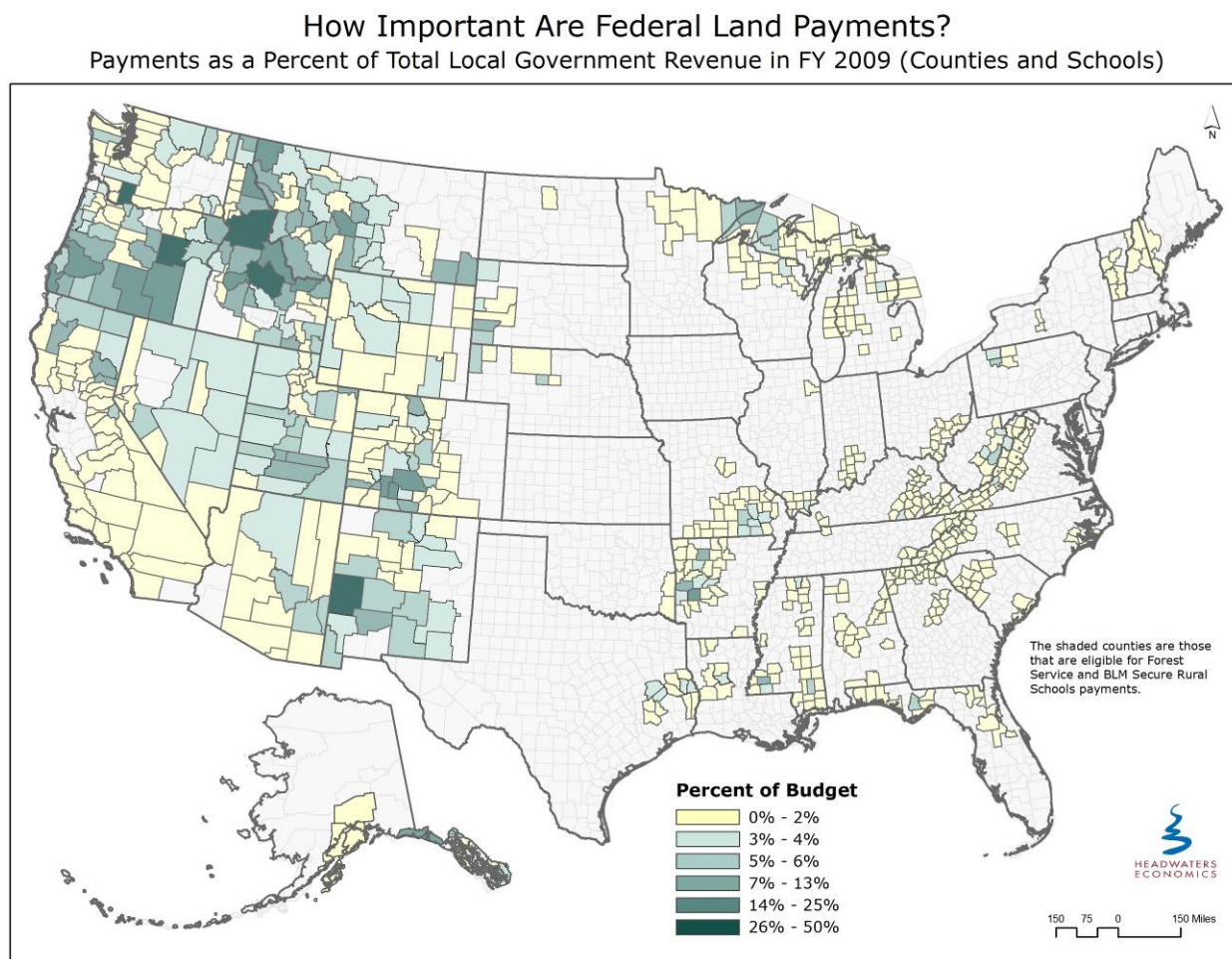


Total SRS payments from the Forest Service and the BLM totaled \$562 million in FY 2009. Oregon received more than 24 percent of those payments, followed by California (9.7%), Idaho (7%), Washington (6.8%), and Montana (4.8%).

Figure 3 (next page) describes the relative importance of federal land payments, expressed as a percentage of county and school budgets.²⁴ Total payments distributed to county government and autonomous school districts are compared to total local government revenue from all sources, including taxes, charges for services, intergovernmental revenue, and other miscellaneous revenue. (The darker the color, the higher proportion of the county's budget).

²⁴ State and local financial data are from the U.S. Census of Governments, conducted every five years. The latest was for FY 2007. Census of Government county financial statistics are based on a national survey and may not match local government financial reports. For a detailed description of Census of Governments survey methods, survey year (fiscal year), and definitions, see: 2006 Government Finance and Employment Classification Manual at www.census.gov/govs/www/06classificationmanual/06_gfe_classmanual_toc.html. Federal payments to counties are reported by the federal fiscal year in which they are authorized and are delivered to counties during the next local government fiscal year (e.g., federal land payments for federal FY 2009 are received by counties during local governments' FY 2010). For this reason, we compare FY 2009 federal land payments data to FY 2010 estimates of local government financial statistics (estimated from FY 2007 Census of Governments data).

Figure 3



When federal payments to counties are analyzed in terms of their relative importance to county and school budgets, Oregon, Idaho, western Montana and selected counties in southern Utah and New Mexico are comparatively dependent. For example, in FY 2009 in Douglas County, Oregon these payments constituted approximately 18 percent of the combined government and school budgets, and 13 percent of county budgets alone. In Idaho County, Idaho, federal land payments made up 37 percent of the combined government and school budgets, and 57 percent of county budgets alone. The same year, county payments made up 46 percent of the combined government and school budgets, and 60 percent of the county budget for Catron County, New Mexico.

However, these examples are the exception. Of the 721 counties that are eligible to receive payments, federal land payments constituted more than 25 percent of combined county and school budgets for only five counties (or less than 1% of all eligible counties) and more than 10 percent of budgets for 35 counties (or less than 5% of eligible counties).

Options for Reform of County Payments:		<u>Page</u>
1. End SRS Transition Payments:	Return to revenue sharing payments that are linked to commodity receipts, while fully funding PILT to reduce the number of affected counties.	20
2. Extend SRS Transition Payments:	Reauthorize SRS with no substantive changes to funding or distribution formulas.	24
3. Expand Revenue Sharing Payments:	Allow SRS to expire and reform 25% Fund and BLM O&C 50% payments by expanding payments to include the value of commodities <i>and</i> the value of stewardship and restoration activities.	26
4. Reform SRS Payments with a New Distribution Formula:	Reform Title I distribution formula to leverage job creation and forest management goals, including:	34
4a. Give Preferential Assistance to Counties with the Greatest Need:	Distribute payments to local governments based on economic need and economic opportunity.	34
4b. Control Federal Costs by Reducing Development in Wildfire-Prone Areas:	Reward counties for actions that reduce development potential adjacent to federal forest lands, reducing taxpayer costs and expanding land management opportunities.	42
4c. Link Payments to The Value of Ecosystem Services Produced by Federal Public Lands:	Reward forest activities that produce significant value in ecosystem services delivered to counties (such as road removal or management activities that reduce public and private costs and forest activities that sequester carbon to mitigate climate change).	48
4d. Distribute Higher Payments to Counties with Protected Public Lands:	Distribute Forest Service and PILT payments to local governments based partially on the protected status of federal public lands.	52
5. Implement Tax Equivalency Payments:	Replace SRS, commodity revenue sharing payments, and PILT with payments equivalent to the property taxes federal land would pay if the lands instead were privately owned and used for similar purposes.	59



To see the effect on individual areas, see the interactive maps on:
www.headwatereconomics.org/county payments

IDEA 1: END SRS TRANSITION PAYMENTS

Return to revenue sharing payments that are linked to commodity receipts, while fully funding PILT to reduce the number of affected counties.

The Idea

The Secure Rural Schools and Community Self-Determination Act (SRS) expires in FY 2011. If not reauthorized by Congress, counties again will receive Forest Service and BLM payments that are funded by receipts from commodity extraction on public lands. Counties will continue to receive PILT at fully funded levels.

How the Idea Works

In 2008 Congress reauthorized SRS as an optional and temporary program scheduled to sunset in 2011 (last payments will be made FY 2011). Under SRS, counties may choose between two options: (1) to receive SRS transition payments or (2) receive their share of commodity receipts generated on public lands. If SRS is not reauthorized, all counties will receive their revenue sharing payment from the value of commodities extracted on Forest Service and O&C lands. In addition, each county will continue to receive PILT, which often will increase to offset some or all of the loss in revenue sharing payments (though PILT still must be re-appropriated starting in FY 2012).

The Formula

Each county's payment will be calculated as follows:

$$\text{County Payment} = \text{Revenue Sharing Payment} + \text{PILT}$$

For an explanation of the revenue sharing programs, see Appendix A.

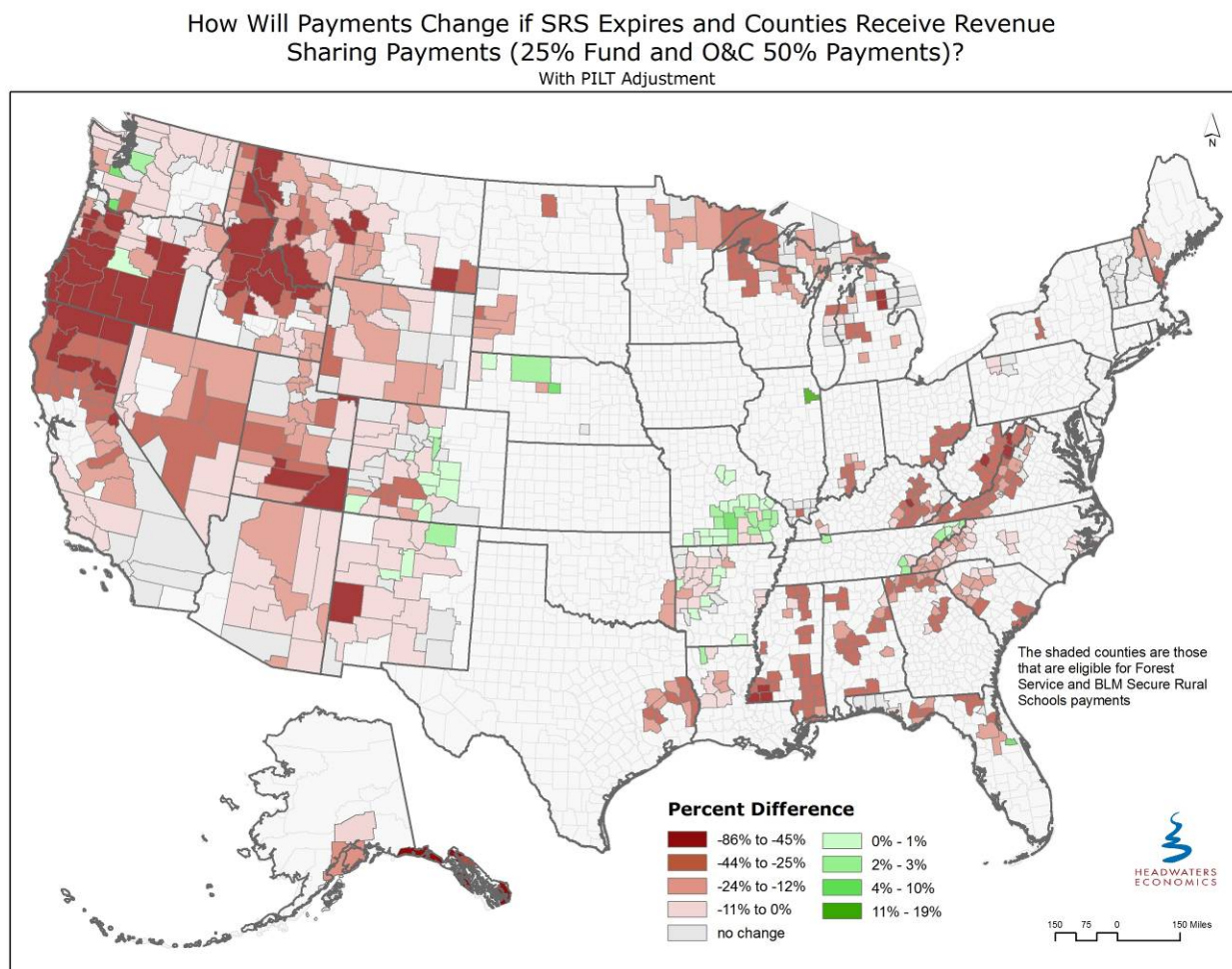
How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

We estimate that revenue sharing payments will be significantly lower for most counties when compared to current SRS payments, but a corresponding increase in PILT payments will mean that many counties will not see a dramatic difference in the total federal land payments they receive. However, those counties that will see significantly lower payments already are among the most dependent on SRS payments. For these counties, lower payments will be compounded by increased volatility in annual payments. Returning to revenue sharing payments will have several impacts. First, it increases incentives for state and local governments to lobby for increased logging on public lands. Second, stewardship, restoration, and conservation projects that do not generate receipts probably will receive less support from local officials. Third, SRS Title II funds will go away, removing funding that has encouraged collaborative restoration work on public lands.

How Counties Will Be Affected

Figure 4 shows how payments will change if the SRS expires in 2011 as scheduled and payments revert back to revenue sharing (Forest Service 25% Fund and BLM O&C 50% payment). We estimate the revenue sharing payment each county would receive, as well as PILT and changes to education equalization funding in states that include federal land payments into the state distribution formula. (Green indicates net gain; red indicates net loss). The current payment was calculated as the average payment for FY2008 through FY2011. The projection is for FY2011.

Figure 4



To see the effect on individual areas, see the interactive maps on:
www.headwaterseconomics.org/county payments

If SRS expires in 2011 and payments to states and counties revert to revenue sharing (Forest Service 25% Fund and O&C 50% payment), counties and schools across the country will receive \$262 million less by 2014 when compared to the average payment from FY 2008 to 2011, a 31-percent-lower payment level.

Overall, 563 of 718 counties will see lower payments with 425 counties experiencing losses greater than 10 percent. Forty-five counties will see their payments decline by half or more.

Our estimates are based on three factors:

1. The difference between current SRS payments, measured as the average payment over the period FY 2008 to 2011, and estimated revenue sharing payments from the Forest Service and BLM.²⁵
2. Higher PILT payments that will adjust to cover for all or a portion of the difference between Forest Service SRS payments and estimated 25% Fund payments (BLM O&C payments are exempt from the PILT formula).
3. Higher state school equalization payments to affected counties in the 13 states that include the school portion of Forest Service SRS and 25% Fund payments in state equalization funding (rather than delivering payments directly to the school districts based on the amount of federal public lands within their jurisdictions).²⁶

Another important finding is that federal and state policy will affect how counties and schools will experience funding declines. For example, in Oregon, schools will see little-to-no change in overall funding. Oregon directs 30 percent of Forest Service SRS and 25% Fund payments, about \$25 million in FY 2009, to the State School Fund. The State School fund distributed about \$3 billion to schools across the state in FY 2009. As a result, schools across the entire state will share in the funding decline, not only the counties eligible for SRS payments. The loss of SRS dollars will be small relative to the size of the State School Fund (0.8% decline in state assistance to school districts).²⁷

By comparison, in Montana Forest Service SRS and 25% Fund payments are delivered directly to eligible school districts based on the presence of federal land. School districts cannot receive PILT, so districts in Montana will experience a direct loss equal to the difference between current SRS payments and projected 25% Fund payments.

²⁵ Twenty-five percent of Forest Service receipts by proclaimed National Forest (Forest Service ASR 13-1, FY 2009) are distributed to counties based on each county's proportional acreage. (Each county receives a share of the 25% Fund equal to the share of proclaimed National Forest Acres within their borders). Proportional acreage is calculated from Forest Service ASR 10-2, FY 2009 that reports SRS payments by PNF that reports acres of national forest by county. Fifty percent of O&C receipts are distributed to the 18 Oregon O&C counties using proportional acreage. O&C payments include the Coos Bay Wagon Road (CBWR) payments, which are based on the amount of lost tax revenue. We follow methods described by the BLM for budgeting purposes to allocated CBWR receipts. U.S. Department of Interior, Bureau of Land Management, Oregon State Office. <http://www.blm.gov/or/index.php> (last accessed 11/22/10).

²⁶ These states include: Arizona, Arkansas, Colorado, Louisiana, Missouri, Nebraska, New Mexico, Oregon, Pennsylvania, Tennessee, Vermont, Washington, and Wyoming. We assume that the formula will automatically adjust and increase by an amount proportional to the decline in Forest Service payments. The other states (not listed) do not count Forest Service receipts against a school district's equalization payment, meaning the decline in Forest Service SRS payments will result in direct funding declines for schools in these states. See: An Inquiry into Selected Aspects of Revenue Sharing on Federal Lands. 2002. A report to the Forest County Payments Committee, Washington, D.C. Research Unit 4802-Economic Aspects of Forest Management on Public Lands, Rocky Mountain Research Station, USDA Forest Service, Missoula, MT.

²⁷ Oregon Department of Education, Oregon State School Fund (SSF). <http://www.ode.state.or.us/search/results/?id=168> (last accessed 11/22/10).

Pros and Cons of the Idea

If SRS is not funded because of federal budget or other concerns, revenue sharing payments from the Forest Service and O&C lands become relatively more attractive to county governments because they are permanently authorized and have a dedicated funding through commodity receipts. If PILT remains fully funded after 2012 (which remains uncertain), the affect on counties will be attenuated.

There are two downsides of relying on PILT to soften the impact of ending SRS transition payments. First, there is a two-year lag between declining agency payments and the increase in PILT, meaning all counties will experience lower payments immediately and not receive the benefit of the PILT formula for two years (a one-time two-year PILT transition payment could bridge this gap, but will require congressional action). Second, PILT is only appropriated through 2012, adding uncertainty to future payment levels. The PILT program will have to be appropriated annually or long-term after that date for most counties to receive predictable funding similar to current levels.

Another outcome of this idea is that payments again will be linked to commodity receipts, providing counties with incentives to prefer increased timber harvesting to other activities. Title II funds also will disappear, leaving RACs without resources to undertake stewardship and restoration projects, and attract significant matching funds and collaborative effort.

One additional policy consideration is that in 2008 Congress changed the revenue sharing formula to calculate payments based on a seven-year rolling average of commodity receipts. This change could result in authorized payments exceeding available funding in some years, exposing revenue sharing payments to congressional appropriations and potential shortfalls below authorized payment amounts.

Even in counties where total compensation will remain similar, services and projects funded through Title III will only be funded at the discretion of counties. In other words, the purpose of Title III will be lost, even where funding levels remains consistent. Congress could revisit enabling legislation and funding levels for cooperative agreements between agencies and counties to ensure that some of the purposes of Title III remain funded—mainly compensation for public safety services delivered on public lands, including search and rescue and emergency response.

IDEA 2: EXTEND SRS TRANSITION PAYMENTS

Reauthorize SRS with no substantive changes to funding or distribution formulas.

The Idea

The idea maintains the status quo with Congress reauthorizing SRS and appropriating similar funding levels for SRS and PILT.

How the Idea Works

Congress will reauthorize SRS in 2012 with no substantive change for a period of 10 years and appropriate funding equivalent to the average payments for the period FY 2008 to FY 2011. Congress will also extend full-funding for PILT for 10 years beginning in FY 2013.

The Formula

The SRS distribution formula will be significantly simplified so that each county's payment is equal to the average payment received over the period FY 2008 to 2011. Counties will receive the same payment every year for 10 years.

$$\text{County Payment} = \text{Average County Payments from FY 2008 through 2011}$$

The payment could be adjusted for inflation each year using the Consumer Price Index. For a detailed explanation of the various county payment programs, see Appendix A.

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

Extending SRS and PILT will provide stable and predictable compensation, but only for the period that Congress guarantees appropriations.

The idea maintains the decoupling of payments from commodity receipts, a reform that has lessened pressure for logging as a source of revenue and generated support for forest health and conservation projects, opening new economic opportunities for public land communities. Reforms to how the 25% Fund and O&C 50% payment are calculated partially undermined this achievement of SRS. The new revenue sharing payment is calculated based on a seven-year rolling average of commodity receipts (instead of a single year's receipts).²⁸ The reform was intended to reduce annual volatility from revenue sharing payments by spreading receipts out over seven years. It has resulted in counties pushing for more logging on National Forests over the last two years, despite the four-year extension of SRS, because if SRS is not reauthorized, logging that occurred during the previous seven years will affect each county's payment in FY 2012. A ten-year extension will only functionally decouple payments from commodity receipts for the first three years.

Extending SRS will continue Title II's funding support for collaborative efforts to improve infrastructure and forest health. Title II's success, however, has been limited. RACs have been unable to achieve the kind of landscape-scale restoration and stewardship projects appropriate to forest health needs on all public lands. Title II funding also is not targeted based on restoration need or economic opportunity, but

²⁸ For more detail on these reforms, see: <http://www.fs.fed.us/srs/Title-IV.shtml> (last accessed 11/22/10).

rather on historic logging receipts and proportional public land acres (payments are driven by the Title I distribution formula, not an assessment of forest health need or economic opportunity). Extending SRS Title II with no reform may be best described as a missed opportunity to leverage more support for restoration and stewardship work, and to create jobs in the counties that need them most.

How Counties Will Be Affected

Counties will see no change assuming funding levels remain the same.

The effect of expending SRS payments can be seen in Figure 2, on page 17 which shows how current federal land payments (FY 2009) from the Forest Service, BLM, and PILT are distributed to state and local governments across the U.S.

The question for Congress, if they adopt this idea, is which funding level to use for SRS payments. One proposal is to extend SRS payments based on FY 2009 funding levels.²⁹ Throughout this paper, we use the average payment over the period FY 2008 to 2011 as the current payment that could be appropriated at a fixed level.

Pros and Cons of the Idea

A ten-year reauthorization provides predictability and can streamline the payment process by simplifying the distribution formula. SRS has made important policy strides by decoupling payments from commodity receipts and directing payments based on community economic needs. Continuing SRS as it currently designed will keep in place the current SRS Title II and Title III programs which encourage forest health through restoration and stewardship projects while addressing cost issues such as fire risk management.

One drawback is that as long as SRS is not permanently authorized and appropriated, counties will face periodic fiscal and political uncertainty. Because SRS does not have a dedicated funding source, concerns about the federal deficit and federal spending may make it politically difficult to secure continued funding for SRS and PILT, particularly at current full-funding levels.

A disadvantage of simplifying the funding formula is that it will no longer adjust for changes in per capita personal income. More to the point, reauthorization will forego broader opportunities to reform the current county payments formula to improve the economic needs criteria. Currently, the SRS program is performing poorly in providing assistance to the neediest counties (see Figure 10, page 39 and Idea 4a for more details). Locking in a simplified SRS formula for the next ten years will benefit traditionally high timber-producing counties but will not allow for flexibility in the program to assist counties facing the greatest economic needs

²⁹ Partnership for Rural America. <http://www.partnershipforruralamerica.org/default.shtml> (last accessed 11/22/10).

IDEA 3: EXPAND REVENUE SHARING PAYMENTS

Allow SRS to Expire and Reform 25% Fund and BLM O&C 50% payments by expanding payments to include the value of commodities and the value of stewardship and restoration activities.

The Idea

SRS is set to expire in FY 2011 (the last payments to counties will be made in January 2012). This idea assumes that SRS is not reauthorized and counties will again receive their share of commodity receipts from the Forest Service 25% Fund and BLM O&C revenue sharing.

Currently, only commercial receipts are eligible for revenue sharing. The idea will expand the definition of “gross receipts” that are eligible for revenue sharing in a way that goes beyond commercial receipts to include restoration, stewardship, recreation, and conservation projects that increase values produced on public lands through watershed restoration, forest health, and wildlife habitat improvements. The value of these “forest products” can be quantified through a variety of non-market valuation techniques.

As public land management goals shift from commodity production to stewardship, restoration, and conservation, the link between forest products and county payments is broken. However, currently, counties do not share in the production of these values on public lands. This idea will re-make this link by sharing a portion of the value of forest products produced through restoration, stewardship, and conservation activities with local governments.³⁰

Expanding the definition of receipts is not a new idea. In 1976, Congress included timber receipts retained in the Knutson-Vandenberg (K-V) Fund (used by the agency for reforestation), and timber purchaser credits (used to finance road construction) in the definition of “gross receipts” that must be shared with states and local governments.³¹ Originally, receipts generated from salvage timber sales were not shared with counties. In 1988, Congress changed this policy when it added receipts generated from salvage timber sales to the 25% Fund.³²

Currently the values of commodities that result from stewardship contracts are not eligible for revenue sharing.³³ Translating these values into payments to counties will become increasingly important as the Forest Service and the BLM rely more and more on stewardship contracting. Stewardship contracting makes it easier for the agencies to work more collaboratively and to do restoration and stewardship work that would otherwise not necessarily pay for itself.

³⁰ U.S. Forest Service resources on stewardship end result contracting can be found at <http://www.fs.fed.us/forestmanagement/stewardship/index.shtml/direction/index.shtml> (last accessed 10/29/10). In addition, Sustainable Solutions Northwest has a valuable resource on collaboration and stewardship contracting work that can be found at <http://www.sustainablenorthwest.org/resources/collaboration-and-stewardship> (last accessed 10/29/10).

³¹ National Forest Management Act of 1976, NFMA: P.L. 94-588. Cited by Gorte, Ross. 2000. Forest Service Receipt-Sharing Payments: Proposals for Change. Congressional Research Service Report for Congress, RS20178.

³² Continuing Resolution for FY 1988 (P.L. 100-202, 101 Stat. 1329) cited by Ross Gorte (*Ibid.*, Gorte, 2000).

³³ Commodity values associated with stewardship contracts can be traded to a contractor for services provided, or receipts can be retained by the agencies and applied to needed service work in the same contract, or transferred to another approved project. USDA Forest Service, “Everything You Wanted to Know About Stewardship End Result Contracting... But Didn’t Know What to Ask.” <http://www.fs.fed.us/forestmanagement/stewardship/index.shtml> (last accessed 10-30-2010).

How the Idea Works

This idea can be implemented in two different ways or as a combination of both. The values can be measured in terms of activity or outcome.

Activity (Forest Project) Based Valuation:

Stewardship and restoration activities often include timber harvest and other commodity values that are not eligible for revenue sharing. However, stewardship contracting authorities allow the agencies to trade these commodity values to a contractor in return for service work, including re-vegetation, road removal, or watershed improvements. These commodity values can be measured, along with the value of other service values, including retained receipts (cash paid to the agency for commodity values) and agency funding. Together, these add to the value of the stewardship or restoration project.

Outcome (Forest Product) Based Valuation:

Stewardship and restoration projects have goals including watershed restoration, forest health, recreation, and wildlife habitat improvements. The value of these outcomes can be quantified through a variety of non-market valuation techniques. Once quantified, these values will be added to the total of commodity receipts eligible for Forest Service and O&C revenue sharing.

The Formula

Activity (Forest Project) Based Valuation:

For this idea, revenue sharing is the sum of commodity receipts and the calculated value of forest health activities using either the Activity Based or Outcomes Based approach. Each county's payment is calculated as follows:

$$\text{County Payment} = (\text{Commodity Receipts} + \text{Forest Health Activity Values}) + \text{PILT}$$

The total value of FY 2009 stewardship contract accomplishments is calculated by summing the value of commodities traded for services, retained receipts (cash paid to the agencies for commodity values), agency spending, and matching funds. This amount was added to traditional commodity receipts to calculate each county's revenue share entitlement. The total value of legacy roads projects is the total cost of road removal and restoration work, including total agency spending and matching funds.

These two values are added together at the forest level and for the O&C lands and apportioned to counties based on proportional acreage. Each county's proportionate share is assumed to be the total value of gross receipts eligible for revenue sharing. Each county's payment is equal to 25 percent of the value generated on National Forests, and 50% of the value generated on O&C lands.

Additional methods for calculating the economic value of activities that produce ecosystem service products are discussed in Appendix C.

Outcome (Forest Product) Based Valuation:

For this idea, revenue sharing is the sum of commodity receipts and the calculated value of forest health activities using either the Activity Based or Outcomes Based approach. Each county's payment is calculated as follows:

$$\text{County Payment} = (\text{Commodity Receipts} + \text{Forest Health Outcome Values}) + \text{PILT}$$

Because ecosystem services generally are not traded in markets, the prices of these services cannot be easily observed from market transactions. Economists have developed methods to value goods and services that are not traded in a market, broadly defined as “non-market valuation methods.”

Non-market valuation methods fall into three general categories: revealed preference, stated preference, and the averted expenditure approach. All of these non-market valuation methods require extensive data regarding individuals' behavior and preferences or engineering costs. When the time or resources are not available to do a full primary study, economists use an approach known as Benefit Transfer which involves applying estimates from valuation studies that evaluated similar policies or activities as the one being studied. While benefits transfer may not provide the precision possible with original studies, it can provide a range of reasonable values.

In this paper, we use benefit transfer to estimate non-market values for a set of ecosystem services produced by Stewardship Contracts on Forest Service and BLM O&C lands, and by Forest Service Legacy Roads and Trails Restoration Initiative (legacy roads) during FY 2009. Where it is not currently possible to estimate these values, we identify the data or methodological gaps that will need to be filled to allow estimation.

The estimated value of ecosystem services at the forest scale is apportioned to counties based on proportional acreage. Each county's proportionate share is assumed to be the total value of gross receipts eligible for revenue sharing. Each county's payment is equal to 25 percent of the value generated on National Forests, and 50 percent of the value generated on BLM O&C lands.

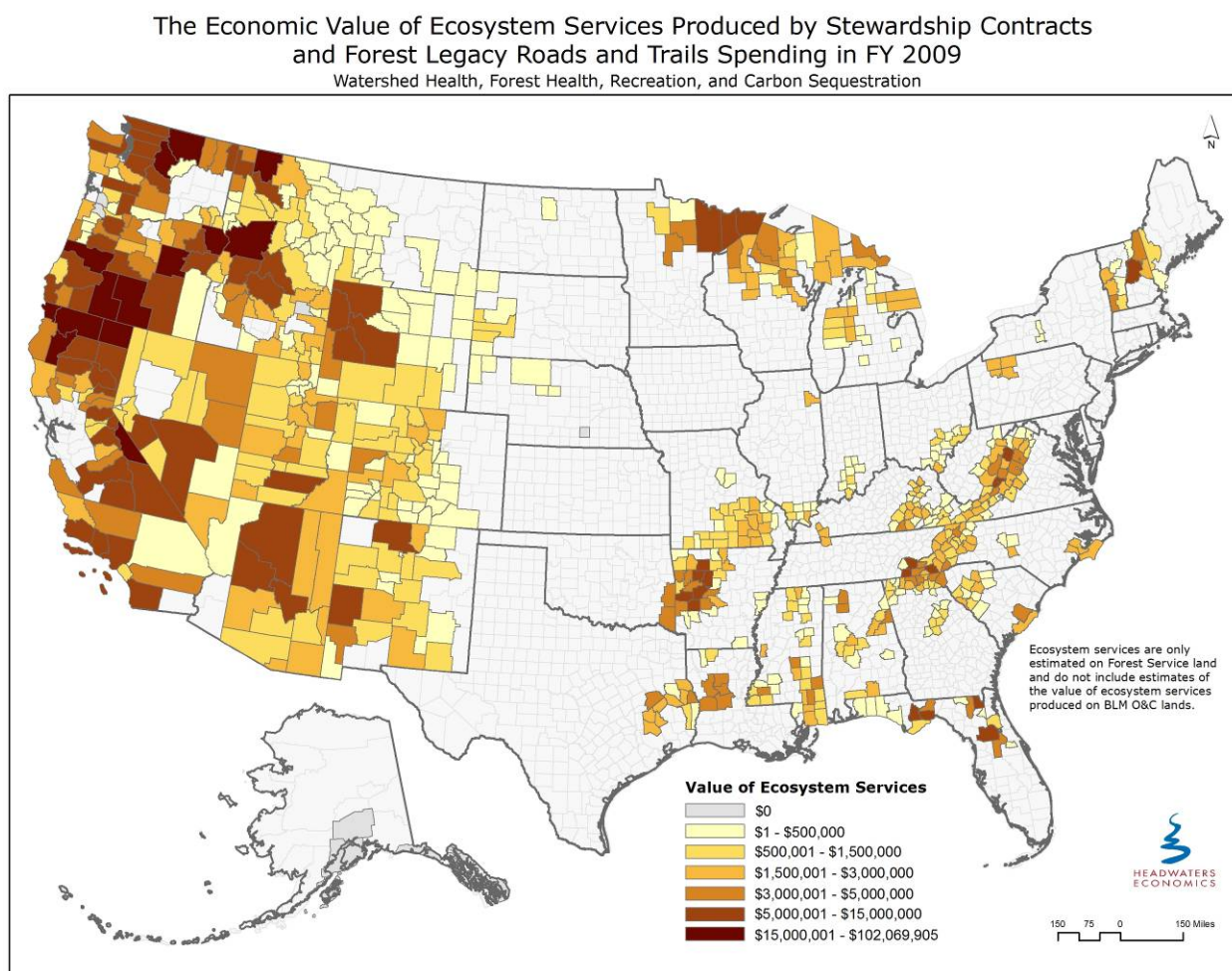
Additional methods for calculating the economic value of ecosystem service products are discussed in Appendix C.

IV. OPTIONS: EXPAND REVENUE SHARING PAYMENTS

Figure 5 shows the economic value of ecosystem services produced as a result of projects completed using stewardship contracting authorities and Forest Legacy Roads and Trails Initiative dollars (FY2009). (The darker the color, the higher the value of ecosystem services).

The economic value of ecosystem services is a measure of how communities benefit from healthy watersheds, healthy forests, recreation opportunities, and carbon sequestration. The economic values are estimated using a variety of methods, including existing market values (carbon sequestration), avoided costs (reduced sedimentation), travel cost studies (recreation opportunities), and willingness to pay studies (wildfire risk mitigation).

Figure 5



To see the effect on individual areas, see the interactive maps on:

www.headwaterseconomics.org/countypayments

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

This idea will not necessarily improve predictability for counties. Linking payments directly to forest management practices will always expose them to the uncertainties of agency funding and planning processes, changing economic conditions, and changing attitudes about land management priorities.

This idea does have the potential to deliver significantly higher economic opportunities to counties and improved forest health. SRS Title II is intended to help communities transition their economies away from dependence on traditional commodity extraction by investing in roads and other infrastructure, soil productivity, ecosystem health, watershed restoration and maintenance, control of noxious weeds, and reestablishment of native species. Title II shows potential, but funding levels and other barriers have limited the scale and influence of Title II projects. An expanded revenue sharing program could result in more and larger stewardship and restoration projects if county governments lend their support once they see how they would benefit from these programs.

Stewardship contracts create higher levels of economic activity spread across a wider spectrum of economic sectors than a traditional timber sale of similar size and commodity value. Stewardship contracts can also be designed to meet forest health goals that extend beyond commercial timber receipts. As a result, this idea will reward counties more for restoration and stewardship activities on public lands than for commodity extraction accomplished through traditional commercial sales.

This idea is consistent with other federal programs aimed at encouraging the production of non-market ecosystem services. For example, the U.S. Farm Bill and Clean Water Act paid \$1.1 billion to private landowners in 2008 to protect 5.9 million acres of private land through the Environmental Quality Initiatives Program (EQuIP), Conservation Stewardship Program and drinking water protection programs.³⁴ These programs provide funding for landowners to take specific actions to improve watershed health and water quality.

How Counties Will Be Affected

If SRS expires in 2011 and payments to states and counties revert to revenue sharing reformed by this idea, the results will likely be:

Activity (Forest Project) Based Valuation:

Figure 6 shows the difference between current SRS payments (for eligible counties) and how payments would change if SRS expires and is replaced with an expanded 25% Fund that includes the value of forest activities that produce stewardship and restoration benefits. (Green indicates net gain; red indicates net loss).

We added the value of products associated with stewardship contracts and Legacy Roads Projects (these are new additions to the 25% Fund) to commodity receipts (already a part of 25% Fund). This map shows only the value of stewardship contracts based on activities that took place in 2009. This idea changes the incentives for local governments to support stewardship contracting, so future payments may be significantly higher. Current payment was calculated as the average payment for FY2008 through FY2011. The projection is for FY2014.

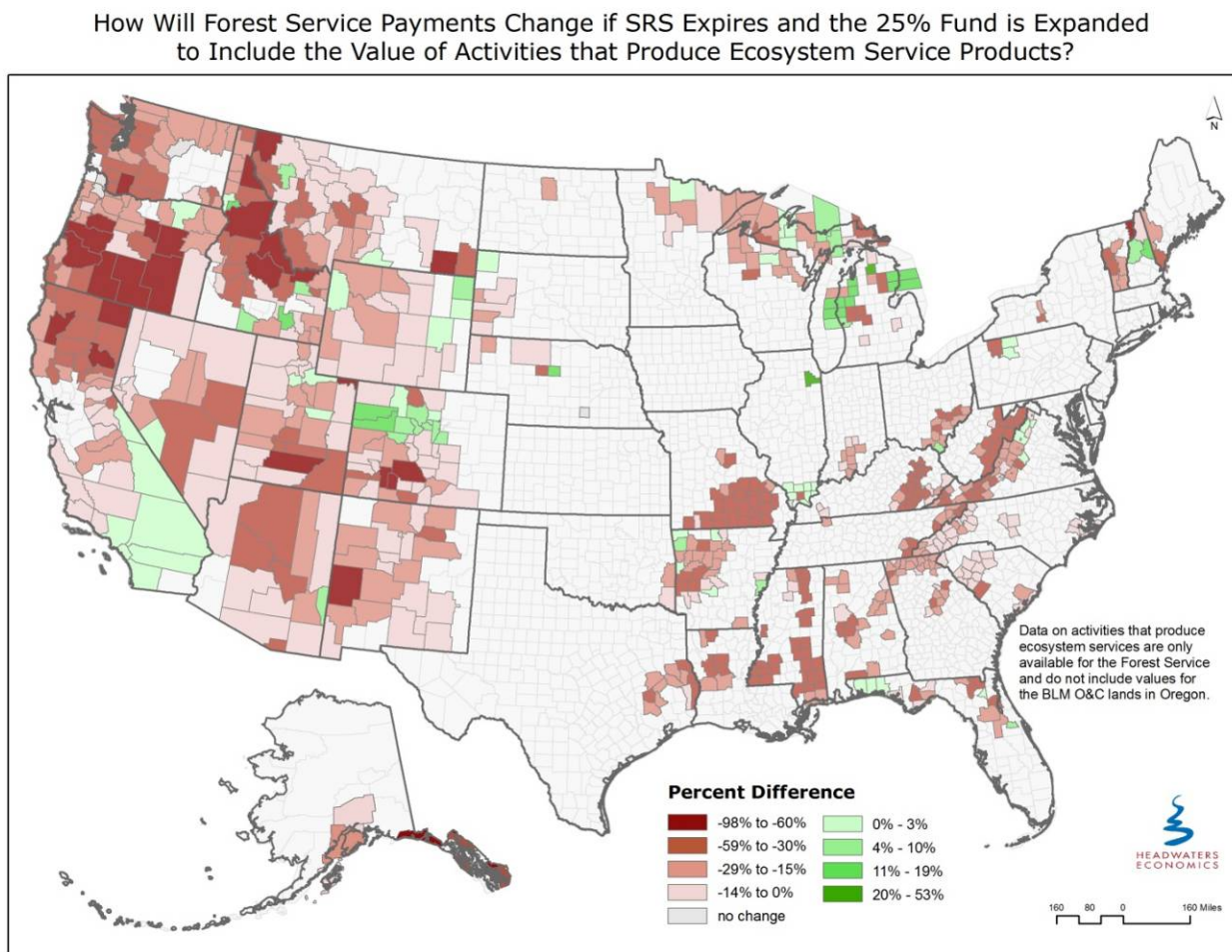
³⁴ Stanton, T., M. Echavarria, K. Hamilton, C. Ott. 2010. State of Watershed Payments: An Emerging Marketplace. *Ecosystem Marketplace*. http://www.foresttrends.org/documents/files/doc_2438.pdf (last accessed 11/22/10)

IV. OPTIONS: EXPAND REVENUE SHARING PAYMENTS

It is important to note that Figure 6 shows the *minimum* value of an expanded 25% Fund based on stewardship and restoration activities. Once this idea is in effect, there will be an incentive for county governments to support and expand these types of activities, and the payments to counties will increase beyond today's levels.

The data we used to calculate projected future activity based revenue sharing payments are based on stewardship contract outcomes and Forest Legacy Roads and Trails Initiative funded projects for FY 2009.

Figure 6



Counties and schools across the country will receive \$247 million less by 2014 when compared to the average payment from FY 2008 to 2011, a 33-percent-lower payment level.

Overall, 631 of 718 counties will see lower payments with 519 counties experiencing losses greater than 10 percent. Forty-one counties will see their payments decline by half or more.

Eighty-three counties will see an increase in payments, with 15 counties seeing payments more than 10 percent higher.

Outcome (Forest Product) Based Valuation:

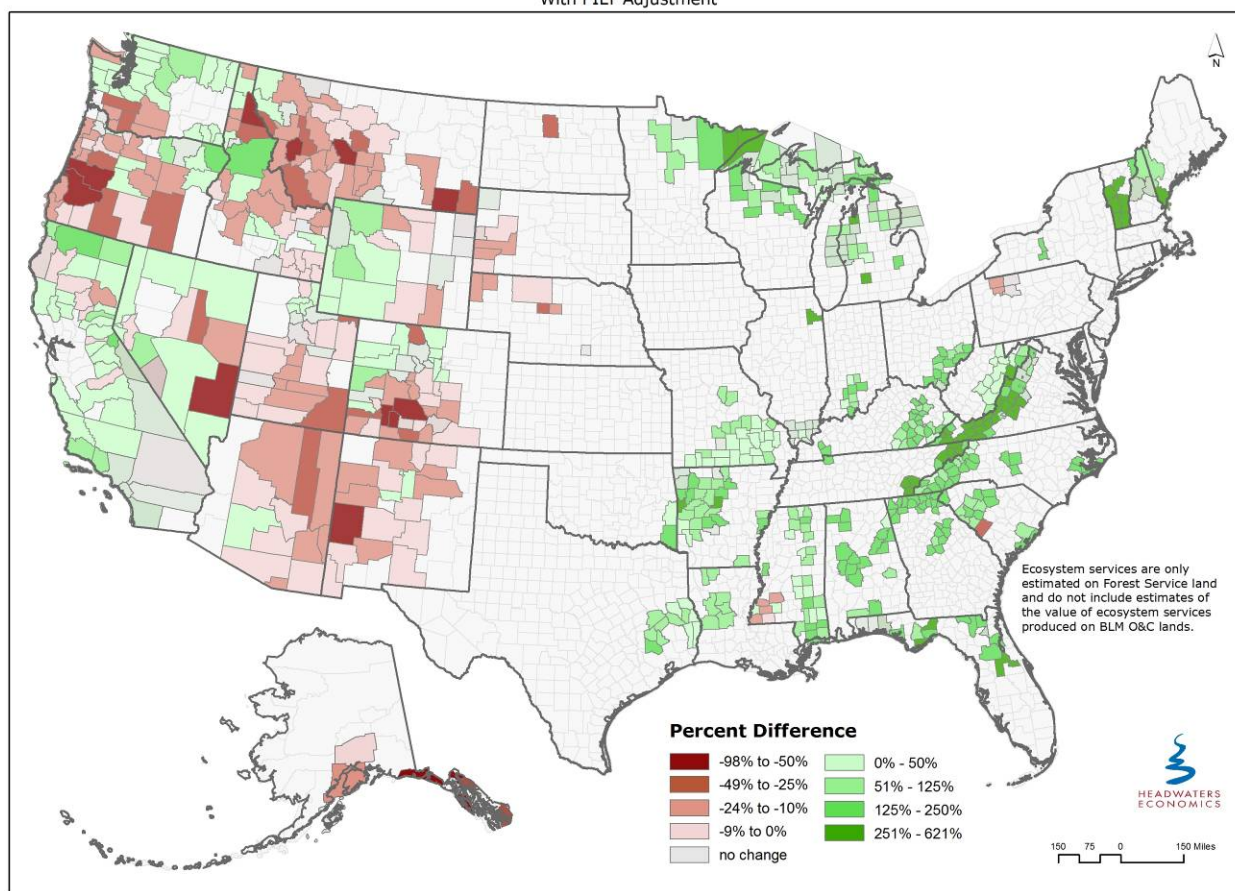
Figure 7 shows the net difference between current SRS payments (for eligible counties) and how payments would change if SRS expires and is replaced with an expanded 25% Fund that includes the value of ecosystem services produced by stewardship contracts and Forest Legacy Roads and Trails Initiative spending. (Green indicates net gain; red indicates net loss).

We added the value of healthy watersheds, healthy forests, recreation, and carbon sequestration “products” (new additions to the 25% Fund) to commodity receipts (already a part of the 25% Fund) and distributed this new, higher payment to counties. With this idea in place, future payments may be significantly higher if counties collaborate with the Forest Service to meet the significant restoration and stewardship needs on public lands. Current payment was calculated as the average payment for FY2008 through FY2011. The projection is for FY2014.

It is important to note that Figure 7 shows the *minimum* value of an expanded 25% Fund based on the increased value of ecosystem services. Once this idea is in effect, there will be an incentive for county governments to support and expand stewardship and restoration activities, and there will be an increased demand for new and expanded ways to measure non-market values, resulting in an increase in payments to counties beyond what can be measured using today’s valuation studies.

Figure 7

How Will Forest Service Payments Change if SRS Expires and the 25% Fund is
Reformed to Include the Value of Ecosystem Service Products?
With PILT Adjustment



IV. OPTIONS: EXPAND REVENUE SHARING PAYMENTS

Counties and schools across the country will receive \$80 million more by 2014 when compared to the average payment from FY 2008 to 2011, an 11-percent-higher payment level.

Overall, 217 of 718 counties will see lower payments with 123 counties experiencing losses greater than 10 percent. Fifteen counties will see their payments decline by half or more.

Four hundred and ninety-seven counties will see an increase in payments, with 425 counties seeing payments more than 10 percent higher and 332 counties seeing payments more than 50 percent higher.

Pros and Cons of the Idea

The idea will improve forest health and create economic opportunity by linking funding directly to the production of non-market forest health values. County governments are currently concerned that SRS will sunset in 2011 and are therefore more inclined to support timber harvesting activities by federal agencies rather than restoration and stewardship work.³⁵ By including restoration and stewardship values as part of revenue sharing payments, this idea will increase the size of each county's payment and create more jobs, and county governments will therefore have an incentive to support activities that increase forest health.

This idea also will create an incentive for agencies, counties, and other interested parties (e.g., universities and non-government organizations) to work together to do the monitoring, database management, and research.

By linking county payments to restoration and stewardship activities, there is potential to fund county payments through emerging markets or charges for ecosystem services provided to the public, including clean water, wildlife, and carbon sequestration. (See later sections of this report on funding ideas for more details.)

Some non-market values can be more easily measured and valued than others. Estimating values at the regional or forest scale for the full-suite of ecosystem services will require new research methods and application in more geographic areas.³⁶

One of the ongoing debates in how to create and grow markets in ecosystem services concerns whether values must be known perfectly before markets can be established; or if markets must be in place first to create the demand for information that improves the efficiency of transactions. If this idea is adopted, the first payments will almost certainly be inefficient (counties will be paid too little or too much for ecosystem services). Over time, the market for county payments will learn and become more efficient.

A major limitation of the idea is that it must be funded, at least initially, with congressional appropriations. There may be opportunities to tap into emerging markets or fees for ecosystem services to fund county payments, but this is not likely to be in place by FY 2012 when these payments will begin.

³⁵ Revenue sharing payments are calculated using a seven-year rolling average of commodity receipts. Local governments are keenly aware that commercial receipts this year could affect payments after FY 2011.

³⁶ For more information on ecosystem service valuation data and methods, see Appendix B.

IDEA 4: REFORM SRS PAYMENTS WITH A NEW DISTRIBUTION FORMULA

4 a: Give Preferential Assistance to Counties with the Greatest Need

Distribute payments to local governments based on economic need and economic opportunity.

The Idea

Counties performing poorly economically (with lower household income and wages and higher levels of poverty) and with less potential for economic growth and diversification (with lower education levels and greater isolation from population centers and markets) will receive proportionately higher shares of SRS payments.

This idea builds on one of the purposes of SRS: to help transition counties away from a dependence on public lands commodity extraction. The idea also is consistent with economic development goals frequently pursued by the federal government, and addresses concerns about the equitable distribution of SRS payments that dominated the 2007 and 2008 reauthorization debates.³⁷

How the Idea Works

The “income adjustment” portion of the SRS formula will be changed by using five metrics, described in the formula section below, that measure relative economic need and economic development potential.

Currently, SRS payments are calculated using a “base share” and an “income adjustment.” The base share for eligible counties is determined by a combination of the proportion of national forest and BLM O&C acreage and the average of three highest payments made to the county from 1986 to 1999. The income adjustment is based on per capita income, and counties with lower per capita income receive proportionately more of the share of payments.

There are better metrics than utilizing per capita income only to calculate economic need and to achieve the goal of assisting counties that need payments the most (see Appendix B for an explanation of the limits of per capita income and a description of alternative measures of economic stress and well-being).

³⁷ The States of Oregon, Washington, and California received the lion’s share of the approximately \$2.7 billion of funding distributed under Titles I, II and III of the SRS Act between 2000 and 2007. Oregon received by far the largest share, with \$1.2 billion, while California and Washington received \$473 million and \$322 million respectively. From one perspective, this result was exactly as it should have been. SRS was initially passed to make up for lost timber receipts, and so it was only appropriate that the Pacific Northwest, historically a great timber producing region, benefitted disproportionately. States that did not have historically high timber harvesting levels were understandably less enthusiastic. The Bush Administration favored revising the funding formula to take stock of current economic conditions. Mark Rey, Under Secretary of Natural Resources for the Department of Agriculture, testified “Many now largely urban or suburban counties in the west are getting a substantial amount of money . . . because the formula was a reflection of the historical timber receipts that those counties enjoyed . . . at an earlier time. Many of those counties . . . are pretty vibrant right now.” The Administration felt that urbanized areas that could generate funds from traditional municipal revenue sources ought to do so, rather than rely on federal handouts. As a result, the distribution formula was changed in 2008 so that other states realize a more substantial benefit from it. Secure Rural Schools and Community Self-Determination Reauthorization Act of 2007: Hearing on S. 380 Before the Subcommittee on Public Lands and Forests, Committee on Energy and Natural Resources, 110th Cong. 1 (2007).

An adjustment to the base share that is based on economic need can also be considered an opportunity for federal land policy to stimulate the economy.

The Formula

Each county's payment is calculated as follows:

$$\text{County Payment} = \text{Base Share} / \text{Adjustment Based on Need}$$

This is the same, simplified formula as currently used, but this paper expands "Adjustment Based on Need" to include five factors:

Measures of Economic Performance or Hardship:

1. *Median Household Income*: a measure of all sources of income, including wages, salaries, retirement income, investment income, and others.
2. *Average Earnings per Job*: an indicator of the relative quality of the jobs in the county.
3. *Percentage of Families Below the Poverty Level*: a measure of economic hardship.

Taken together these three measures are an indication of a county's economic performance relative to other counties in the nation.

Measures of Economic Potential:

4. *Percentage of the Population with a Bachelor's Degree or Higher*: an indicator closely associated with lower unemployment rates and higher wages.
5. *County Typology – Degree of Isolation from Markets*: a measure of the proximity to population centers and job markets.

These two measures can be used together to measure the relative economic development potential of a county relative to others in the nation.

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

Using five factors rather than simply per capita income will increase the complexity of the funding formula, but it should not impact the long-term predictability of payments as the new metrics utilized by this paper to assess economic need are widely utilized and well understood.

In terms of economic opportunity, as this paper notes earlier, during the last 30 years many rural counties have experienced a dramatic shift in their economies. Counties have diversified into more service-related occupations while commodity-related sectors have contributed less than 3 percent of total new jobs from 1990 to 2008.³⁸

Not all public lands counties, however, have been able to create a diverse, robust, and resilient economy with a healthy tax base. Poverty, low-paying jobs, lack of education, isolation from markets, and difficulties competing in expanding service industries are persistent challenges for some counties. Favoring the neediest counties for relatively higher SRS payments is consistent with the original goal of SRS to help counties diversify economically. It also is consistent with the current system of payments that gives preferential treatment to counties with lower per capita income.

This idea may also improve forest health by changing the incentive structure. Without some form of economic assistance, there will be a strong incentive for some of the most remote, economically challenged counties to push for public lands commodity production that provides short-term benefits but proves in the long run to be ecologically and politically unsustainable.

The maps on the following pages help place this idea into the proper context.

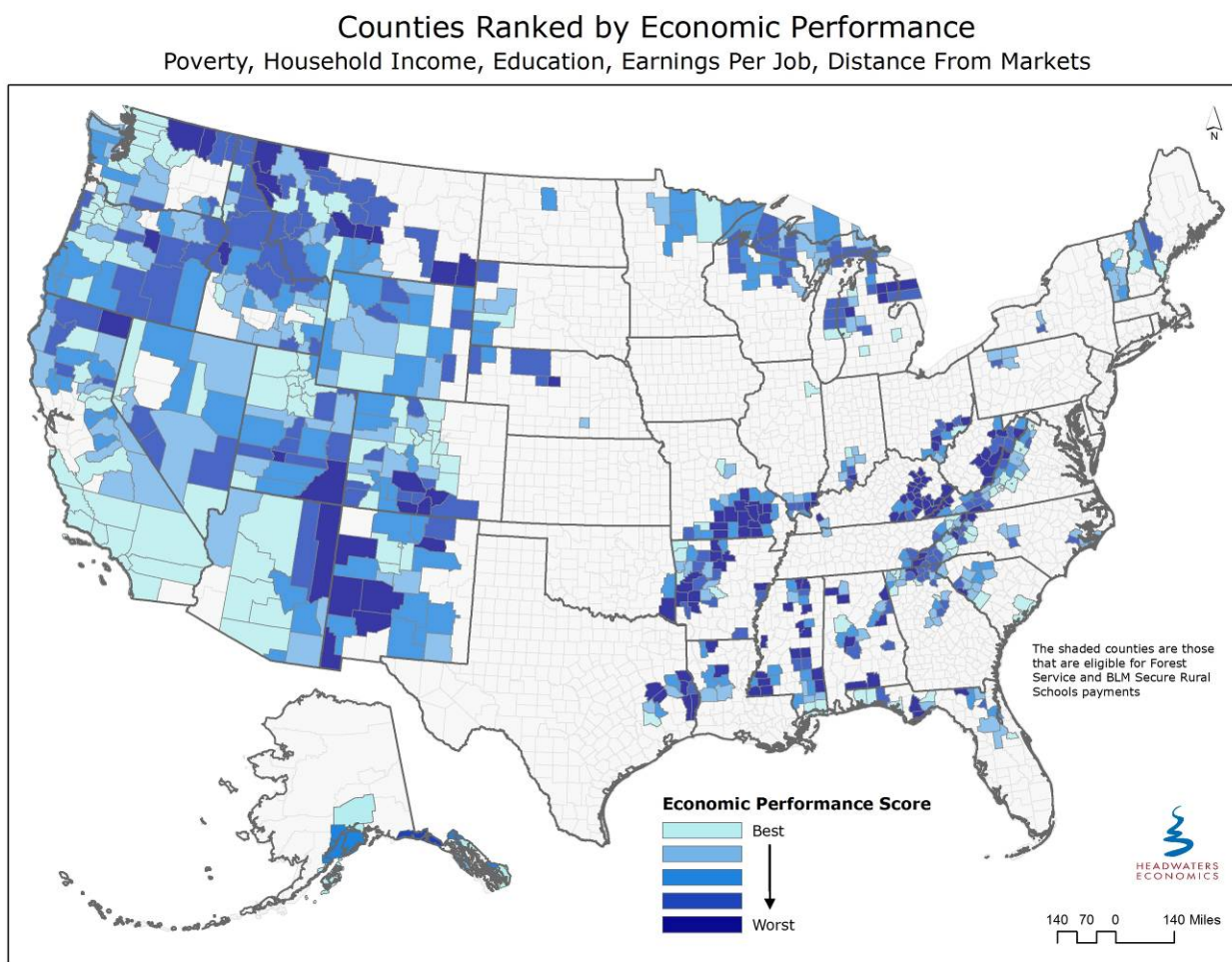
³⁸ *Ibid.*, U.S. Department of Commerce, 2010.

IV. OPTIONS: REFORM SRS BASED ON ECONOMIC NEED

Figure 8 shows a ranking of economic performance and development potential, from best (light blue) to worst (dark blue), based on five equally weighted criteria.

Economic performance is measured as percentage of households below poverty, median household income, and average earnings per job. Economic development potential is measured as percentage of the workforce with a bachelor's degree or higher and degree of isolation from markets (on a continuum: metro, metro outlying, micro, micro outlying, rural).

Figure 8

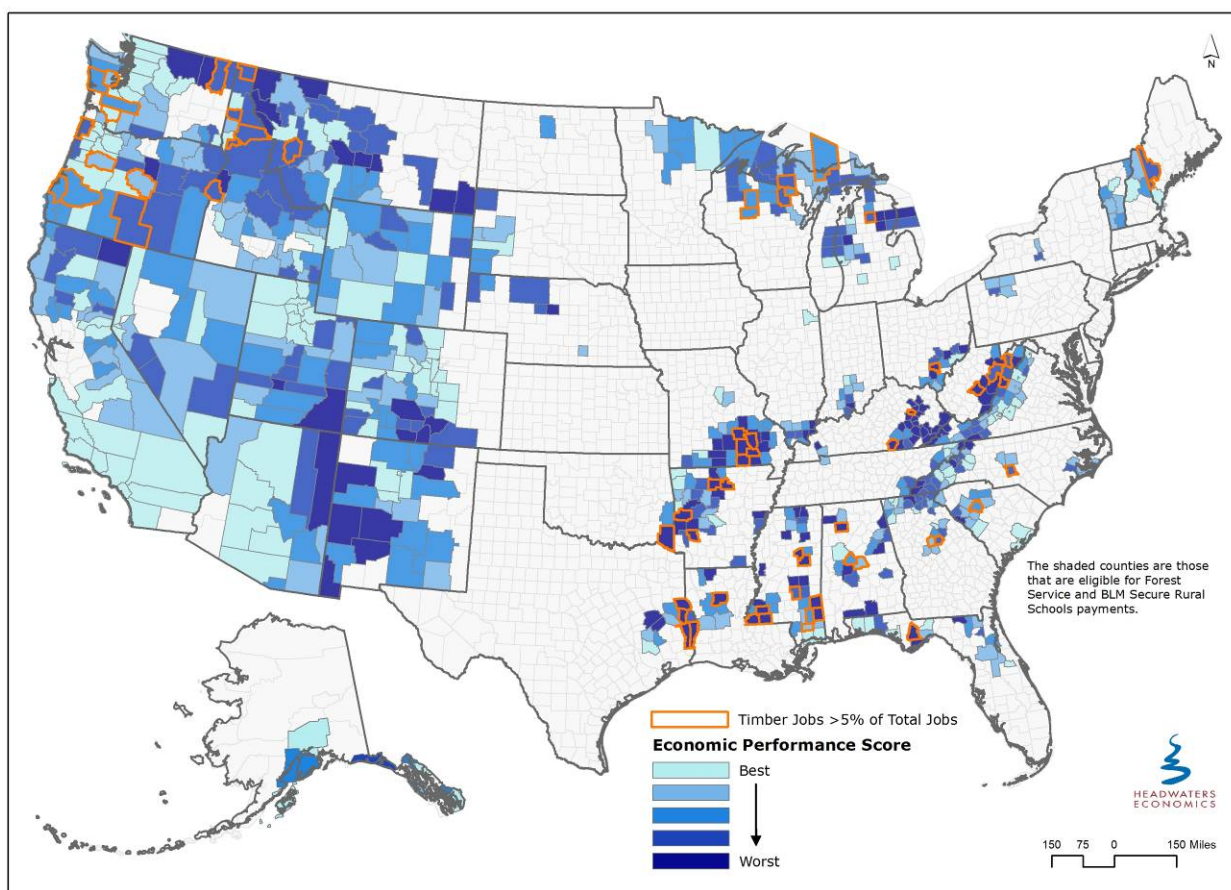


To see the effect on individual areas, see the interactive maps on:
www.headwaterseconomics.org/countypayments

Figure 9 shows a ranking of economic performance and development potential, from best (light blue) to worst (dark blue). Counties with more than 5 percent of total employment in the timber industry are highlighted in orange to identify counties where a workforce exists that could be employed in restoration and stewardship.

Figure 9

County Economic Performance and Timber Dependency



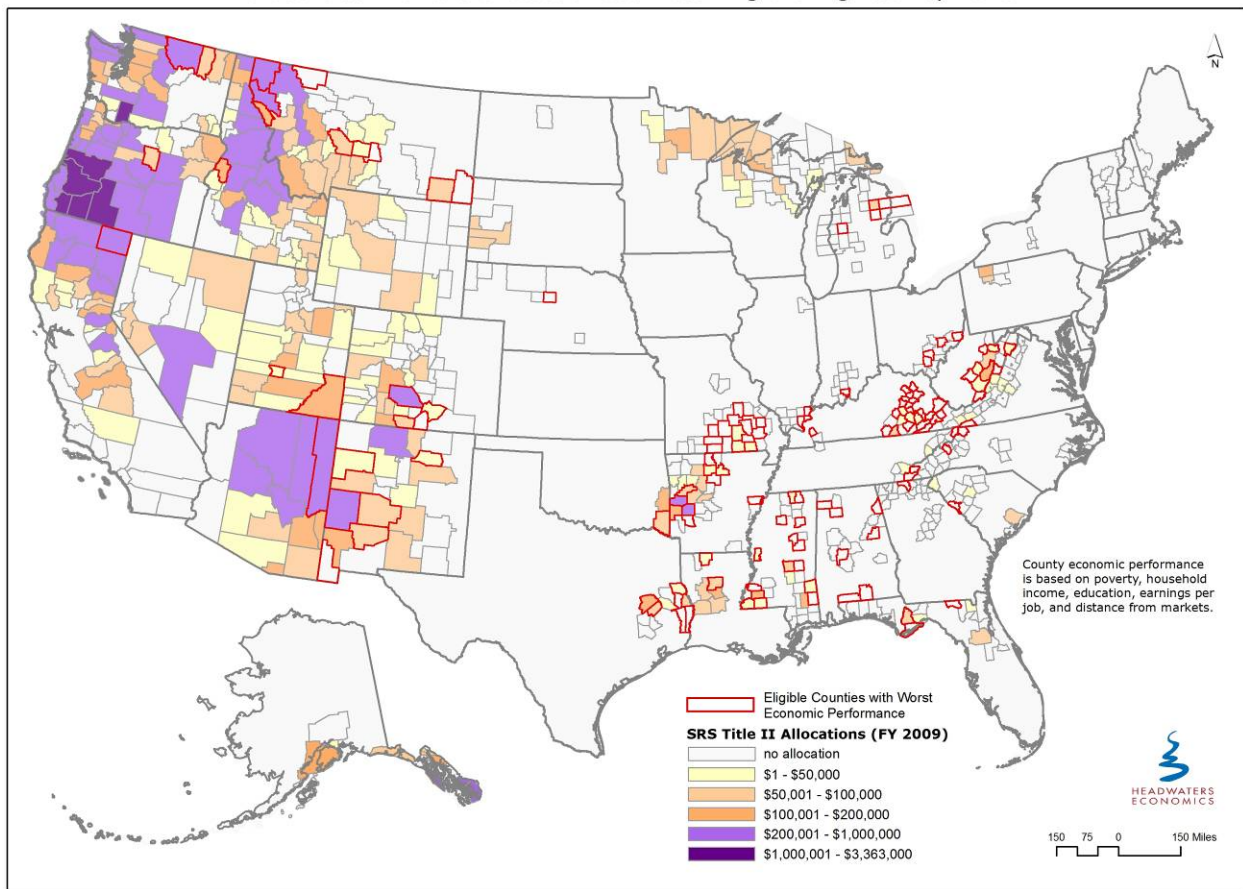
IV. OPTIONS: REFORM SRS BASED ON ECONOMIC NEED

Figure 10 identifies the top 20 percent of counties in terms of poor economic performance (outlined in red; these are the darkest colored counties in Figure 8 on page 37) and the allocation of SRS Title II payments (FY 2009) (the darker the color, the higher the allocation).

Title II of SRS was developed to encourage land restoration and stewardship activities (for example, logging with forest health as the goal) and one of the benefits will ideally have been the creation of new economic activity. However, as Figure 10 indicates, with a few exceptions, Title II payments have not gone to those counties with the greatest need. In addition, the amount of funds for Title II has not been significant enough to make much of a difference: in FY2009 Title II payments totaled \$53 million nationwide, or just 9 percent of total SRS payments.

Figure 10

SRS Title II Payments Compared to County Economic Performance Are Counties With the Greatest Need Receiving the Highest Payments?



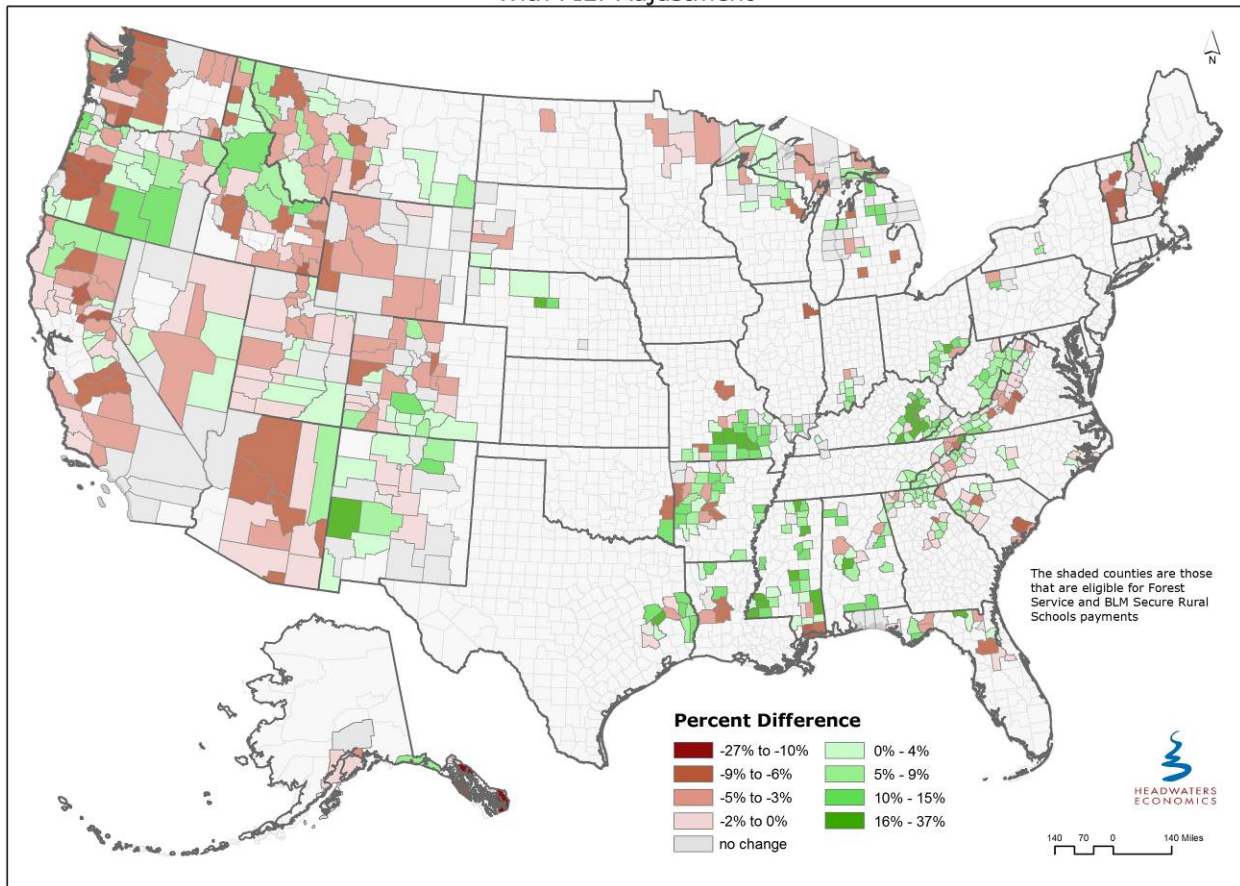
How Counties Will Be Affected

Figure 11 shows the net difference between current SRS payments and a new SRS payment system (including PILT payments) that allocates proportionately higher payments to counties with low economic performance and development potential. (Green indicates net gain; red indicates net loss).

Current payment was calculated as the average payment for FY2008 through FY2011. The projection is for FY2011.

Figure 11

How Will SRS Payments Change if the SRS Formula Adjusts for Economic Performance?
With PILT Adjustment



Counties and schools across the country will receive the same total payments by 2014 when compared to the average payment from FY 2008 to 2011. Overall, 311 of 718 counties will see lower payments with 13 counties experiencing losses greater than 10 percent. No counties will see their payments decline by half or more, and 311 counties will see an increase in payments, with 79 counties seeing payments more than 10 percent higher.

Pros and Cons of the Idea

By adjusting the SRS formula to give preferential treatment to the neediest counties, the federal payments will serve an important goal of economic development, job creation, and poverty alleviation. In addition, using a broader and improved set of criteria to link payments to economic performance and opportunity has the advantage of targeting payments to those counties that need payments the most.

Currently, some counties receive an elevated base share because the average of three highest payments made to the county from 1986 to 1999 was high. This means that some counties, now relatively wealthy and metropolitan, receive a disproportionate amount of SRS funds despite needing it the least. Economic development is a top concern at all levels of government, and this idea will target funding accordingly.

A disadvantage of this idea is that it increases the complexity of the SRS formula, making it more difficult to understand without some knowledge of economic performance criteria and statistics.

Methods Used

See Appendix B for a full discussion of the methods used for this proposed idea.

IDEA 4: REFORM SRS PAYMENTS WITH A NEW DISTRIBUTION FORMULA

4 b: Control Federal Costs by Reducing Development in Wildfire-Prone Areas

Reward counties for actions that reduce development potential adjacent to federal forest lands, reducing taxpayer costs and expanding land management opportunities.

The Idea

Distribute relatively higher SRS payments to counties that control the pace, scale, and pattern of residential development in the wildland-urban interface (WUI).³⁹

Wildfires represent a significant safety and cost risk. Every year the federal government spends \$3 billion to fight wildfires, double the amount of a decade ago. A significant portion of the cost is attributable to defending homes on private property adjacent to fire-prone public lands.⁴⁰ Yet, in the 11 continental western states—where most federal lands are located and where wildfire frequently occurs—only 14 percent of the WUI is developed, leaving the remaining 86 percent, or more than 20,000 square miles, open for further development. If 50 percent of the WUI in the West were developed, the cost of protecting homes from wildfire will exceed the Forest Service’s annual budget.⁴¹ With continued development, warming of the Earth’s atmosphere and increased outbreak of insects and diseases, the costs of wildland firefighting will increase.⁴²

One way to control escalating costs to taxpayers is to influence the pattern, density, and amount of development in the WUI.⁴³ Planning and regulation of development is generally the concern of local government. SRS payments can be used to create incentives for county governments to reduce future

³⁹ The wildland urban interface is defined as private forestlands that are within 500 meters of public forestlands. For a full definition, see Gude, P.H., R. Rasker, and J. van den Noort. 2008. “Potential for Future Development on Fire-Prone Lands.” *Journal of Forestry* 106(4): 198-205.

http://www.headwaterseconomics.org/wildfire/PGude_2008_Forestry.pdf (last accessed 9/14/10).

⁴⁰ According to the Forest Service’s Office of Inspector General, 50-95% of the costs of wildland firefighting go to protecting homes: U.S. Department of Agriculture. Office of Inspector General. November 2006. Audit Report: Forest Service Large Fire Suppression Costs. Report No. 08601-44-SF. According to a study by Headwaters Economics in Montana, 30% of the costs are attributable to protecting homes in the wildland-urban interface: Headwaters Economics: August 2008. Montana Wildfire Cost Study. http://www.headwaterseconomics.org/wildfire/HeadwatersEconomics_FireCostStudy_TechnicalReport.pdf (last accessed 9/14/10).

⁴¹ For a thorough discussion of the costs of fighting wildfires to protect homes and ten proposed solutions, see: Headwaters Economics. 2009. Solutions to the Rising Costs of Fighting Fires in the Wildland-Urban Interface. Headwaters Economics: August 2008. Montana Wildfire Cost Study. <http://www.headwaterseconomics.org/wildfire/HeadwatersFireCosts.pdf> (last accessed 9/14/10).

⁴² *Ibid.*, Headwaters Economics: August 2008. Montana Wildfire Cost Study. In Montana the average annual cost of protecting homes from wildfires is \$28 million. Based on past firefighting costs, Headwaters Economics determined that a 1° F increase in average summertime temperatures doubles the cost of protecting homes from wildfires.

⁴³ The density of development is an important factor. A study in Montana found that each additional house within one mile of a wildfire is associated with roughly an \$8,000 increase in fire suppression costs. Each additional home within six miles of a wildfire is associated, on average, with a \$1,240 increase in fire suppression costs, with an average cost of \$664 per acre (the average lot size of homes involved in wildfires was 12 acres). *Ibid.*, Headwaters Economics.

WUI development or as a disincentive through a downward adjustment in SRS payments as a penalty for WUI development. This idea will save taxpayers money in the long run by reducing future wildfire costs for local, state, and federal governments.

This idea builds on Title III of SRS that already provides funding for wildfire preparedness. Title III funds may be used to implement the Firewise Communities program, which seeks to provide education and assistance to homeowners to help them guard against personal and property damage from wildfires. Title III funds may also be used to develop community wildfire protection plans. However, Title III funds are small (in FY2009, \$32 million nation-wide, or 5 percent of total SRS payments). In addition, Title III funds do not address the fundamental issue of the pace, scale, and patterns of future WUI development, nor does it provide incentives (or disincentives) to steer development in a way that saves taxpayer money.

How the Idea Works

There are four ways this idea could be implemented:

A. Mandatory, penalty-driven solution: change the base share to penalize building in the WUI

Under this idea counties that develop more homes in the WUI will receive proportionately less of the SRS allocation than those counties where development in the WUI is slower or at higher densities. The density of homes is important because research has shown that the cost of fighting wildland fires is influenced not only by the number of homes in the WUI, but also by their spatial distribution, with homes on large lots relatively more expensive to defend than homes that are clustered close together.⁴⁴

SRS payments currently are calculated using a “base share” that is determined by a combination of the proportion of national forest acreage and the average of three highest payments made to the county from 1986 to 1999. The SRS formula could be modified by dividing the base year by a metric that measures the change in the number of acres new acres developed in the WUI in the county compared to a base year (for example, acres of new WUI land developed from 2010 to 2011). Using the 2010 census as a base year, the number and density of homes in the WUI can be mapped by the federal government (for example, by the Forest Service or FEMA).⁴⁵ Each year (or every several years) the WUI lands are measured and re-mapped, showing at the county level the change in acres of WUI land developed.

This idea penalizes counties that allow further development that increases costs to the federal government to protect these homes from wildfires. The program is mandatory because the change in WUI land developed metric is built into the SRS distribution formula.

B. Voluntary, incentive-driven solution: apply for a reward for not building in the WUI

SRS money could be set aside for counties to apply for on a competitive basis. Each applicant county will be required to prove they have effectively controlled development in the WUI.

⁴⁴ *Ibid.*, Headwaters Economics: August 2008. Montana Wildfire Cost Study.

⁴⁵ For detailed maps and tables showing WUI development, by county in the West, see the on-line interactive tool: <http://www.headwaterseconomics.org/wildfire/> (last accessed 9/15/10).

The process for measuring and rewarding the lack of new development in the WUI could follow these steps:

1. A portion of SRS funds are set aside as a competitive fund that counties can apply for if they can prove increases in the amount of WUI land that is not developable. This is called the *SRS WUI Fund*.
2. In 2010 all WUI lands are defined and mapped for every county in the country.⁴⁶ This is the base year against which progress is measured.
3. For each county, the number of acres of undeveloped WUI lands is quantified—this is the WUI development potential.
4. A county can apply for *SRS WUI Funds* by providing proof that WUI development potential has been reduced.
5. The change in acres of WUI land that can be developed is translated into a numeric score (number of new acres developed).
6. All counties that apply are ranked according to their score.
7. The *SRS WUI Funds* are allocated once per year to applicant counties in proportion to their score. Counties that have most reduced the number of acres of developable WUI lands receive a higher proportion of the funds.

For a hypothetical example, in 2010 a county in the West has 100,000 acres of WUI, with 10,000 acres developed, leaving 90,000 acres as potentially developable. Using a combination of land use planning tools (conservation easements, zoning, higher density requirements, transferable development rights, land purchases, etc.) the county reduces its potentially developable WUI lands from 90,000 acres to 50,000 acres. The county applies to the *SRS WUI Fund* by providing proof of how it reduced its WUI developable lands by 40,000 acres. Every county applying for the *SRS WUI Fund* submits its own number. The acres submitted by each county are ranked, and the *SRS WUI Fund* is allocated proportionately; those counties with the greatest acreage reduction in developable WUI receive proportionately the greatest share of the fund.

This idea rewards reducing the size of developable land in the WUI, which in turn saves the federal government future wildfire protection expenses. The program will be voluntary and competitive and counties can apply every year.

C. *Combine the mandatory, penalty-driven idea with the voluntary, incentive-based idea*

This idea combines both a penalty and an incentive into one formula. The base year of the SRS formula is divided by a score that quantifies the number of new acres developed in the WUI since 2010 *and* counties may apply for a portion of the *SRS WUI Fund* if they can prove a reduction in acres of developable WUI lands.

D. *Use SRS Title III funds to help counties plan development away from fire-prone lands*

⁴⁶ This has already been done for the West, using the 2000 Census: <http://www.headwaterseconomics.org/wildfire/> (last accessed 11/22/10.). Each county can be ranked according to percent of the WUI developed and undeveloped.

Title III of SRS provides funding for special county projects related to public lands, including *Firewise* community planning.⁴⁷ The uses of Title III dollars could be expanded to include projects addressing development potential in the WUI, including mapping, land use planning, and conservation easements or land purchase. In other words, Title III funding could be used to help counties with land use planning and improving public safety.

One of the purposes of Title III is to reduce fire risk in the WUI. This idea furthers that goal by extending direct funding for reducing development potential, and creating incentives for counties to use Title III dollars in this way.

The Formula

Depending on the idea implemented, each county's payment is calculated as follows:

- A. *Mandatory, penalty-driven solution: change the base share to penalize building in the WUI*

$$\text{County Payment} = \text{Base Share} / \text{Change in Developable WUI Acres}$$

- B. *Voluntary, incentive-driven solution: apply for a reward for not building in the WUI*

$$\text{County Payment} = \text{Base Share} + [(\text{Change in Developable WUI Acres}) * \text{SRS WUI Fund}]$$

- C. *Combine the mandatory, penalty-driven idea with the voluntary, incentive-based idea*

$$\text{County Payment} = \text{Base Share} / [(\text{Change in Developable WUI Acres} + \text{Change in Developable WUI Acres}) * \text{SRS WUI Fund}]$$

- D. *Use SRS Title III funds to help counties plan development away from fire-prone lands*

This idea requires no change to the SRS formula.

⁴⁷ Counties receiving more than \$100,000 in SRS funding are required to allocate 15-to-20% to Title II and Title III projects. SRS transition payments were to be funded at 85% of the historic three-year-high payments over the period 1986 to 1999. Senator Max Baucus (D-MT) secured additional funding equal to the remaining 15%.

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

For many communities in the country the presence of public lands is an attractant for people—including retirees, tourists and entrepreneurs—who like to visit and live adjacent to public lands. The building industry can continue to benefit from the growing demand to live in high-amenity areas, and county governments can continue to reap property tax benefits from development. This idea is not designed to stop development. Rather, the goal is to alter the pattern of development, with higher SRS payments going to counties that have designed higher density residential patterns in areas that are easier to defend from wildfires, and where catastrophic wildfires are less likely.

The idea provides continued SRS payments to counties, with built-in incentives for land use planning that saves federal taxpayer dollars, and with penalties for developing land in a way that drives up firefighting costs to the federal government. It is fair to the taxpayer and land management agencies by avoiding escalating firefighting costs associated with development in the WUI.

The idea also improves forest health. With fewer or no homes in the WUI, wildland fires are more likely to be managed for beneficial use—allowing the natural role of fire in many ecosystems, reducing fuel loads, and making forest more resilient (against infestations, temperature changes, and other threats) over the long term.

How Counties Will Be Affected

It is not possible to estimate and map how counties could be affected if this idea is implemented. To get a sense of the magnitude of the problem and ideas for solving the problem of growing wildfire-related costs, Headwaters Economics has prepared a white paper that reviews the literature on the topic and provides ten proposed solutions. The paper, as well as a West-wide, county-by-county WUI analysis, is available at: <http://www.headwaterseconomics.org/wildfire/>.

Pros and Cons of the Idea

A. Mandatory, penalty-driven solution: change the base share to penalize building in the WUI

The principle advantage of this idea is that it accomplishes several goals at once. It reduces future costs to the federal government, increases safety, and improves land health by returning the ecological role of fire to public lands.

Another advantage of this idea is that county governments control the actions needed to reap relatively higher SRS payments. In contrast to other land management ideas presented in this paper, this idea can be implemented by county commissioners alone with little or no coordination or guidance from federal land management agencies.

A challenge behind this idea is obtaining data and implementation. The Decennial Census of Population and Housing contains information on housing location and density, so establishing the base year using the 2010 census is relatively simple and based on known and peer-reviewed methods.⁴⁸ Knowing how many new homes have been developed since 2010, as well as their density, is more difficult. One way to solve

⁴⁸ Mapping and tabulating development in the wildland-urban interface over time has long been a topic of serious academic pursuit and several methods have been developed. For a review of the methods, see Gude, P.H., R. Rasker, and J. van den Noort. 2008. "Potential for Future Development on Fire-Prone Lands." *Journal of Forestry* 106(4): 198-205.

this is to require counties to provide this information if they want to be eligible for higher SRS payments. Counties will have to conduct mapping, with the federal government setting the appropriate guidelines, standards, and timeframes. Another option is for the federal government to require counties to conduct annual mapping of WUI lands as a condition for SRS payment eligibility.

B. Voluntary, incentive-driven solution: apply for a reward for not building in the WUI

This idea has the advantage of using incentives (rather than regulations) for land use planning in the wildland-urban interface. County governments can continue to permit residential development in the WUI. All the idea does is offer optional incentives to county governments that choose to undertake land use planning that saves the federal government in firefighting costs.

A disadvantage of this idea is that it does not guarantee that WUI land will not be developed in the future. Zoning laws, for example, could be reversed or not enforced. Another disadvantage is that quantification of a county's reduction in developable WUI lands is subjective and subject to fraud. This can be solved by periodically verifying that no new homes were developed on the WUI lands the county said were no longer developable. If found in violation, the county will not be eligible for future *SRS WUI Fund* payments.

One way to ensure that zoning regulations last longer (that there are no variances on the regulations) is to allow counties to apply for the *SRS WUI Fund* every year. This will create an incentive to continue to prove a reduction in the amount of developable land.

C. Combine the mandatory, penalty-driven idea with the voluntary, incentive-based idea

See discussion of the pros and cons of ideas A and B above.

D. Use SRS Title III funds to help counties plan development away from fire-prone lands

Allowing Title III funds to be used for land use planning to control the pace, scale and pattern of future development has the advantage of saving taxpayers money with a small change in the authorizing language for SRS. Another advantage is that it is voluntary and builds on existing programs.

The disadvantage is that counties may continue to use Title III funding to help educate owners of buildings in the existing WUI how to make them safer, without using the funds to plan for future development. County governments may show little interest in changing future development patterns without strong incentives.

IDEA 4: REFORM SRS PAYMENTS WITH A NEW DISTRIBUTION FORMULA

4c: Link Payments to the Value of Ecosystem Services Provided by Federal Public Lands

Reward forest activities that produce significant value in ecosystem services delivered to counties (such as road removal or management activities that reduce public and private costs and forest activities that sequester carbon to mitigate climate change).

The Idea

Distribute relatively higher SRS payments to counties where agencies are completing projects that improve forest health, delivering economic benefits to adjacent communities and to the nation.

One of the purposes of SRS is to help transition economies away from dependent on commodity production on public lands. Title II funds are intended to meet this goal by providing resources for infrastructure, stewardship, and restoration activities that generate economic opportunity while improving forest health (see Figure 10 on page 39 for an analysis of well this has worked. Only 9% of FY2009 SRS payments were allocated to Title II).

This idea will use a different mechanism, redistributing Title I payments (where in FY2009 85 percent of SRS payments were allocated) to states and counties, based on activities that increase the value of ecosystem services. This will create a powerful incentive for county governments to support activities that improve forest health and create stewardship and restoration related jobs.

This idea uses the same criteria and data as Idea 3, but considers a different mechanism to make county payments, using a new SRS formula (instead of reforming revenue sharing payments as considered in Idea 3).

How the Idea Works

SRS payments are currently calculated using a “base share” that is determined by a combination of the proportion of national forest acreage and the average of three highest payments made to the county from 1986 to 1999. The SRS formula will be modified by multiplying each county’s base share by a factor equal to the value of ecosystem services produced on the national forest or BLM O&C lands that encompass the county relative to the value of ecosystem services produced across all eligible lands. In other words, counties that produce higher values of ecosystem services (by accomplishing greater outcomes through stewardship contracts and other restoration and conservation projects) will receive payments above their calculated base share. Counties that produce lower values of ecosystem services will receive proportionately lower payments.

Under this idea, the SRS distribution formula will be significantly simplified so that each county’s base share is equal to the average payment received over the period FY 2008 – 2011.

There are two ways—Activity Based and Outcome Based—to estimate the value of ecosystem services produced on public lands. See the corresponding section of Idea 3 (page 26) for a full discussion.

See Figure 5 on page 29 for an analysis of the economic value of ecosystem services produced as a result of projects completed using stewardship contracting authorities and Forest Legacy Roads and Trails Initiative dollars (FY2009).

The Formula

Each county's payment is calculated as follows:

$$\text{County Payment} = \text{Existing SRS Base Share} * \text{Adjustment Based on the Value of Ecosystem Service Products}$$

The existing SRS Base Share is equal to each county's average payment received over the period FY 2008–2011 relative to total SRS payments from FY 2008 to 2011.

This formula is calculated using the Outcome (Product) based values of ecosystem services as described briefly in Idea 3 and in more detail in Appendix C.

The more detailed formula explains that each county is guaranteed half of their average payment from FY 2008 to 2011, plus an additional payment based on the relative value of ecosystem services produced on national forests and O&C lands across the country. The formula can be adjusted to ensure a higher or lower guaranteed base payment, resulting in a relatively stronger or weaker link to the value of ecosystem service products produced on public lands (and therefore a stronger or weaker set of incentives for counties to collaborate with the agencies to complete needed restoration, stewardship, and conservation projects).

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

The idea will create economic opportunity and improve forest health by introducing a new incentive structure into the SRS Title I distribution formula. By linking payments to broadly shared values and national policy goals, the idea will increase the chance of securing long-term appropriations while markets mature for these values.

By retaining the base share payment, this idea will provide a strong or weak incentive to counties by using different ways of calculating each county's payment. If the factor that adjusts each county's base share is relatively powerful, county payments will be less certain from year to year, but the incentives to work with the agencies to improve forest health will be stronger.

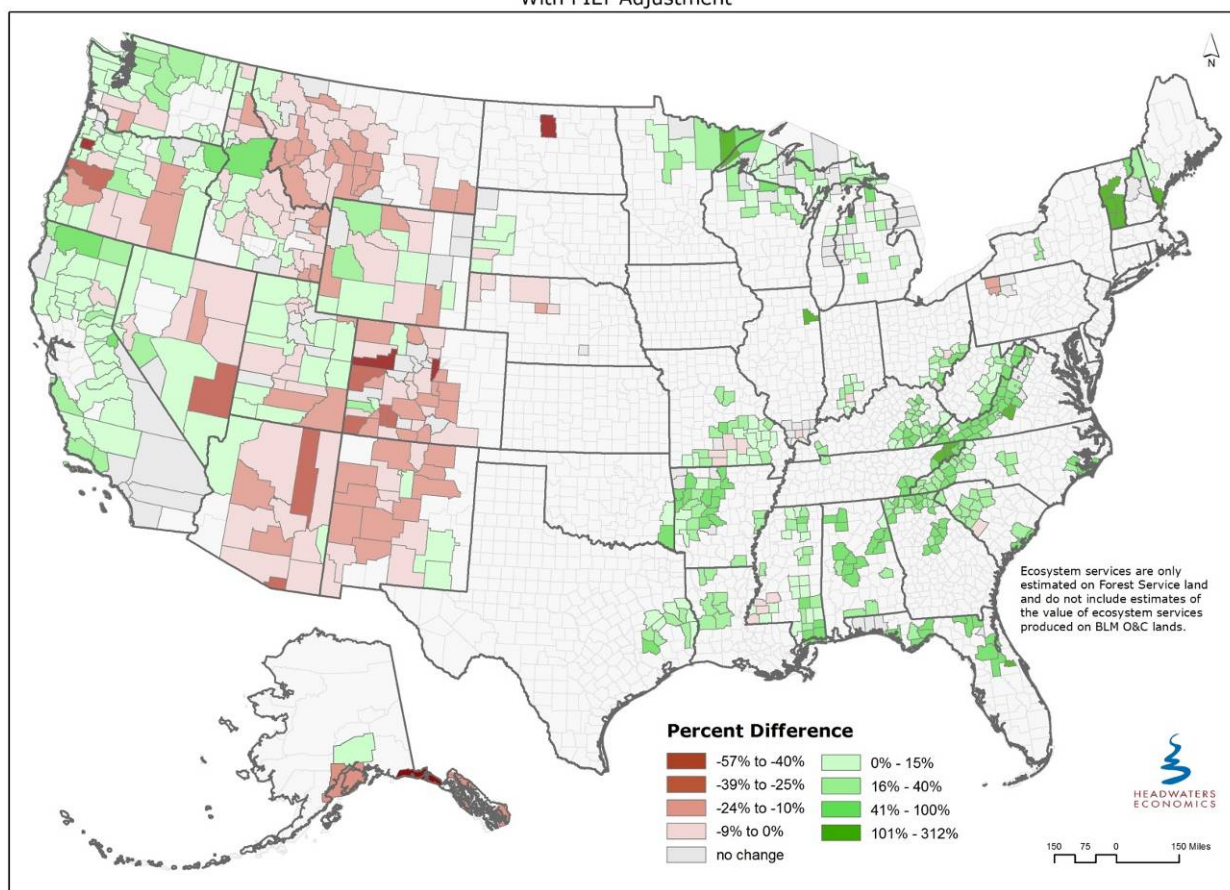
How Counties Will Be Affected

Figure 12 shows the net difference between current SRS payments (for eligible counties) and a new SRS payment formula that allocates payments to counties based partially on the value of ecosystem services produced as a result of restoration and stewardship projects completed on public lands. (Green indicates net gain; red indicates net loss).

This idea guarantees each county half of their existing payment, plus an additional payment based on the relative value of ecosystem services produced on public lands within their boundaries. Counties in national forests generating the highest watershed, forest, recreation, and carbon sequestration values will receive the highest payments (above their current SRS payment). Current payment was calculated as the average payment for FY2008 through FY2011. The projection is for FY2011.

Figure 12

How Will SRS Payments Change if the SRS Formula Adjusts for Ecosystem Service Values?
With PILT Adjustment



To see the effect on individual areas, see the interactive maps on:

www.headwaterseconomics.org/countypayments

Counties and schools across the country will receive the same total payments by 2014 when compared to the average payment from FY 2008 to 2011.

Overall, 189 of 718 counties will see lower payments with 77 counties experiencing losses greater than 10 percent. One county will see its payment decline by half or more.

A total of 459 counties will see an increase in payments, with 327 counties seeing payments more than 10 percent higher. Of those, 78 counties will receive payments more than 50 percent higher.

It is important to note that Figure 12 shows the *minimum* value of a revised SRS payment formula based on the value of ecosystem services. Once this idea is in effect, there will be an incentive for county governments to support and expand stewardship and restoration activities, and there will be an increased demand for new and expanded ways to measure non-market values, resulting in an increase in payments to counties beyond what can be measured using today's valuation studies

Pros and Cons of the Idea

By aligning incentives to encourage current land management goals, the idea of linking payments to the value of ecosystem services will leverage county payments to support stewardship, restoration, and conservation of public lands. As discussed previously, county payments are an influential program affecting how counties view public land management decisions.

This idea also will create an incentive for agencies, counties, and other interested parties (e.g., universities and non-government organizations) to work together to do the monitoring, database management, and research required to make this idea work. An ongoing debate in how to create and grow markets in ecosystem services is if exact values must be known before markets can be established, or if markets must be in place first to create the demand for information that improves the efficiency of transactions. If this idea is adopted, the first payments will almost certainly be inefficient (counties will be paid too little or too much for ecosystem services). Over time, the market for county payments will learn and become more efficient.

The downside is that linking payments to the value of ecosystem services is dependent on congressional appropriations for funding, at least in the near-term. The current funding mechanism for SRS first uses commodity receipts to make county payments, and the difference between authorized payments and available receipts is made up from the federal Treasury. There may be future opportunities associated with this idea to generate new funding from the value of ecosystem services produced on public lands, which would reduce or eliminate the need for appropriated monies.

Certain challenges to measuring the value of ecosystem services produced on public lands must be overcome in order to implement this idea. The product-based method is difficult to measure and will require significant improvements in monitoring, data management, and research. Some non-market values can be more easily measured and valued than others. Estimating values at the regional or forest scale for the full suite of ecosystem services will require new research methods and application in more geographic areas.

IDEA 4: REFORM SRS PAYMENTS WITH A NEW DISTRIBUTION FORMULA

4 d: Distribute Higher Payments to Counties with Protected Public Lands

Distribute Forest Service and PILT payments to local governments based partially on the protected status of federal public lands.

The Idea

SRS and PILT are both based partially on the number of federal acres in each county. This idea would reform the SRS and PILT formulas to weight payments in favor of counties that have protected public lands.

The idea is based on the finding that protected public lands are associated with economic well-being, but the relationship between public lands and growth depends on quality public services, including access to markets and an educated workforce.⁴⁹ Linking county payments to the protected status of public lands will help ensure that counties with specially designated public lands, including wilderness lands, benefit fiscally from these lands, and have extra resources to provide the quality services necessary for economic growth.

Protected federal public lands are defined as public lands that have special designated status that restricts certain commodity uses.⁵⁰ Lands that do not carry these special designations will not count towards a higher payment for counties. These include, for example, wilderness study areas and inventoried roadless lands. If these lands are eventually designated as wilderness or are placed in some other protected status, they would become eligible for higher PILT and SRS payments.

⁴⁹ Studies, articles and literature reviews on the economic contribution of protected public lands are available from: <http://www.headwaterseconomics.org/protectedlands> (last accessed 10/23/10).

For an analysis of the importance of transportation for high-amenity areas, see Rasker, R., P.H. Gude, J.A. Gude, and J. van den Noort. 2009. The Economic Importance of Air Travel in High-Amenity Rural Areas. *Journal of Rural Studies* 25(2009): 343-353, available at: http://www.headwaterseconomics.org/3wests/Rasker_et_al_2009_Three_Wests.pdf (last accessed 11/24/10). Also see the “Three Wests” web page at Headwaters Economics which provides information on three distinct types of counties in the American West as measured by access to markets: www.headwaterseconomics.org/3wests.php (last accessed 11/24/10).

⁵⁰ Protected federal public lands consist of: national parks and preserves (managed by the National Park Service), wilderness (NPS, Fish and Wildlife Service, Forest Service, Bureau of Land Management), national conservation areas (BLM), national monuments (NPS, FS, BLM), national recreation areas (NPS, FS, BLM), national wild and scenic rivers (NPS, FS, BLM), waterfowl production areas (FWS), wildlife management areas (FWS), research natural areas (FS, BLM), areas of critical environmental concern (BLM), and national wildlife refuges (FWS). For a description of the methods used to describe protected public lands, and an analysis of the relationship between these lands and economic growth, see: Rasker, R. 2006. “An Exploration Into the Economic Impact of Industrial Development Versus Conservation on Western Public Lands.” *Society and Natural Resources*. 19(3): 191-207.

How the Idea Works

The SRS formula and the PILT formula are based partially on the number of federal acres in a county. Each of these formulas can be modified to favor higher payments for lands in special protected status. The easiest way to accomplish this goal is to weight each acre in protected status more heavily in the respective formulas. The example used here counts each protected acre as 1.5 eligible acres, generating a 50 percent bonus for specially designated acres.

PILT currently authorizes higher payments for newly acquired wilderness and national park acres for a period of five years.⁵¹ This idea extends the concept of higher PILT payments for certain acquired lands to include all federal land currently covered by special protected designations, as well as any future acquisitions or designations that result in additional acres receiving special protected designations.

The idea also extends the concept of higher payments for specially designated lands to the SRS formula.

The way the current PILT formula compensates counties with additional payments for newly acquired protected public lands is to base the value of those lands on the taxable value of the land acquired. This idea simplifies the payment formula by adding a 50 percent premium to the number of protected acres. For example, the FY2010 PILT full funding payment is calculated using a value of \$2.40 per acre for all federally eligible acres in a county. This idea would increase the actual number of eligible acres by multiplying the number of eligible acres that have special protected designations by 1.5. This functionally increases the full payment amount by a premium of 50 percent for all protected lands. This would have had the effect of raising the PILT per-acre payment in FY 2010 from \$2.40 to \$3.60 for protected public lands.

The 50 percent premium for protected public lands would also apply to the minimum PILT per-acre payment established by Congress.

The idea would not change other aspects of the PILT formula, so it would not override population limits or the reduction for prior-year payments. By applying the protected public land premium to the minimum PILT payment in addition to the full funding amount, this idea will result in higher PILT payments for every county that has protected public lands, regardless of population limits or prior-year payments. In FY 2010, this idea would have had the effect of increasing the minimum per-acre PILT payment from \$0.33 to \$0.495 for all protected public lands (for more detail on the PILT formula, see Appendices A and D).

In the SRS formula, weighting protected acres more highly would not have a similar effect of increasing overall SRS payments, but instead would direct a larger portion of the amount allocated by Congress for SRS to counties with a higher number of protected acres. Each county's SRS payment is based partially on their share of all eligible Forest Service and BLM O&C acres. Counties with relatively more eligible public lands are rewarded by the formula with a proportionally higher payment. This idea would further weight the SRS formula to counties that have proportionally more protected public lands.

⁵¹ The additional payment covers lands acquired by the federal government to be included in the national park system or as national forest wilderness. The law states that "The Interior Secretary shall make payments only for the five fiscal years after the fiscal year in which the interest in land is acquired. Under guidelines the Secretary prescribes, the unit of general local government receiving the payment from the Secretary shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest. A unit receiving a distribution may use a payment for any governmental purpose." P.L. 97-258, as amended Section 6904. Additional Payments.

Using both the PILT and the SRS formula to weight payments based on protected public lands ensures that counties benefit. Counties whose PILT payment is limited by population or by high prior-year payments will mainly benefit from a higher SRS payment (the increase in the SRS payment will not have the effect of lowering the county's PILT payment). Counties whose PILT payment is not limited by population or by high prior-year payments will largely benefit from a higher PILT authorization. The increase in SRS payments for these counties will be subtracted from their PILT authorization. However, because their PILT full payment amount will rise, they will still receive a higher payment.

The Formula

PILT

The PILT formula would calculate the full payment amount as follows:

$$\text{PILT Payment} = (\text{Eligible Acres} * \text{Per-Acre Amount}) + (\text{Protected Lands Eligible Acres} * 1.5) * \text{Per Are Amount})$$

In the formula above, protected eligible acres are the acres with special designations that qualify as protected public lands.

The PILT full payment amount calculated using the above formula would still be subject to population limits and will be reduced by prior-year payments as described in the current PILT formula.

SRS

The SRS formula would increase slightly in complexity because the calculation of eligible acres would expand to the following:

$$\text{Eligible Acres} = (\text{Eligible Acres}) + (\text{Protected Lands Eligible Acres} * 1.5)$$

In the formula above, protected eligible acres are the acres with special designations that qualify as protected public lands.

Additional methods and results of the reformed PILT and SRS formula are discussed in the section “How Counties Will Be Affected.”

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

By using both the SRS formula and the PILT formula, this idea has two mechanisms that will promote predictability and stability in payments.

The PILT formula is designed to mitigate volatility in revenue sharing payments (including SRS), and a higher PILT entitlement will contribute to higher payment and greater stability, or both.

Reforming the SRS formula to include the protected status of public lands will not increase the overall amount of money available for counties, but would instead redistribute payments among eligible counties. As with all the other ideas in this paper that propose to reform the SRS formula, this reform idea will create winners and losers among eligible counties. Counties with more protected public lands (measured as total acres) will capture a higher share of the amount of money Congress authorizes for SRS payments. Counties with fewer protected public lands will receive proportionately less of the total appropriated SRS amount.

The idea will create incentives for county governments to pressure Congress to protect additional public lands in order to receive higher PILT payments, or to win a larger share of the SRS appropriation. Depending on how strong the incentive is (Congress can choose to weight protected public lands more or less), the reforms may more reasonably be expected to remove some opposition to new federal land designations.

The idea will contribute to forest health because protected land designations are generally enacted to protect outstanding resource values, including intact watersheds, wildlife habitat, scenic vistas, recreational opportunities, and other resource values that could be threatened by commercial activities. These special designations also provide additional economic opportunity by maintaining resource values that are associated with economic growth.⁵²

⁵² See, for example: Cromartie, J.B. and J.M. Wardwell. 1999. "Migrants Settling Far and Wide in the Rural West." *Rural Development Perspectives*. Vol. 14(2), Pages 2-8; Beyers, W.B., D.P. Lindahl, and E. Hamill. 1995. "Lone Eagles and Other High Fliers in the Rural Producer Services." Paper presented at the Pacific Northwest Regional Economic Conference, May 1995, Missoula, Montana; Fuguitt, G.V. and C.L. Beale. 1996. "Recent Trends in Nonmetropolitan Migration: toward a New Turnaround?" *Growth and Change*. Vol. 27, Pages 156-174; McGranahan, D.A. 1999. "Natural Amenities Drive Population Change." Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture. Report 781, Pages 1-24; Hansen, A.J, R. Rasker, B., Maxwell, J.L. Rotella, J.D. Johnson, A. Wright Parmenter, U. Langer, W. B. Cohen, R. L. Lawrence, and M. P.V. Kraska. 2002. "Ecological Causes and Consequences of Demographic Change in the New West." *BioScience*. Vol. 52(2): 151-162; and. Rasker, R. 2006. "An Exploration Into the Economic Impact of Industrial Development Versus Conservation on Western Public Lands." *Society and Natural Resources*. 19(3): 191-207.

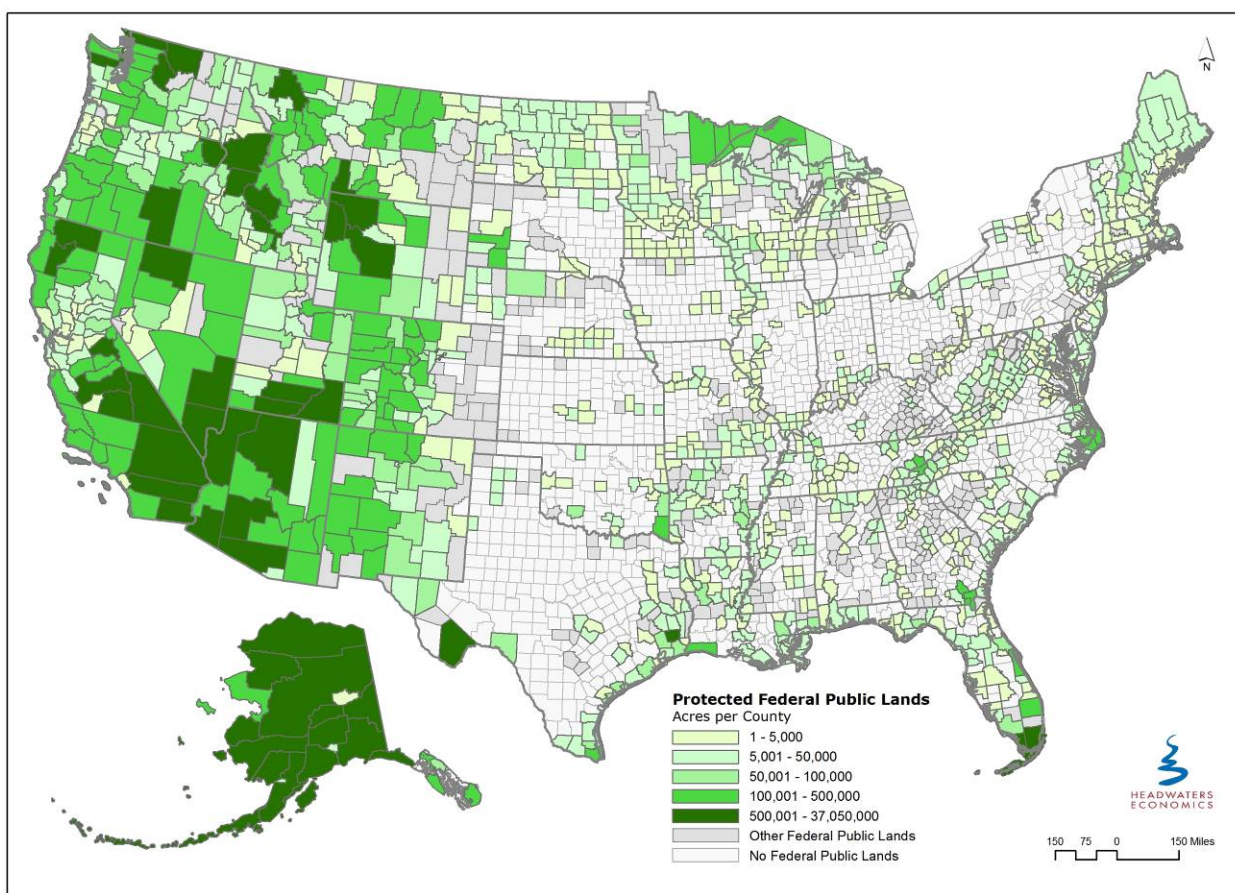
How Counties Will Be Affected

Because we do not have an accurate county-by-county measure of acres of Forest Service land in protected status, we are not able to estimate how SRS payments to Forest Service-eligible acres would be re-distributed based on the share of protected lands. However, we do have a county-by-county measure of protected lands from all agencies combined (Forest Service, Bureau of Land Management, US Fish and Wildlife Service and National Park Service). It is possible to map where those lands exist in order to reveal the relative differences between counties, and represent visually how payments might be proportionately redistributed according to protected lands proportions.

Figure 13 shows the relative proportion of federal lands that are in some form of permanent status, including wilderness, national monument, national parks, national wild and scenic rivers, and others. Under this idea, counties with more protected public lands will receive a higher share of the amount of money Congress authorizes for SRS payments while those with relatively fewer protected public lands will receive proportionately less of the total appropriated SRS amount.

Figure 13

Where Are Protected Federal Public Lands?



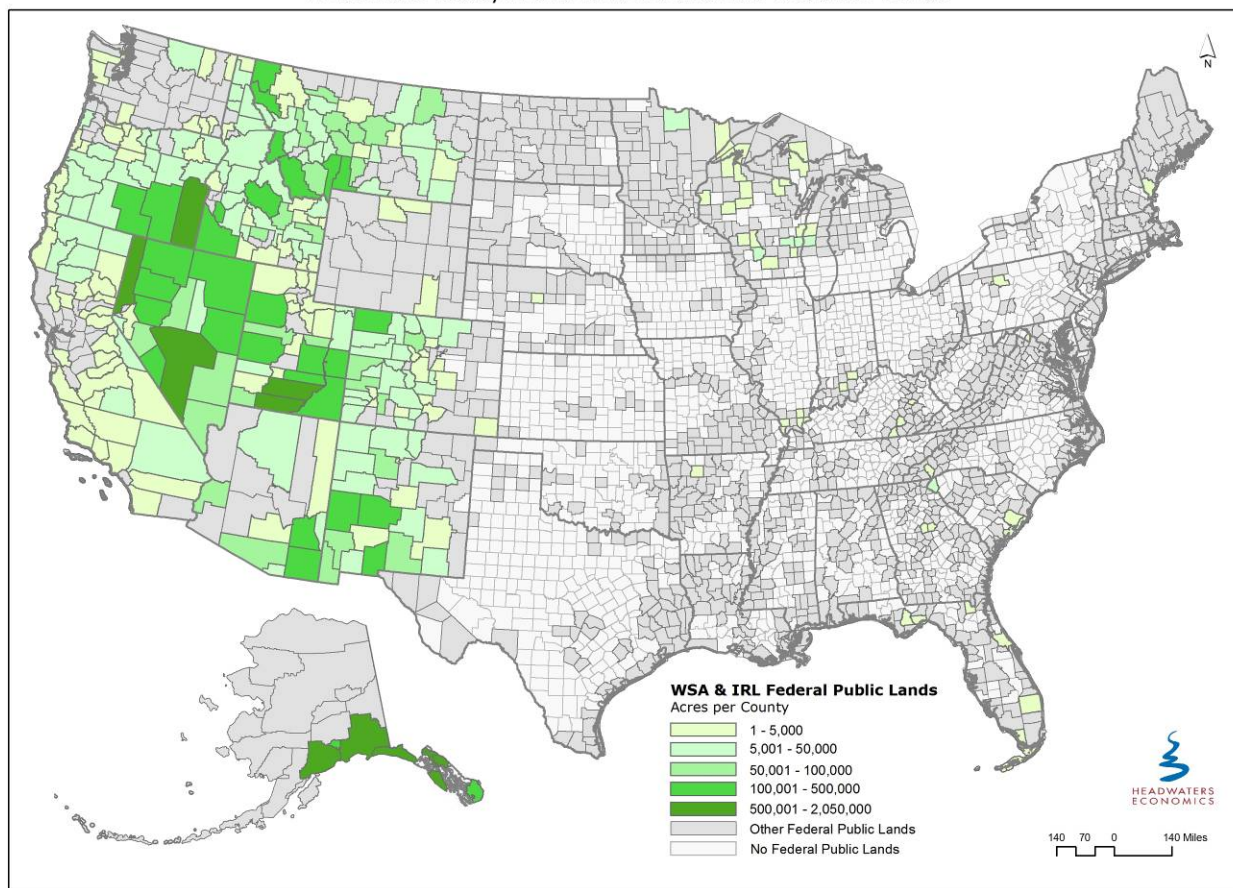
To see the effect on individual areas, see the interactive maps on:
www.headwaterseconomics.org/county payments

IV. OPTIONS: REFORM SRS WITH PROTECTED LANDS

Figure 14 shows the relative proportion of federal lands that have characteristics that make them eligible for some form of designation into a permanent protected status. These consist of wilderness study areas (managed by National Park Service, Fish and Wildlife Service, Forest Service and Bureau of Land Management), and inventoried roadless areas (managed by the Forest Service). If this idea were applied, there would be an incentive to convert these lands into a designated status in order for counties to receive the financial benefit.

Figure 14

Where Are Federal Public Lands That Have Potential to Gain Protected Status? Wilderness Study Areas and Inventoried Roadless Lands



Assuming that Congress continues to fully fund PILT, total payments nationally will go up as a result of proportionately higher PILT entitlements for protected public lands.

Assuming future SRS appropriations are similar to currently appropriated amounts, the idea would not increase total funding amounts, but would make relatively higher payments to counties that have protected public lands.

The PILT formula will moderate the changes in the SRS distribution formula for most counties because the PILT formula will adjust payments upwards in counties that receive lower SRS payments, and PILT will adjust down in counties that receive higher SRS payments.

Pros and Cons of the Idea

One of the main concerns counties have with new land designations is the possibility that restricted uses will lead to declining federal land payments. This is one reason, for example, why county governments often opposed wilderness designations for Forest Service lands; there is no financial benefit from these forms of designations. Reauthorization of SRS with a new formula that rewards counties that have protected lands, combined with similar reforms to the PILT formula, should alleviate these concerns. Depending on the strength of the incentive, the idea could reverse the way counties view public lands, resulting in calls for additional protected lands.

Counties that have protected public land, access to markets, and a well-educated workforce are best situated to capitalize on existing and new land designations (in terms of population, employment, and income growth). Linking higher payments to the protected status of public lands directs resources to counties in a way that leverages today's economic opportunities associated with public lands, helping counties transition their economies away from commodity dependence.

The main drawback, as with most of the ideas to reauthorize SRS, is that it does not identify a new funding source. Payments will continue to depend on congressional appropriations. For this reason, the idea will do little to change predictability for counties, unless the idea wins more support for continued appropriations because of the incentive for conservation of public lands.

Another disadvantage is that this idea does not simplify the SRS distribution formula. It retains the existing SRS formula, but adds another calculation by requiring that the base formula be weighted to reflect the protected status of public lands.

This idea will streamline the PILT formula if this idea replaces the current section that provides for additional payments for certain acquired federal lands (sections 6904 and 6905 of PILT).

IDEA 5: IMPLEMENT TAX EQUIVALENCY PAYMENTS

Replace SRS, commodity revenue sharing payments, and PILT with payments equivalent to the property taxes federal land would pay if the lands instead were privately owned and used for similar purposes.

The Idea

Payments will be equivalent to the property taxes federal land would pay if the public lands instead were privately owned and used for similar purposes (e.g., timber production, grazing, recreation).

Forest Service, BLM O&C, and PILT payments will be replaced by a single payment based on the taxable value of eligible federal public lands. Public lands will be assessed (valued for tax purposes) the same way private lands used for similar purposes are valued.

How the Idea Works

In general, private property is valued for taxation based on its market value. Most states, however, make an exception for agricultural and timber lands. These lands are valued using their productive value rather than their market value. Preferential taxation protects farmers, ranchers, and timber producers from taxes based on the potential development value of land that could exceed their ability to pay.

Under this idea, Forest Service and BLM O&C lands will be assessed based on the productive value of the land, not the potential market value of public lands. Federal lands with special designations that exclude commercial timber and grazing may be the exception. These lands will likely not qualify for preferential assessments, and could be valued more highly for tax purposes. How much higher will depend partly on state and local tax policy, and partly on what kinds of valuation methods Congress puts in place.

Once the taxable value of public land is determined, the local mill levy (tax rate) for county roads and schools will be applied to determine the payment amount.

The Formula

Each county's payment is calculated as follows:

$$\text{County Payment} = \text{Assessed Value of Public Land} * \text{County and School Mill Levy}$$

How the Idea Contributes to Predictability, Economic Opportunity, and Forest Health

Payments will almost certainly be more stable and predictable because the taxable value of land is less subject to volatility than if payments reverted to the 25% Fund system. They are certainly less volatile than commodity prices and the volume of timber cut and sold. Linking budgets to relatively stable land values instead of relatively volatile commodity production and prices achieves stability and predictability for counties.

This idea also largely removes incentives for counties to lobby for particular land management activities. For example, payments from the 25% Fund created incentives for counties to lobby for higher timber harvests as a way of maximizing government receipts and county payments. Because the tax status of public lands will not vary based on the types of projects completed, counties will not have a direct budgetary incentive to request particular land management outcomes.

Tax equivalency payments could create incentives for new land designations if specially designated lands were valued at a higher rate than lands without special designations. For example, specially designated federal lands that exclude commercial resource extraction (e.g., wilderness) could be assessed at a higher rate, creating an incentive for local governments to support new protected land designations.

One drawback is that payments will have to be funded by congressional appropriations, which are uncertain. The experience of past PILT funding fluctuations may be of concern to counties because tax equivalency payments could be similarly volatile if Congress does not guarantee full appropriations permanently. In other words, just because the authorized payments will be predictable and stable using this idea, actual appropriations may not be guaranteed.

How Counties Will Be Affected

Conducting a new tax equivalency study is beyond the scope of this white paper and it is not possible to estimate and map how counties could be affected if this idea is implemented. However, important insight can be gained from existing studies of tax equivalency. The studies consistently find that:

1. The total value of tax equivalency payments would be higher than the full value of current PILT and revenue sharing payments (including SRS funding levels in 2001).
2. The experience of individual counties varies dramatically.⁵³ The average payment will be higher, but the median county will actually receive less money. In fact, about two-thirds of counties will actually receive less money despite higher overall funding levels.

⁵³ For example, one recent study estimated that in 2001, 68% of counties receiving SRS payments in 2001 would receive lower total compensation under a tax equivalency payment program when compared to current SRS payments plus fully funded PILT. See: Ervin G. Schuster and Krista M. Gebert. 2001. Property tax Equivalency on Federal Resource Management Lands. *Journal of Forestry*. Vol 99, Number 5, pp. 30-35. Ross Gorte, (*Ibid.*, Gorte 2000) cites one study suggesting that total compensation is generally adequate, and another that shows that the experience of individual states differ: the Advisory Commission on Intergovernmental Relations found that “compensation, based on revenue sharing, was generally adequate to offset any adverse effect of federal land ownership.” Another study in 1985, which included PILT payments, found federal payments in four of eight states were higher than equivalent private land tax rates, in three states federal payments were lower, and in one, federal

3. Only one-third of counties nation-wide will receive higher payments. A handful of counties—those that have the greatest number of federally owned acres—will receive a disproportionate share of total payments. This explains why total funding levels could rise even as most counties would experience lower payments.

We are not aware of a tax equivalency study completed subsequent to the SRS reauthorization and PILT appropriations in FY 2008. County compensation from FY 2008 to FY 2011 is higher than it was in FY 2001 (when the most recent study was conducted), so the proportion of counties that would receive lower tax equivalency payments relative to SRS and PILT in FY 2008 to FY 2011 is most likely higher than it was in FY2001.

Pros and Cons of the Idea

Tax equivalency payments are attractive because the funding mechanism is easy for local government to understand and because they offer more predictability and stability over time.

Perhaps the biggest reason tax equivalency has not caught on as a way to reform national payments is that many counties currently receive payments in excess of what they could raise by taxing federal lands.⁵⁴ Over time, tax equivalency also has been used to achieve political goals not necessarily associated with fairness to counties (e.g., the Reagan administration's tax equivalency proposal was aimed to reduce federal spending, not fairly compensating counties).⁵⁵

Valuing public lands consistently across a wide variety of state taxation laws will be challenging. In addition, the differences between how much each local government chooses to tax its residents will introduce further complexity and fairness issues. Another issue is reconciling differences in the importance of property taxes in funding local services. Local governments that rely more on sales taxes or user charges to fund basic county services will be disadvantaged relative to local governments in states where property taxes provide the greatest proportion of revenue.

The payment amount is sensitive to the tax policy in each state and county (state law often affects how counties can value and tax land). This means that some counties will receive a higher payment for federal land used for similar purposes based on differences in how land is valued and on tax rates.

payments were roughly equivalent to private land taxes. Sources: Advisory Commission on Intergovernmental Relations. *The Adequacy of Federal Compensation to Local Governments for Tax Exempt Federal Lands*. Report A-68. Washington, D.C. See also: Anne E. Huebner, Clifford A. Hickman, and H. Fred Kaiser. *A Tax Equivalency Study on National Forest System Lands in the United States*. FS-396. Washington D.C.: USDA Forest Service, Dec. 1985. An Inquiry into Selected Aspects of Revenue Sharing on Federal Lands. 2002. A report to the Forest County Payments Committee, Washington, D.C. Research Unit 4802-Economic Aspects of Forest Management on Public Lands, Rocky Mountain Research Station, USDA Forest Service, Missoula, MT (An Inquiry into Selected Aspects of Revenue Sharing) and Ervin G. Schuster and Krista M. Gebert. 2001. Property tax Equivalency on Federal Resource Management Lands. *Journal of Forestry*. Vol 99, Number 5, pp. 30-35. The Inquiry into Selected Aspects of Revenue Sharing report updated tax equivalency findings from FY 1997 (reported by Schuster and Gerbert 2001) to compare these FY 1997 findings to new tax equivalency findings under the new SRS payment program. In FY 1997, total federal land payments were lower than aggregate comparable property taxes, but 52% of counties were tax equivalent (federal land payments are equal or greater than what federal land payments would be if they made payments equivalent to what they would pay if they were privately owned). In 2001, total SRS and PILT payments were still lower than comparable property taxes, but the proportion of tax equivalent counties rose to 68 %.

⁵⁴ Ross W Gorte. 2008. The Secure Rural Schools and Community Self-Determination Act of 2000: Forest Service Payments to Counties. Congressional Research Service Report RL33822, Washington D.C.

⁵⁵ *Ibid.*

One possible solution to this latter issue is to retain PILT. PILT could provide supplemental payments for counties that rely less on property taxes relative to their peers. PILT will also compensate many counties that will see lower tax equivalency payments relative to current Forest Service and BLM payments. Retaining PILT on top of a tax equivalency payment for Forest Service and BLM payments, however, could increase total compensation (e.g., cost to the taxpayer) above today's aggregate payment level.

Another downside is that this idea will eliminate SRS Title II, removing limited but important dollars to support stewardship and restoration activities, and funding for RACs.

It also is hard to say how this idea will affect economic opportunity. Protected public lands are associated with economic well-being and new protected land designations could increase economic opportunity for some counties under certain circumstances. On the other hand, the loss of Title II funding will eliminate employment opportunities associated with public lands infrastructure, restoration, and stewardship activities immediately. The same may hold true for forest health: new designations could protect significant resource values, but fewer resources will be available to meet the significant restoration and stewardship needs on public lands.

This idea is not linked directly to economic need or to incentives that preference one type of land use over another. However, if taxable values for specially designated lands are higher than other federal lands, it will deliver higher payments to counties with public lands in special designations and may encourage new designations.

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To extend the current county payment programs, or to replace them with new ideas, Congress will have to appropriate money from the general Treasury or find other funding sources. The next section offers five options for how Congress could fund future county payments.

V. IDEAS FOR FUNDING FEDERAL LAND PAYMENTS

This section summarizes several ideas for how Congress could fund future county payment programs.

SRS will expire in FY 2011 and PILT is only appropriated through FY 2012. To extend these programs, or to replace them with ideas proposed in this paper, Congress will have to appropriate money from the general Treasury or find a new funding source.

Over its current four-year authorization (FY 2008-2011), SRS will provide an annual average of \$433 million to counties and schools. PILT payments have cost taxpayers more than \$350 million in each of the last three years (FY 2008-2010). The money required to fully fund PILT will increase in FY 2011 and FY 2012 (as SRS transition payments decline). The most recent extension of SRS, debated in 2007 and 2008,⁵⁶ nearly failed because of Congress' inability to agree on how to fund the law.⁵⁷ Concerns about federal spending and the deficit are even more acute today, leaving future SRS and PILT funding far from certain.

⁵⁶ SRS 2007 was a one-year emergency reauthorization as part of the Iraq Accountability Appropriations Act of 2007, Pub. L. No. 110-28, tit. V, ch. 4. SRS 2008 was amended as part of Title VI of the Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. No. 110-343.

⁵⁷ Disagreement centered on perceived inequitable distribution of funds among the states and the provision of funding, generally. The Bush Administration proposed to empower the Forest Service to sell certain federal lands to fund the SRS Act payments. U.S. Senator Larry Craig of Idaho proposed to use funds generated by a new withholding requirement on federal, state, and local contracts (152 Cong. Rec. S11688 (Dec. 8, 2006)). Sen. Craig also directed a working group to examine expediting oil and gas leases to enhance royalty payments, and relaxing NEPA standards for timber operations. A 2007 version of the SRS bill in the House would have offset costs by charging "conservation of resource fees" on federal oil and gas leases in the Gulf of Mexico. The fees would have generated \$2.875 billion in revenue (H.R. Report No. 110-505, pt. 1, at 10 (2006)). An amendment introduced by Congressman Rob Bishop would have offset costs by opening up the Arctic National Wildlife Refuge to drilling. The Amendment was voted down by the House Committee on Natural Resources by a 17-10 vote. Oddly enough, funding considerations did not play a significant role in the debates concerning the SRS Act in 2000. At the time, the United States was experiencing a budget surplus, which provided a starkly different background consideration than the multi-trillion-dollar debt facing the country during the 2007 and 2008 reauthorizations, and the heightened spending and deficit concerns facing the 2011 SRS reauthorization effort.

Options for Funding Future County Payments

1. **Return to Commodity Receipts:** Return to the permanently authorized revenue sharing programs: 25% Fund (Forest Service) and BLM O&C 50% payments.
2. **Continue Direct Appropriations:** Ask Congress for annual or long-term appropriations to fund federal land payments.
3. **Utilize Improvements to Forest Health:** Share a portion of receipts from participation in markets for carbon, water, and/or other services provided by public lands.
4. **Enact New Fees or Taxes:** Enact a new fee or tax on recipients of services supplied by public lands (e.g., recreation fees or taxes on water utilities for clean water delivery).
5. **Sell Public Lands:** Certain public lands could be sold to generate revenue to fund county payments either directly or to create a dedicated permanent fund that will provide county payments from interest earnings.

FUNDING IDEA 1: RETURN TO COMMODITY RECEIPTS

Return to the permanently authorized revenue sharing programs: 25% Fund (Forest Service) and BLM O&C 50% payments.

The Idea

Allow SRS to expire and return to commodity revenue sharing programs. Both the National Forest 25% Fund and the O&C lands revenue sharing programs are permanently authorized and have a dedicated funding source based on receipts generated from commodity development on public lands. No action is required to return to this funding mechanism.

PILT is permanently authorized, but must be appropriated on an annual basis. Currently, PILT is appropriated through FY 2012 at the full funding level. This idea does not propose a change in PILT funding.

How the Idea Works

No action is required by Congress. If SRS is allowed to sunset as planned in FY 2011, counties will receive their permanently authorized revenue sharing payment beginning in FY 2012.

Pros and Cons of the Idea

The major advantage of this idea is that Forest Service and BLM O&C revenue sharing payments are permanently authorized and have a dedicated funding source. The downsides are many: lower payments for most counties when compared to current SRS payments; payment volatility; and an expectation of commercial uses of public lands that are at odds with current public land management goals and values. If fully funded, PILT will help with payment levels and volatility, but future full funding for PILT is in question given the current budget climate.

Congress attempted to smooth some of the volatility inherent to commodity prices and production by basing payments on a seven-year rolling average of commodity receipts. This helps, but creates a new problem if a county's authorized payment (based on the seven-year rolling average) exceeds available funding; Congress may have to appropriate funds to make up the difference. This may expose revenue sharing payments to the same uncertainty associated with continued PILT appropriations (or reauthorization of SRS).

FUNDING IDEA 2: CONTINUE DIRECT APPROPRIATIONS

Ask Congress for annual or long-term appropriations to fund federal land payments.

The Idea

Continue to pay for SRS, PILT, or other reauthorization options with congressional appropriations.

How the Idea Works

Congress will continue to appropriate funding, either annually or for a number of years, to fund SRS and PILT payments. Appropriations will be equal to the fully authorized amount for both programs.

The FY 2009 federal budget says only that “[o]ffsets for the [SRS Act] are provided within the topline of the President’s Budget throughout the Department of Agriculture and elsewhere.”⁵⁸ Within the FY 2009 budget for the Department of Agriculture, the offsets for the SRS Act are not clearly indicated.

Pros and Cons of the Idea

As seen during the past decade, appropriations can provide significant funding for counties and schools. Should Congress reauthorize or reform the county payments program, then large amounts of general Treasury funding will increase the effectiveness of any incentive structure created to promote national policy goals such as job creation or forest health (for example, through Title II of SRS).

Counties should be wary about federal lands payments that are linked to congressional politics and the year-to-year uncertainty of funding levels. Congress faces an increasingly difficult budget environment amid concerns about the growing federal debt. There also is growing pressure to reduce the deficit as well as fund other priorities.

The appropriations process also increases the likelihood that Congress will use the funding opportunity to attach riders or other changes to the federal lands payment program (e.g., altering future distribution formulas). This will provide mixed results for counties. On the positive side, this may make the program more responsive to new or unexpected needs. On the downside, it may increase the volatility of the program and make it much more difficult for county officials, federal agency officials, or others to conduct longer-term budgeting or initiate projects dependent on future county payments.

⁵⁸ U.S. Forest Service, FY 2009 Forest Service Budget Justification, <http://www.fs.fed.us/publications/budget-2009/fy2009-forest-service-budget-justification.pdf>, pages 1-8 (last accessed 3/29/10).

FUNDING IDEA 3: UTILIZE IMPROVEMENTS TO FOREST HEALTH

Share a portion of receipts from participation in markets for carbon, water, and/or other services provided by public lands.

The Idea

Activities on public lands that increase forest health produce a wide range of values, and many of these values can be measured in economic terms. For example, improvements in carbon sequestration, water quality, recreation, and forest health all can be quantified. As a result, they can be monetized through willing seller/willing buyer markets, which is happening already in many parts of the country.⁵⁹

This idea suggests that the Forest Service and BLM will participate in markets for ecosystem services. A portion of the receipts generated from market transactions involving these federal agencies could be directed to county governments and school districts.

Federal agency participation in markets for ecosystem service products can only occur if Congress adopts one of the ideas described earlier in this paper. For example, Idea 3 (expand the definition of gross receipts in revenue sharing) and Idea 4c (change the SRS formula) both suggest linking the economic values of ecosystem services to county payments. At first, these ideas would be funded with continuing federal appropriations, but they open the possibility of identifying and growing dedicated sources of funding in the future.

How the Idea Works

Originally county payments were funded from commodity receipts through the National Forest 25% Fund and the O&C lands revenue sharing programs. Several of the reform ideas presented earlier in this white paper suggest designing a payment program that expands the definition of “receipt” to incorporate the value of stewardship, restoration, and conservation activities on public lands that produce ecosystem service products. The products generated by these activities have real values, and significant work is underway to value ecosystem services produced on public lands.

While markets for the outputs from healthy forests currently are currently small, there are a growing number of efforts to tap into the potential of ecosystem markets.⁶⁰ The value traded in carbon credits, for

⁵⁹ Ecosystem Marketplace has put together a matrix and profile paper summarizing the current state of Payment for Ecosystem Services (PES) internationally. *Forest Trends and the Ecosystem Marketplace*. 2008. Payments for Ecosystem Services: Market Profiles: <http://www.ecosystemmarketplace.com>. (last accessed 10/23/10). Oregon Senate Bill 513 Ecosystem Services Markets Working Group is putting together an assessment of ten of the most widely accepted ecosystem services quantification systems: <http://oregon.gov/OWEB/SB513.shtml> (last accessed 10/24/10). Groups like the Willamette Partnership are valuing ecosystem services in order to establish a credit exchange that assist landowners who want to participate in ecosystem markets. The accounting system, “Counting on the Environment,” is an important step towards developing a market for ecosystem services in Oregon and the Pacific Northwest at large: <http://willamettepartnership.org/ecosystem-credit-accounting/the-willamette-ecosystem-marketplace> (last accessed 10/21/10).

⁶⁰ In Maryland, for example, the Total Maximum Daily Load requirements of the Clean Water Act apply to the Chesapeake Bay, in effect enforcing restoration and pollution laws. The Maryland Department of Natural Resources is interested in the viability of using ecosystem services markets as a way of regulating pollution. DNR is tracking ecosystem services, gathering data on ecosystem valuation, and if viable, will push for establishment of markets. The USDA Office of Ecosystem Markets was established by the Obama Administration to catalyze the development

example, is increasing and may grow significantly if carbon is taxed in one form or another. There is also a growing recognition of and a willingness to pay for watershed restoration as a cost-effective approach to maintaining healthy drinking supplies. Revenue derived from federal participation in such markets could be shared with counties where the product-generating public lands are.

Pros and Cons of the Idea

If market mechanisms can be developed that will partially or fully fund county payments, this approach will create direct incentives that support the general direction of current national forest management goals, by tapping into the various economic values and opportunities associated with producing clean air and water, wildlife habitat, cultural resources, and recreation on public lands.

While current markets are not large enough to fund county payments, adopting a payment distribution system based on the value of ecosystem service products could help change the existing system. Counties seeking to maximize payments will create the necessary demand to shift county payments from a system based on direct appropriations to a market-based approach, which would monetize improvements to forest health. This idea also will assist rural economies in diversifying their economic base to include a mix of industries, rather than just commodity production.

The disadvantages of this approach are that markets are relatively immature, there is weak market demand for forest health services, and, in some cases, measurement and monitoring of landscape health indicators create challenges. If started today, payments to counties from these markets will be extremely small and likely volatile, at least at first, as markets develop. In addition, there are concerns that ecosystem service products produced on federal lands may depress the values of similar services produced on private land.

of markets for ecosystem services. <http://www.fs.fed.us/ecosystemservices/OEM/index.shtml/index.shtml> (last accessed 10/21/10)

FUNDING IDEA 4: ENACT NEW FEES OR TAXES

Enact a new fee or tax on recipients of services supplied by public lands (e.g., recreation fees or taxes on water utilities for clean water delivery).

The Idea

Congress could introduce a fee or tax on services provided by public lands to offset the cost of the county payments program.

How the Idea Works

Public lands provide many services, such as recreation opportunities and clean water. A new fee or tax will be attached to such services, and the revenue will establish a dedicated funding source, reducing or eliminating the need for appropriations to fund county payments.

Federal public lands essentially will provide a service, which then will be levied to pay for improvements to the public lands, in order to provide more or better services in the future. At the same time, a portion of the fee revenue will be treated like commodity revenues and shared with counties.

Because this revenue will be tied to actual public land uses and values, it provides another opportunity to design an incentive structure that rewards public policy goals, such as assisting counties with legitimate costs, encouraging healthy forests, and avoiding future public costs.

The scale of impact will depend on a variety of factors, including: the activities covered; fee levels; which counties pay fees; and whether the fees are returned directly to counties where they incur or are instead pooled for distribution to all counties that qualify for federal land payments.

Pros and Cons of the Idea

It will be difficult to enact new fees and taxes and to set them at appropriate levels. In addition, many believe that public lands, and the benefits they provide such as cleaner air or water, should be provided to the public free of charge.

Another concern is that this proposal will have the net result of taxing healthy or successful uses of public lands, such as recreation opportunities or clean water generation, rather than assessing fees on harmful uses of federal lands.

FUNDING IDEA 5: SELL PUBLIC LANDS

Certain public lands could be sold to generate revenue to fund county payments either directly or to create a dedicated permanent fund that will provide county payments from interest earnings.

The Idea

Selected public lands could be sold to generate revenue that would be used to fund county payments either directly or channeled into a dedicated fund that will fund payments from interest earnings.

How the Idea Works

Motivated by a desire to generate funds that would be channeled into a mandatory account, the Bush Administration proposed empowering the Forest Service to sell certain federal lands to fund the SRS payments in 2007 and 2008. A similar proposal for the Oregon and California grant lands managed by the BLM in Oregon emerged in 2010. The proposal would provide a permanent funding source for the 18 counties in Oregon that contain the O&C lands, and would help to fund a 10-year extension of the SRS for Forest Service lands. The proposal aims to sell approximately half of the BLM O&C lands managed by the BLM.⁶¹

Like the other funding proposals, the impact to counties will depend on the amount of revenue generated from the sale of public lands, and whether the funds are returned directly to counties where they originated or are instead pooled for distribution to all counties qualifying for federal land payments.

Pros and Cons of the Idea

This funding idea will likely meet resistance in Congress. The Bush Administration's earlier proposals failed, and the House Committee on Natural Resources noted, for example, that it "was met with considerable concern by the Congress and the public."⁶²

The current proposal is likely to fall short of expected economic goals because it assumes that timber supply drives the local economy, not timber demand. Timber harvests have declined across federal, state, and private lands in the current recession due to a steep fall in demand for wood products. There is little evidence to suggest that putting up huge amounts of public land for sale will increase demand for timber products, resulting in high sale prices and new logging jobs for Oregon.

The idea also runs counter to current economic opportunity around public lands. The BLM O&C lands have a different management structure than do other federal protected lands. But these lands contain significant natural resources associated with a diversifying regional economy. Managing these lands for a variety of resource values, including but not limited to commodity production, may offer greater long-term economic opportunities for Oregon, particularly in counties with access to metropolitan job markets and a well-educated work force.

⁶¹ See the Association of O&C Counties website describing the Federal Forest Counties and Schools Stabilization Act of 2010 at <http://www.ffcssa.org/>

⁶² H.R. Report No. 110-505, pt. 1, at 7 (2006).

VI: CONCLUSION: THE DIFFICULTIES AND OPPORTUNITIES OF COUNTY PAYMENT REFORM

County governments are compensated for the tax-exempt status of federal public lands within their boundaries. These payments are important, at times constituting a significant portion of county and school budgets. They also affect how public lands are managed, and in turn influence the kind of economic opportunities available to counties.

Over the past 100 years, Congress has reformed and expanded federal land payments to counties, with each change reflecting new economic conditions and changing values of public lands. Most recently, Congress gave counties the option of decoupling payments from timber and other commodity development. Since 2001, with the majority of counties selecting to participate in SRS, and with PILT fully appropriated, county governments have seen an increase in payments and a decline in volatility.

Future county payments are at risk because of the pending sunset of SRS in 2011 and the uncertain appropriation for PILT after 2012 amid growing budget deficit concerns in Washington D.C. SRS's original intent was to be a temporary way to help transition counties away from dependence on commodity production for tax revenues. If SRS is not reauthorized, payments again would be tied to commodity receipts, meaning smaller and more volatile funding for most counties. Tying payments to commodity receipts would also mean fewer incentives to support stewardship and restoration activities, which—although they would create jobs and improve forest health—would not generate revenue-sharing receipts.

SRS has many additional merits. The program provides proportionately higher payments to counties with lower per capita income, and Titles II and III direct funds to stewardship and restoration activities, and wildfire risk reduction. However, there is also significant opportunity for improvement. SRS payments did not always go to the neediest counties, and the funding levels for Titles II and III are too small to meet significant forest restoration needs or to affect local economic conditions. Also, under the current formulation of SRS, county governments do not benefit financially from popular activities, such as stewardship and restoration, which improve forest health.

This paper explores a number of ideas for extending the county payments program, evaluating how each one will meet the goals of providing counties with stable and predictable compensation while reinforcing today's economic and land-health goals.

Many of the ideas presented in this paper suggest reforms to the SRS formula. Some would direct payments to counties in ways that would better meet economic goals; others would create incentives for counties to improve forest health and create jobs, either by collaborating with agencies or by doing so on their own.

Other ideas consider basing county payments on a tax equivalency system, which, although it would offer counties greater predictability and stability, would not benefit the majority of counties. Perhaps a more popular idea—if SRS is allowed to expire and the system returns to revenue sharing payments—is to expand the definition of “gross receipts” to include the value of stewardship and restoration activities.

Some of the ideas suggested in this paper require unique and relatively new measurement techniques. For example, the value of ecosystem services measured in this paper was based on existing studies. Changing the SRS formula so that it rewards activities that produce ecosystem services will create new incentive and will increase efforts to improve techniques for measuring these values.

The best solution may be to combine a number of ideas presented in this paper into a single formula, with “something for everyone.” For example, the formula could have an element that directs payments to counties based on economic need, another element that rewards savings to taxpayers through fire risk reduction, and others that encourage collaboration and promote stewardship and restoration by giving county governments and land managers various ways to increase payments through improving forest health.

Congress will also have to decide how to fund county payments. While a number of ideas exist, including the sale of public lands and a return to commodity receipts, it is likely that in the short term Congress might need to continue a direct appropriation for SRS and PILT. However, in the longer term there is a great opportunity to change what services and value the public receives in exchange for these appropriations, and to tie these payments to activities that increase forest health and create jobs, while at the same time being fair and predictable for county governments.

The reauthorization of SRS will have a higher chance of success if supported by a diverse set of groups—conservationists, forest workers, agency managers, and the public—in addition to county governments. A much broader constituency can be developed to support a future SRS if the program is improved in order to benefit counties that need economic development support or to direct proportionately higher payments to areas with measurable improvements in forest health, fire risk reduction, or to areas with protected lands. Such reforms would have an important effect of creating incentives for county governments to support the types of land management that have widespread public support. Finally, changing SRS in these ways would be consistent with how Congress traditionally has reformed county payments, evolving the system to reflect new values and economic conditions.

APPENDIX A: FEDERAL LAND PAYMENT PROGRAMS DISCUSSED

This appendix describes the federal land payment programs discussed in this paper.

Forest Service 25% Fund

In 1906, the Forest Service began sharing a portion of commodity receipts, mainly from timber, with counties as compensation for non-taxable federal lands. The portion of receipts shared with counties was raised from 10 percent to the current 25 percent in 1908.⁶³

The payments were to be used for roads and schools in the counties at the discretion of each state (states choose what portion of Forest Service payments must be spent on roads vs. schools).⁶⁴ States also differ on how they allocate funds to schools: some states pass the funds directly back to school districts based on national forest acreage in each district, others allocate the payments to a state school equalization fund, meaning Forest Service payments are distributed to schools across the state with no basis in national forest acreage.

In 2008, the 25% Fund was reformed to base revenue sharing payments on a 7-year rolling average of receipts, rather than on the current year's receipts.

The 25% Fund is permanently authorized and has a dedicated funding source in the form of commodity receipts. If the Secure Rural Schools and Community Self-Determination Act is not reauthorized for FY 2012 and beyond, all counties will still receive their proportionate share of the 25% Fund.

BLM Oregon and California Land Grant (O&C) Revenue Sharing Payments

In 1937, the Bureau of Land Management (BLM) began sharing commercial receipts generated on the revested and reconveyed Oregon and California Railroad grant lands (O&C) with counties along the same model as the Forest Service 25% Fund.⁶⁵ The main differences are the level of compensation (originally 75% and now 50%) and the permitted uses—payments are made directly to the county government, which can use them for any governmental purpose.

Secure Rural Schools and Community Self-Determination Act (SRS)

Congress passed SRS in 2000 to provide optional assistance to states and counties whose revenue sharing payments (Forest Service 25% Fund and BLM O&C 50% payments) declined from the 1980s through the 1990s. SRS guarantees each eligible county a payment equal to the highest three years of revenue sharing payments between 1986 and 1999. SRS also added two new titles to help counties diversify their economies beyond commodity extraction and help pay for services directly related to public lands, including emergency services and community wildfire preparedness.

⁶³ Act of May 23, 1908, Pub. L. No. 60-136 (the 25% Payment).

⁶⁴ Federal legislation mandated that payments fund county roads and schools, but left to states how to allocate the funds between these two services. See Congressional Research Service Memorandum, Forest Service Revenue-Sharing Payments: Distribution System. November 19, 1999. Ross Gorte. (Available from Headwaters Economics).

⁶⁵ O&C Lands Act, Pub. L. No. 74-405, tit. II(a) (1937).

The full payment amount was scheduled to transition downward over the six-year authorization period. Funding was derived first from receipts received by the federal government from activities of the Forest Service on national forest land, and the Bureau of Land Management on revested and reconveyed grant lands, with any surplus to be funded from federal Treasury funds.

SRS is organized into three titles:

Title I: *Optional Payments for State and Counties.* Title I payments replace revenue sharing payments and must be used to fund county roads and schools. Counties receiving a total payment in excess of \$100,000 must direct between 80 and 85 percent of funds to Title II or Title III projects.

Title II: *Funding for Special Projects on Public Land.* The purpose of Title II dollars are to promote collaboration between the agencies and adjacent communities to help counties transition their economies away from dependence on commodity extraction. Newly formed Resource Advisory Committees (RACs) make recommendations for special projects on public lands funded with Title II dollars. Such projects must further the purposes of the SRS Act, including fostering investment in roads and other infrastructure, soil productivity, ecosystem health, watershed restoration and maintenance, control of noxious weeds, and reestablishment of native species. RACs typically have authority over some subset of a state's territory. For instance, there are six RACs for the State of Idaho: Central Idaho, Eastern Idaho, the Idaho Panhandle, North Central Idaho, South Central Idaho, and Southwest Idaho.⁶⁶

Title III: *County Funding for Special Projects.* Counties have the authority to develop and select Title III projects. Under the 2000 legislation, Title III funds can be used for search and rescue, community service work camps, easement purchases, forest related education opportunities, fire prevention and county planning, and community forestry.

SRS Reauthorization in 2008⁶⁷

Congress did not make dramatic changes to Title II or Title III of the SRS Act in the 2008 reauthorization. The most substantial changes were to the funding formula of Title I. Under the current Title I, certain covered states—California, Louisiana, Oregon, Pennsylvania, South Carolina, South Dakota, Texas and Washington⁶⁸—are given transition payments, which are pegged to the sums paid to states and counties in 2006 under the SRS Act as then implemented. In 2008, the covered states received 90 percent of such sums. In 2009 and 2010, they received 81 and 73 percent respectively.⁶⁹ As of 2011, covered states will start receiving the “formula payment,” as described below.

States other than covered states may opt to receive a seven-year rolling average of 25% Fund payments, or the 50% payments. However, they may alternately elect to receive the Formula Payment. The Formula Payment is based on a share of the full funding amount, which is the total funding allocated on a nationwide basis for the SRS Act. The full funding amount nationwide is set at \$500 million for FY 2008; \$450 million for FY 2009; and \$405 million for FY 2010. A formula is used to calculate the share that

⁶⁶ For a list of current Forest Service RACs, see U.S. Forest Service, Resource Advisory Committees. https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf (last accessed 3/23/10).

⁶⁷ SRS Act of 2008 Pub. L. No. 110-343.

⁶⁸ It is unclear from the legislative history why certain states were selected to be covered states.

⁶⁹ Pub. L. No. 110-343, tit. VI, § 103.

states and counties are entitled to receive.⁷⁰ Roughly speaking the share is a function of acreage of federal land, the three highest 25% payments or 50% payments for the years 1986 to 1999, and per capita income.

SRS Title II retains the Resource Advisory Committee approval process. RACs continue to have significant leeway to innovate, however they are still constrained to choose projects consistent with the purposes of the SRS Act as outlined in Section 2. These purposes are not significantly different from those outlined in the earlier version of the SRS Act.

Title III has a significantly more narrow scope in the current legislation. Whereas the 2000 legislation provided funding for projects in six broad areas, the current legislation limits funding to projects in three specific areas. First, funds may be used to implement the Firewise Communities program, which seeks to provide education and assistance to homeowners to help them guard against personal and property damage from wildfires. Second, funds can be used to reimburse the county for search and rescue and other emergency services. Third, funds may be used to develop community wildfire protection plans in coordination with the Secretary of Agriculture or Interior, as appropriate. Counties need not seek federal approval in advance of the actual expenditures. Rather, they must seek reimbursement after the fact, by submitting certification to the Secretary of Agriculture, or Interior, (as appropriate) that the funds were used in accordance with Title III.

Funding for payments under the current version of the SRS Act is derived from (1) funds appropriated to carry out the act; (2) revenues, fees, penalties or miscellaneous receipts received by the federal government from activities by the Forest Service and Bureau of Land Management on applicable federal lands; and (3) to the extent of any shortfall, Treasury funds not otherwise appropriated.

Total SRS payments from the Forest Service and the BLM totaled \$562 million in FY2009. Title I made up 85 percent of the total payment (\$478 million), Title II made up 9 percent (\$53 million), and Title III made up 5 percent (\$32 million). SRS payments are set to transition down from a high of \$623 million in FY 2008 to an estimated low of \$378 million in 2011.

Lands eligible for SRS payments include all Forest Service lands and the Oregon and California lands (O&C) managed by the BLM in Oregon. The total SRS payment in FY2009 includes SRS payments made to counties as compensation for Forest Service and BLM O&C lands. Of the total SRS payment in FY2009, 17 percent (\$95 million) was made to compensate 18 counties in Oregon for the BLM O&C lands in their jurisdictions. The rest of the SRS payment (83 percent, \$467 million) was made to counties as compensation for Forest Service lands within their jurisdictions.

⁷⁰ See U.S. Forest Service, Title I- Secure Payments for States and Counties Containing Federal Land, <http://www.fs.fed.us/srs/docs/calculations.pdf> (last accessed 3/16/10).

Payments in Lieu of Taxes (PILT)

"Payments in Lieu of Taxes" (PILT) are federal payments to local governments that help offset losses in property taxes due to nontaxable federal lands within their boundaries.⁷¹ The payments are made annually for tax-exempt federal lands administered by the BLM, the National Park Service, the U.S. Fish and Wildlife Service (all agencies of the Interior Department), the U.S. Forest Service (part of the U.S. Department of Agriculture), and for federal water projects and some military installations. PILT payments can be used for any governmental purpose at the discretion of the receiving county. Only county governments are eligible for PILT payments.

PILT interacts with SRS in meaningful ways. PILT was passed in large part to increase and stabilize existing federal revenue sharing programs, including the Forest Service 25% Fund and the BLM O&C lands 50% revenue sharing program. The formula used to compute PILT payments begins with a base payment for every acre of eligible federally owned land within a county and is then reduced by the amount of revenue sharing payments from the previous year, and is subject to a population cap. A minimum base payment covers counties whose entitlement falls below a per-acre threshold after revenue sharing payments are subtracted and the population cap is determined.

PILT payments are in addition to other federal revenues (such as oil and gas leasing, livestock grazing, and timber harvesting) that the federal government transfers to the states. The DOI has distributed more than \$4.7 billion dollars in PILT payments (on average, \$147 million annually) to each state (except Rhode Island) plus the District of Columbia, Puerto Rico, Guam, and the Virgin Islands since these payments began in 1977.

PILT is permanently authorized and the funding formula is set in statute. Payments, however, must be appropriated by Congress on a recurring basis. While PILT received a guaranteed five-year full-appropriation as part of the Emergency Economic Stabilization Act of 2008, the program must receive a new appropriation for FY 2013.

⁷¹ Public Law 94-565, dated October 20, 1976 as rewritten and amended by Public Law 97-258 on September 13, 1982 and codified at [Chapter 69, Title 31 of the United States Code](http://www.doi.gov/pilt/chapter69.html) <http://www.doi.gov/pilt/chapter69.html> (last accessed 10/23/10).

APPENDIX B: METHODS USED TO CALCULATE ECONOMIC NEED

Idea 4a suggested reforming the SRS payment formula in order to give preferential assistance to counties with the greatest need. This appendix elaborates on some of the ideas presented in that section of the paper.

Calculating County Economic Need and Development Potential for a Revised SRS Formula

The current SRS formula uses per capita income (PCI) as a metric to make adjustments to the SRS base payments. The disadvantages of using this metric are:

PCI is total personal income divided by total population. In many counties non-labor income, such as dividends, interest and rent (money earned from investments), and transfer payments (including retirement payments), make up more than one-third of total personal income and are often the source of new real income growth (related in large part to an aging population). This means PCI can rise even when the overall economy is in decline. It is not unusual to find counties where non-labor income is growing while other measures of well-being, such as household income or average earnings per job, are declining.

A second concern with PCI is that it consists of total personal income divided by total population. In some counties the average family size is relatively large, leading to a large overall population. Dividing total personal income by population may in those instances result in a low PCI that does not accurately reflect the well-being of the average family.

Another problem with PCI is that it does not address economic development potential. Some counties have low education rates and are in rural areas with no easy access to larger markets. These counties could have a more limited set of economic opportunities available to them.⁷²

The methods explained below offer an alternative way of measuring economic need and development potential. The metrics used for the formula are readily available nationwide for all counties from data published by federal agencies.

⁷² For a discussion of the importance of access to markets, see Rasker, R., P.H. Gude, J.A. Gude, and J. van den Noort. 2009. The Economic Importance of Air Travel in High-Amenity Rural Areas. *Journal of Rural Studies* 25(2009): 343-353. http://www.headwaterseconomics.org/3wests/Rasker_et_al_2009_Three_Wests.pdf (last accessed 10/23/10). Also see Headwaters Economics' "Three Wests" web page, which provides information on three distinct types of counties in the American West as measured by access to markets. www.headwaterseconomics.org/3wests.php (last accessed 10/23/10).

Measures of Economic Performance or Hardship:

- A. Median Household Income: The sum of money received by household members 15 years old and over. It includes wage and salary income; self-employment income; interest, dividends, or net rental or royalty income from estates and trusts; Social Security and Railroad Retirement income; Supplemental Security Income, public assistance or welfare payments; and retirement, survivor, or disability pensions.⁷³

The advantage of median household income is that it is a comprehensive measure of all the sources of income, measured at the household level. The disadvantage is similar to the use of PCI in instances when household income is made up largely of non-labor sources. For this reason, an additional labor-related measure is needed.

- B. Average Earnings Per Job: The total earnings divided by total full-time and part-time employment.⁷⁴

The advantage of this measure is that it indicates the relative quality of jobs available in a county.

- C. Percentage of Families Below the Poverty Level: The U.S. Bureau of the Census uses a sophisticated technique for measuring poverty for different family configurations. For example, the poverty threshold in 1999 for a family of four with two children less than 18 years was determined to be an annual income of \$16,954.⁷⁵

Measures of Economic Potential:

- D. Percentage of the Population with a Bachelor's Degree or Higher: The percentage of the population 25 years or older who have earned at least a bachelor's degree.

Education is one of the most important indicators of the potential for economic success, and lack of education is closely linked to poverty. Studies show that areas whose workforce has a higher-than-average education level grow faster, have higher incomes, and suffer less during economic downturns than other regions.⁷⁶ Education rates make a difference in earnings and unemployment rates. In 2009, the average weekly earnings for someone with a bachelor's degree was \$1,025, compared to \$626 per week for someone with a high school diploma. While in 2009 the unemployment rate among college graduates was 5.2 percent, for high school graduates it was 9.7 percent.⁷⁷

⁷³For the full definition of Median Household Income, see the U.S. Bureau of the Census:

http://factfinder.census.gov/home/en/epss/glossary_i.html#income (last accessed 9/9/10).

⁷⁴For the full definition of Average Earnings per Job, see the Bureau of Economic Analysis, U.S. Department of Commerce: <http://www.bea.gov/regional/definitions/> (last accessed 9/9/10).

⁷⁵ The term poverty, as used by the U.S. Census Bureau, is defined at:

http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=subject&id=POVERTYSF3&dsspName=DEC_2000_SF3&back=update&lang=en (last accessed 9/9/10).

⁷⁶ For information on the relationship between level of education, earnings, year-round employment, and unemployment rates, see: U.S. Census Bureau's 2002 publication "The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings." <http://www.census.gov/prod/2002pubs/p23-210.pdf> (last accessed 9/9/10).

⁷⁷ The wage and unemployment effects of education are available from the Bureau of Labor Statistics:

http://www.bls.gov/emp/ep_chart_001.htm (last accessed 10/23/10).

- E. **County Typology—Degree of Isolation from Markets:** Counties are classified as belonging to one of five categories: Central Metropolitan Statistical Area, Outlying Metropolitan Statistical Area, Central Micropolitan Statistical Area, and Outlying Micropolitan Statistical Area. A fifth category for all other counties is Rural.

One of the principle determinants of economic success for a county is the ability of its businesses to trade with market centers and of its residents to work in centralized population centers. For example, someone living in a Core Metropolitan Area, or a nearby Outlying Metropolitan Statistical Area, has different employment opportunities from someone who lives in a Rural area. The five categories delineated above serve as a continuum from most densely populated to most sparsely populated. This typology serves as a measure of the degree of connection to markets, including labor markets.⁷⁸

Definitions:

Metropolitan Statistical Areas: counties that have at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. Metropolitan Statistical Areas are classified as either central or outlying.

Micropolitan Statistical Areas: counties that have at least one urban cluster of at least 10,000 but less than 50,000 population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. Micropolitan Statistical Areas are classified as either central or outlying.

Rural: counties that are not designated as either metropolitan or micropolitan.

Central Areas: counties that contain the urban core of metropolitan and micropolitan areas.

Outlying Areas: counties adjacent to metropolitan or micropolitan counties that have a high degree of social and economic integration with the urban core, as measured by commuting to work.⁷⁹

⁷⁸ *Ibid*, Rasker et al., 2009.

⁷⁹ Definitions of county typologies can be found at the U.S. Census Bureau. <http://www.census.gov/population/www/metroareas/metroarea.html> (last accessed 9/9/10).

Methods Used to Develop Maps

The following describes how the variables were used to develop the information that was presented in Figures 8 through 11 presented under Idea 4a:

The five variables listed above were gathered for every county in the U.S. The variables were all normalized. They were recalculated to a zero to one index by dividing the individual county values for each variable by the highest value for that variable (for example, Index Household Income for Clark County, Idaho = Household Income (Clark County) / Highest Household Income (Douglas County, CO).

The five indexed variables were then added or subtracted based on whether the variable indicates a strong or weak economy. For example, high average earnings per job is a positive while high number of families below the poverty level is a negative. Rural counties were given the lowest score, meaning they are the farthest from markets, while Central Metropolitan Statistical Area counties were given the highest score.

An economic performance and economic development potential score was calculated for each county as:

$$\text{Economic Performance Score} = \text{Poverty} - \text{Education} - \text{Household Income} - \text{Earnings per Job} - \text{Distance from Market}.$$

To create the payment adjustment factor the economic performance score was divided at the median, with the top half of the counties (those with the worst economic performance) recalculated to a zero/one index and the bottom half to a zero/negative one index. We added one to the results of this calculation so that the economic performance index of the worst performing county is two, the median county is one, and the county with the best performing county is zero.

The new formula guarantees each county half of its base payment (the average payment the county received from FY 2008 to FY 2011), and adjusts the second half by the county's economic performance score. The worst performing county will receive one and a half times its current payment using this formula, while the best performing county will receive exactly half of its current payment. The median county receives the same payment.

The formula is:

$$\text{County Payment} = (\text{Base Payment} * 0.5) + [(\text{Base Payment} * 0.5) * \text{Economic Performance Index}]$$

APPENDIX C: METHODS USED TO ESTIMATE THE VALUE OF LAND AND WATERSHED HEALTH

Estimating the Activity-Based Value and the Product-Based Value of Stewardship Contracts and Forest Service Legacy Roads and Trails Remediation Initiative Spending

Two ideas in this paper (Idea 3 and Idea 4c) propose to link county payments to a broad set of values being produced on public lands. This section describes the methods used to define and measure those values. We look at two types of agency authorities and funding that are specifically designed to produce products associated with land and watershed health—stewardship contracting authorities and the Forest Legacy Roads and Trails Remediation Initiative (Legacy Roads).

Stewardship Contracts

Stewardship contracts provide the Forest Service and BLM with new authorities that allow the agencies to work more collaboratively and to complete restoration and stewardship work that will not necessarily pay for itself.⁸⁰

Two of the new stewardship contracting authorities allow the agencies to trade goods for services and to retain residual receipts to spend on additional service work (for example, infrastructure projects and restoration activities). The ability to apply the value of commodities produced through a stewardship contract to service work provides new resources the agencies can use to complete a broader set of restoration, infrastructure, and stewardship goals associated with a stewardship contract relative to a traditional timber contract. These new authorities, along with others, mean that stewardship contracts can be designed to achieve non-commodity goals as a primary purpose of the contract.

For counties, the new authorities mean that the value of commodities produced by stewardship contracts is not eligible for revenue sharing payments.⁸¹ Uncertainty around SRS reauthorization has led some states and counties to oppose expanded use of stewardship contracts in favor of traditional timber sales that generated commercial receipts eligible for revenue sharing.⁸²

Reform to the Forest Service 25% Fund that calculates the value of receipts based on a 7-year rolling average—a reform intended to reduce year-to-year volatility in eligible receipts—has heightened concerns.⁸³ The reform means that what happens this year on the forest could affect a county's revenue sharing payment in 2012 and beyond if SRS is not reauthorized.

⁸⁰USDA, Forest Service, Stewardship End Result Contracting.

<http://www.fs.fed.us/forestmanagement/stewardship/index.shtml> (last accessed 10/23/10).

⁸¹ Commodity values associated with stewardship contracts can be traded to a contractor for services provided, or receipts can be retained by the agencies and applied to needed service work in the same contract, or transferred to another approved project. USDA Forest Service, "Everything You Wanted to Know About Stewardship End Result Contracting... But Didn't Know What to Ask." <http://www.fs.fed.us/forestmanagement/stewardship/index.shtml> (last accessed 10/30/10).

⁸²U.S. Government Accountability Office (GAO). 2008. Use of Stewardship Contracting is Increasing, but Agencies Could Benefit from Better Data and Contracting Strategies. GAO Report 1-66. Washington, D.C.

⁸³ Title IV of SRS 2008 "(Section 601(b)) amends 16 U.S.C. 500 (i.e., 25% Payments to States) to change the way in which the 25% payment is calculated. It provides for a 7-year rolling average, i.e., that the 25% payments are to be an amount equal to the annual average of 25% of all amounts received for the applicable FY and each of the preceding 6 FYs from each National Forest." <http://www.fs.fed.us/srs/Title-IV.shtml> (last accessed 10/23/10).

As the agencies expand their use of stewardship contracts, uncertainties about how SRS works will become more important, i.e., how revenue sharing payments are calculated and which receipts are eligible for revenue sharing.⁸⁴

Forest Legacy Roads and Trails Remediation Initiative (Legacy Roads)

The Forest Service Legacy Road and Trail Remediation Initiative (Legacy Roads) provides funding to the agency to improve watershed health by repairing and removing forest roads. The primary goal is watershed health, but the funding is also intended to reduce future road maintenance costs and improve public safety across the Forest Service road system.⁸⁵

Congress appropriated \$40 million for Legacy Roads in FY 2008 and reappropriated funding in the last two years (2009 and 2010). The program is not permanently authorized and funding must be appropriated on an annual basis.⁸⁶

Legacy Roads projects benefit counties through direct employment, cost savings associated with reduced sedimentation, and other benefits provided by healthy watersheds. For example, heavy sediment loads reduce the capacity of downstream hydro power generation and impose additional costs on metropolitan and agricultural water systems. Sedimentation can smother spawning gravels important to anadromous fish and poorly designed or damaged roads can also block access to upstream habitat.

While Legacy Roads projects create significant value on public lands (in the form of ecosystem service products associated with healthy watersheds) these values are not shared with counties. As the Forest Service conducts more restoration work, there will be more pressure to find ways to share the value of these activities with counties.

⁸⁴ According to the Pinchot Institute for Conservation "the Obama Administration's FY 2011 budget proposal for the USDA Forest Service brings a new focus to the use of stewardship contracts and agreements as a preferred land management option for the National Forest System. The budget includes a new \$694 million Integrated Resource Restoration line item that is intended to focus agency resources on forest ecosystem restoration. A land management option that focuses on working with local communities to provide opportunities for rural economic development and ecosystem uplift, stewardship contracting, allows the USDA Forest Service and the USDOJ Bureau of Land Management to focus their resources on ecosystem management." Pinchot Institute for Conservation. The Role of Communities in Stewardship Contracting: A Programmatic Review of Forest Service Projects - Report to the USDA Forest Service, FY2009. <http://www.pinchot.org/gp/2009StewardshipContracting>. (last accessed 10/23/10).

⁸⁵ USDA Forest Service, Region 6, Legacy Roads and Trails. <http://www.fs.fed.us/r6/fishing/regional/habitat/legacy.html> (last accessed 10/23/10).

⁸⁶ Wildlands CPR, a non-governmental organization advocating for continued Legacy Roads funding, provides a good summary. <http://www.wildlandscpr.org/legacy-roads> (last accessed 10/23/10).

Estimating Activity-Based Values

In this paper, activity-based values of stewardship contracts and Legacy Roads are defined as the sum of all the resources applied to complete the service work (e.g., forest thinning, re-vegetation, or road removal) prescribed by the stewardship contract or Legacy Roads project.

For stewardship contracts, the activity-based value is the sum of goods traded for services, retained agency receipts, and agency spending. For Legacy Roads projects, the activity-based value is the sum of agency funding and any matching funds contributed to completing the prescribed service work.

In FY 2009, the total activity-based value of stewardship contracts was \$103 million, and the total activity-based value of Legacy Roads was \$56 million.

The 25% Fund distributes payments to counties based on the total receipts generated by areas Congressionally designated as national forest, and the proportion of acres in each county area.⁸⁷ We used this method to estimate the activity-based value of stewardship contracts and Legacy Roads by county.

Stewardship contract data from the Forest Service are only available at the Forest Service regional scale. The BLM reports summary statistics for stewardship contracts by state. We estimated the value of Forest Service stewardship contracts based on each county's proportional acreage of all Forest Service land in the region, and BLM stewardship contracts based on each county's proportional acreage of BLM lands in the state. Legacy Roads data (Forest Service only) are available at the national forest scale.

Table 1 shows the activity-based value of stewardship contracts and Legacy Roads for the 20 counties in the nation that had the highest total values based on FY 2009 data.

⁸⁷ "Proclaimed" national forests are not the same as national forests. For example, the Beaverhead-Deerlodge National Forest in Montana is made up of two proclaimed national forests: the Beaverhead PNF and the Deerlodge PNF.

Table 1
Activity-Based Value of Stewardship Contracts and Legacy Roads by County, FY 2009.

County	State	Activity-Based Value		
		Stewardship Contracts	Legacy Roads	Total
Siskiyou County	California	1,673,891	5,446,564	7,120,455
Greenlee County	Arizona	5,224,450	213,863	5,438,313
Catron County	New Mexico	4,278,009	327,493	4,605,502
Idaho County	Idaho	3,125,674	1,293,318	4,418,992
El Dorado County	California	4,154,816	201,740	4,356,556
Coconino County	Arizona	3,236,935	371,443	3,608,378
Apache County	Arizona	3,430,151	140,413	3,570,564
Navajo County	Arizona	3,387,570	138,670	3,526,240
Deschutes County	Oregon	3,228,627	125,037	3,353,664
Tuolumne County	California	3,078,874	80,336	3,159,210
Douglas County	Oregon	1,421,641	1,108,735	2,530,376
Shoshone County	Idaho	1,764,178	482,154	2,246,332
Del Norte County	California	620,555	1,574,695	2,195,250
Trinity County	California	522,282	1,638,879	2,161,161
Ravalli County	Montana	1,441,365	705,512	2,146,878
Flathead County	Montana	1,771,753	276,262	2,048,015
Clackamas County	Oregon	1,718,740	325,938	2,044,678
Lake County	Oregon	1,951,440	53,854	2,005,294
Lincoln County	Montana	1,330,588	567,576	1,898,165
Klamath County	Oregon	1,575,073	108,794	1,683,867

Estimating Product-Based Values

The economic value of the services produced by stewardship contracts and Legacy Roads is a measure of how communities benefit from healthy watersheds, healthy forests, recreation opportunities, and carbon sequestration. Because these products, or ecosystem services, generally are not traded in markets, the prices of these services cannot be easily observed from market transactions.

Economists have developed methods to value goods and services that are not traded in a market, broadly defined as “non-market valuation methods.” Non-market valuation methods fall into three general categories: revealed preference, stated preference, and the averted expenditure approach. All of these non-market valuation methods require extensive data regarding individuals’ behavior and preferences or engineering costs.

When the time or resources are not available to do a full primary study, economists use an approach known as “benefit transfer,” which involves applying estimates from valuation studies that evaluated similar policies or activities in other areas to the one being studied. While benefits transfer may not provide the precision possible with original studies, it can provide a range of reasonable values.

In this paper, we use the benefit transfer approach to estimate non-market values for a set of ecosystem services produced by stewardship contracts and by Legacy Roads during FY 2009. Where it is not currently possible to estimate these values, we identify the data or methodological gaps that will need to be filled to allow estimation.

Table 2 lists activities conducted as part of a stewardship contract or a Legacy Roads project, and the ecosystem service products they produce. A (+) sign in the matrix means the activity produces positive economic value, while a (–) sign means the activity generates an economic loss for that particular ecosystem service. For example, decommissioning system roads results in positive economic value (+) through erosion reduction that lowers the cost of maintaining water infrastructure downstream. A (+) or (–) also indicates we were able to find literature on the subject and know that it can be quantified.

Data from the BLM report accomplishments under the eight land management goals listed in Table 2, which are drawn from the authorizing legislation.⁸⁸ Stewardship contracts completed or approved in FY 2009 listed five of these eight management categories for 2009. The goals described in these eight activities are not specific enough to estimate the value of ecosystem service products, with the exception of noxious weed control, prescribed fire to improve habitat, and removing vegetation to improve forest health and reduce fire risk. The value of ecosystem service products produced in Oregon (including all BLM lands, not specific to the O&C lands) was \$217,000. Because of these limitations, we could not isolate and measure the ecosystem services values produced by stewardship contracts on the BLM O&C lands in Oregon.

This omission does not appear to change the results significantly. One reason is that the BLM in Oregon has not applied stewardship contracts across significant acreage (according to agency data, acres treated for the eight management categories are only 3,243 compared to over 22,000 acres of wildfire mitigation projects alone on Forest Service lands in Region 6).

⁸⁸U.S. Department of the Interior, Bureau of Land Management. BLM Stewardship Project Guidance v 2.0, November 2005.
http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/0.Par.48921.File.dat/Stewardship_Contracting_Guidance_2-0.pdf (last accessed 11/15/10).

Because of the scant current use of stewardship contracts by the BLM relative to the Forest Service, adopting an idea that reforms county payment distribution based at least in part on the value of products produced by stewardship contracts would work against Oregon. That said, the BLM O&C lands in Oregon have hugely significant forest resources and tremendous restoration needs. Adopting some version of Idea 3 or 4c could create the incentive necessary for counties and the BLM to work together to increase the amount of restoration and stewardship work taking place on the O&C lands, providing significant community benefits and realizing county payments that are more in-line with the forest resources and management needs in Oregon.

Table 2. Summary of ecosystem service categories and valuation status from SC and LRP projects.								
Activity Category	Ecosystem Service							Quantified?
	Carbon sequestration	Erosion reduction	Fire risk mitigation	Noxious weed reduction	Recreation	Riparian habitat	Watershed health	
Legacy Roads program activities (Forest Service Only)								
Install stream crossings		+				+		Yes
Restore stream habitat					+	+		Yes
Remove aquatic organism passages (AOP) barriers					+	+		No
Improve passenger car (PC) roads		+			+			Yes
Maintain PC roads		+			+			Yes
Improve high-clearance car (HC) roads		+			+			Yes
Maintain HC roads		+			+			Yes
Decommission system roads	+	+			-			Yes
Decommission unauthorized roads	+	+						Yes
Maintain trails		+			+			Yes
Improve trails		+			+			Yes
Improve watershed health						+	+	No
Stewardship contracting project activities, Forest Service								
Green tons of biomass for bio-energy	-		+					Yes
Acres of forest vegetation established	+	+						Yes
Acres of forest vegetation improved							+	Yes
Acres treated to reduce the risk of fire	-		+				+	Yes
Acres of non-WUI fuels treated	-		+				+	Yes
Acres of fuels treated in the WUI	-		+				+	Yes
Miles of stream habitat restored/enhanced		+			+	+		Yes
Acres of terrestrial habitat restored/enhanced					+		+	No
Acres of noxious weed/ invasive plants treated				+				Yes
Miles of HC roads improved		+			+			Yes
Miles of PC roads improved		+			+			Yes
Watersheds restored to fully functioning condition						+	+	No
Stewardship contracting project activities, BLM								

Table 2. Summary of ecosystem service categories and valuation status from SC and LRP projects.								
Activity Category	Ecosystem Service							Quantified?
	Carbon sequestration	Erosion reduction	Fire risk mitigation	Noxious weed reduction	Recreation	Riparian habitat	Watershed health	
Road and trail maintenance or obliteration to restore or maintain water quality		+			+			No activities to date
Soil productivity, habitat for wildlife and fisheries, or other resource values					+	+		No
Setting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat					+	+		No
Removing vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives			+					Yes
Watershed restoration and maintenance							+	No activities to date
Restoration and maintenance of wildlife and fish habitat						+		No
Control of noxious and exotic weeds and re-establishing native plant species				+				Yes
Improving rangeland health		+					+	No

Table 2 lists activities conducted as part of a stewardship contract or a Legacy Roads project, and the ecosystem service products they produce. A (+) sign in the matrix means the activity produces positive economic value, while a (–) sign means the activity generates an economic loss for that particular ecosystem service. For example, decommissioning system roads results in positive economic value (+) through erosion reduction that lowers the cost of maintaining water infrastructure downstream. A (+) or (–) also means we were able to find literature on the subject and know that it can be quantified.

Table 3 shows the product-based value of stewardship contracts and Legacy Roads for the 20 counties in the nation that had the highest total values based on FY 2009 data for four general categories of ecosystem service products: stream and watershed restoration, forest health, recreation, and carbon sequestration.

Figure 5 on page 29 shows these values by county for all counties eligible to receive Forest Service SRS payments nation-wide.

Figures 15 to 18 show the values for each of the component ecosystem service products for the same counties.

Table 3
Product-Based Value of Stewardship Contracts and Legacy Roads by County, FY 2009.

County	State	Product-Based Value				Total
		Stream and Watershed Restoration	Forest Health	Recreation	Carbon Sequestration	
Idaho County	Idaho	23,699,351	76,355,899	3,913,668	-1,899,012	102,069,905
Siskiyou County	California	4,928,005	77,548,479	2,586,155	-3,464,272	81,598,366
Lincoln County	Montana	3,197,789	29,058,489	403,300	-791,257	31,868,322
Okanogan County	Washington	10,701,709	19,821,798	59,955	-540,807	30,042,655
Chelan County	Washington	10,506,707	19,821,798	58,704	-540,910	29,846,299
Grant County	Oregon	2,566,030	21,919,882	69,316	-597,188	23,958,041
Mono County	California	4,854,027	19,100,838	61,850	-1,102,261	22,914,454
Trinity County	California	459,276	20,280,645	3,232,836	-1,340,371	22,632,385
Klamath County	Oregon	2,315,337	20,773,221	25,230	-571,492	22,542,296
Lane County	Oregon	3,710,189	17,025,843	469,775	-464,619	20,741,188
Modoc County	California	44,998	19,117,186	27,052	-1,263,791	17,925,445
Del Norte County	California	1,028,330	15,142,202	681,267	-675,166	16,176,633
Lake County	Oregon	1,594,720	14,398,765	12,509	-396,125	15,609,869
Wallowa County	Oregon	1,531,444	14,273,211	11,815	-392,416	15,424,054
Park County	Wyoming	7,754,521	6,813,902	82,553	-76,838	14,574,138
Plumas County	California	156,964	15,193,297	197,666	-1,004,373	14,543,554
Sanders County	Montana	1,990,725	12,229,415	105,296	-336,875	13,988,562
Fresno County	California	34,519	14,755,630	41,886	-975,459	13,856,575
Lassen County	California	2,865,758	11,168,651	165,100	-644,514	13,554,994
Douglas County	Oregon	3,094,763	10,464,378	241,526	-273,965	13,526,702

Figure 15

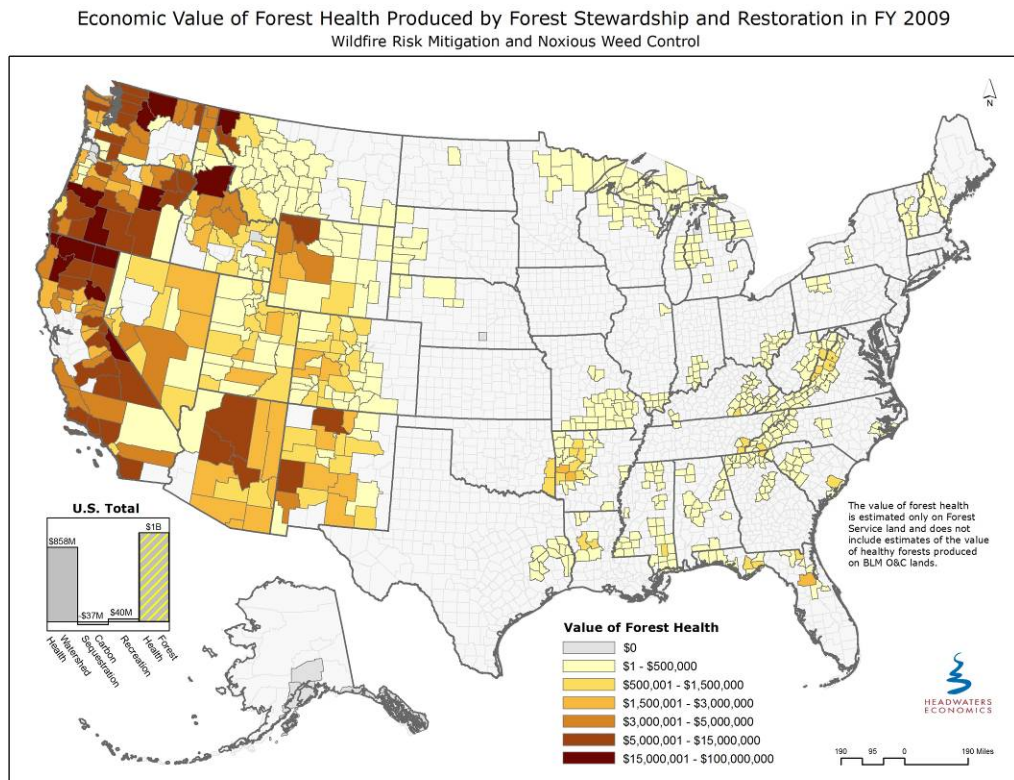


Figure 16

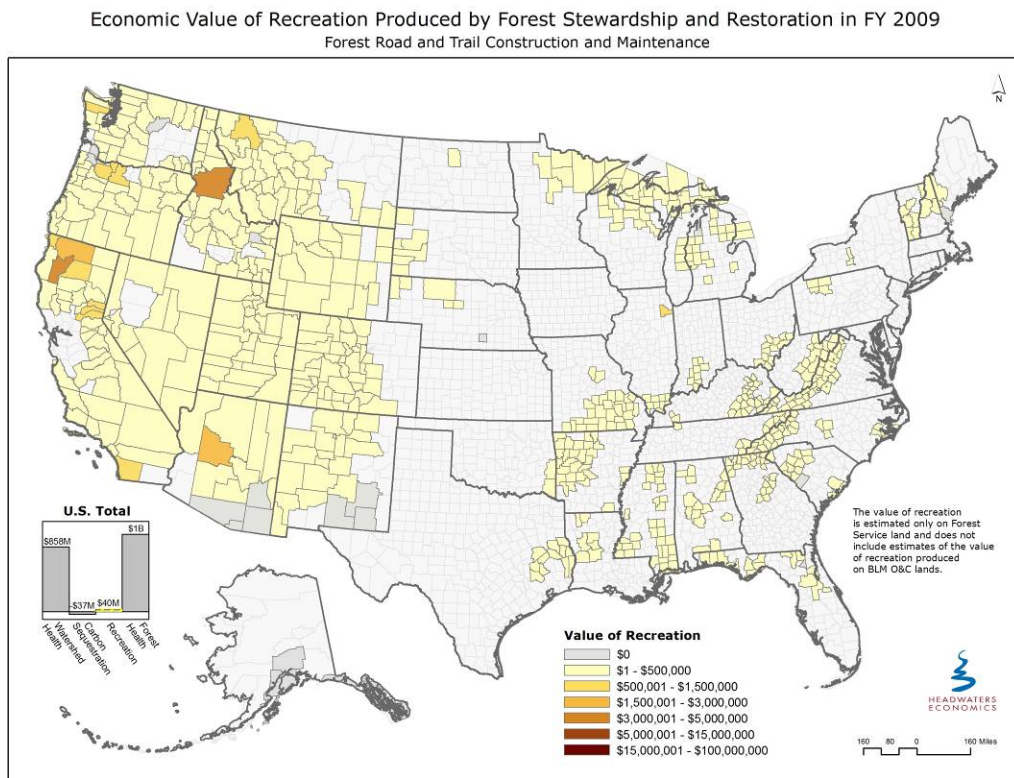


Figure 17

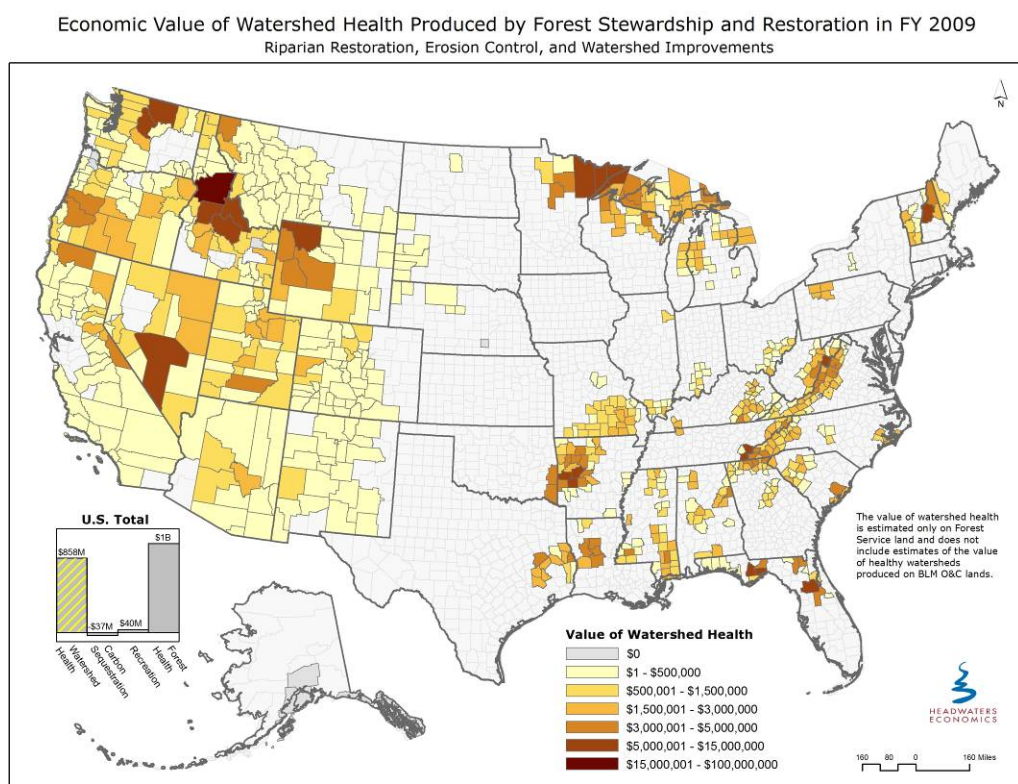
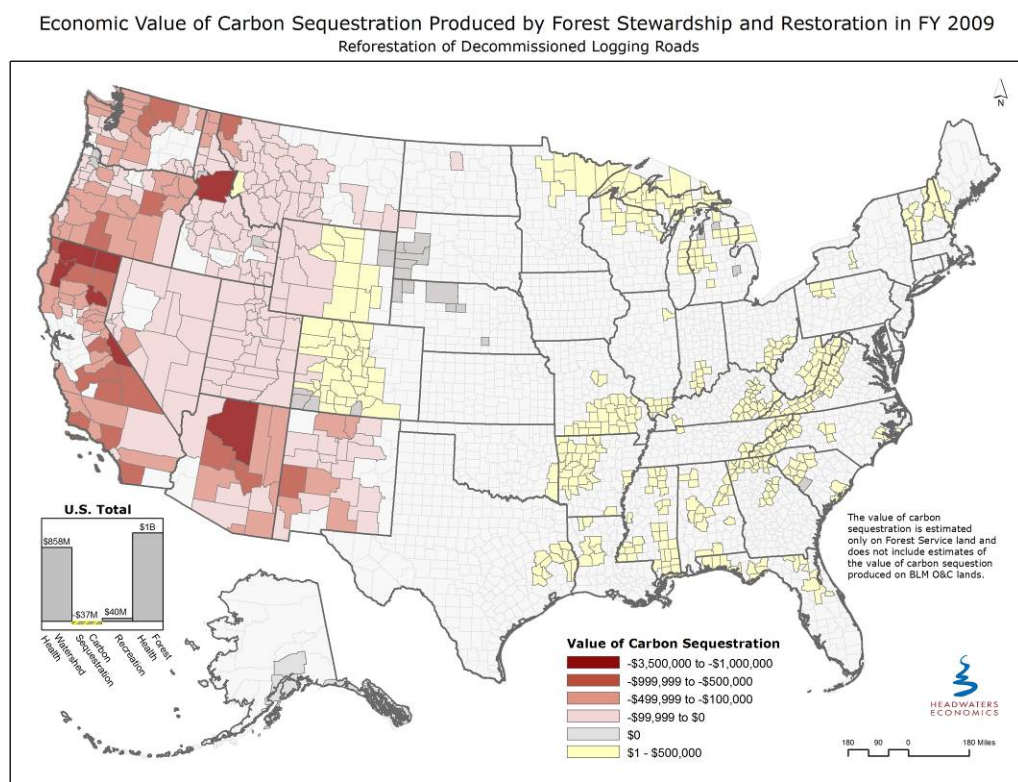


Figure 18



APPENDIX D: PAYMENTS IN LIEU OF TAXES

This appendix describes how PILT payments change relative to SRS payments. For a description of the PILT program, see Appendix A.

Estimating Future Payments in Lieu of Taxes (PILT)

Each county's PILT authorization is equal to a per-acre base payment that is reduced by prior year revenue sharing payments, and is subject to a population limit. How PILT changes relative to changes in Forest Service payments depends on both the amount of revenue sharing payments, and how each county's PILT payment is determined.⁸⁹ There are three types of counties under the PILT formula:

Type A counties: Total revenue sharing payments do not exceed the difference between the PILT minimum payment and the full entitlement amount. PILT will increase and make up the loss of county government revenue.

Type B counties: Total revenue sharing payments exceed the PILT minimum payment and the full entitlement amount. PILT will not increase until revenue sharing falls below this threshold.

Type C counties: PILT payment is capped by the population limit and will not increase.

To estimate future PILT payments, we calculate the difference between the county governments share of FY 2008 Forest Service and BLM O&C payments and the county government's share of projected Forest Service and BLM O&C Payments.⁹⁰ This difference is subtracted from the prior year payments subtracted from the county's FY 2010 PILT payment. This amount is added to the FY 2010 PILT payment and represents the full funding amount for the estimated year.

Each county's estimated full funding amount is compared to the calculated payment ceiling (based on population) and the payment floor (based on a minimum per-acre amount) to determine the correct payment amount.

⁸⁹ Department of Interior. 2010. Payments in Lieu of Taxes (PILT) National Summary, Schedule 2: Payments by County.

⁹⁰ BLM payments under O&C are not counted against PILT. Only the portion of Forest Service payments directed to the county government are used, including the county road share of Title I or 25% Fund payments, and the Title III amount. Some counties may direct road funding to an autonomous road district to avoid the reduction in PILT payments. We were not able to determine which counties pursue this option and it was not factored into the estimates (making the PILT increase too high in these counties, assuming they are Type A counties).

APPENDIX E: DATA SOURCES USED IN MAPS

	Data Sources Used
Figure 1: Key Developments in the History of County Payments	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. http://www.doi.gov/pilt ; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ . Pre 1986 25% Fund payments are estimated from historic timber cut and sold reports (FY 1905-2008 National Summary Cut and Sold Data and Graph. U.S. Department of Interior, Bureau of Land Management, Oregon State Office. County Payments Citizen Advisory Committee, Official Payments to Counties. http://www.blm.gov/or/rac/ctypaypayments.php .
Figure 2: How Are Federal Lands Payments Distributed Today?	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. http://www.doi.gov/pilt ; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Interior, Bureau of Land Management, Oregon State Office. County Payments Citizen Advisory Committee, Official Payments to Counties. http://www.blm.gov/or/rac/ctypaypayments.php .
Figure 3: How Important Are Federal Land Payments?	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. http://www.doi.gov/pilt ; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Interior, Bureau of Land Management, Oregon State Office. County Payments Citizen Advisory Committee, Official Payments to Counties. http://www.blm.gov/or/rac/ctypaypayments.php ; U.S. Department of Commerce. 2009. Census of Governments Survey of State and Local Government Finances, Washington, D.C.
Figure 4: How Will Payments Change if SRS Expires and Counties Receive Revenue Sharing Payments (25% Fund and O&C 50% Payments)?	U.S. Department of Agriculture, Forest Service ASR 13-1, FY 2009. Proportional acreage is calculated from Forest Service ASR 10-2, FY 2009 that reports acres of national forest by county; U.S. Department of Interior. 2010. Payments in Lieu of Taxes (PILT) National Summary, Schedule 2: Payments by County; An Inquiry into Selected Aspects of Revenue Sharing on Federal Lands. 2002. A report to the Forest County Payments Committee, Washington, D.C. Research Unit 4802-Economic Aspects of Forest Management on Public Lands, Rocky Mountain Research Station, USDA Forest Service, Missoula, MT (An Inquiry into Selected Aspects of Revenue Sharing).

	<u>Data Sources Used</u>
Figure 5: The Value of Ecosystem Services Produced by Stewardship Contracts and Forest Legacy Roads and Trails Spending in FY 2009.	U.S. Department of Agriculture, Forest Service, Servicewide Automated Timber Sale Accounting (ATSA) tables, Stewardship Contracting Regional Summary, FY 2009; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Agriculture, Forest Service, Legacy Roads and Trails Remediation Initiative, FY 2008 Project Reports. Methods for ecosystem services valuation can be found in Appendix C.
Figure 6: How Will Forest Service Payments Change if SRS Expires and the 25% Fund is Reformed to Include the Value of Activities that Produce Ecosystem Service Products?	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. U.S. Department of Agriculture, Forest Service, Servicewide Automated Timber Sale Accounting (ATSA) tables, Stewardship Contracting Regional Summary, FY 2009; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Agriculture, Forest Service, Legacy Roads and Trails Remediation Initiative, FY 2008 Project Reports.
Figure 7: How Will Forest Service Payments Change if SRS Expires and the 25% Fund is Reformed to Include the Value of Ecosystem Service Products?	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. U.S. Department of Agriculture, Forest Service, Servicewide Automated Timber Sale Accounting (ATSA) tables, Stewardship Contracting Regional Summary, FY 2009; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Agriculture, Forest Service, Legacy Roads and Trails Remediation Initiative, FY 2008 Project Reports. Methods for ecosystem services valuation can be found in Appendix C.
Figure 8: Counties Ranked by Economic Performance	U.S. Department of Commerce. 2010. Bureau of Economic Analysis, Regional Economic Information System, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Local Area Unemployment Statistics, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Quarterly Census of Employment and Wages, Washington, D.C.
Figure 9: County Economic Performance and Timber Dependency	U.S. Department of Commerce. 2010. Bureau of Economic Analysis, Regional Economic Information System, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Local Area Unemployment Statistics, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Quarterly Census of Employment and Wages, Washington, D.C.

	<u>Data Sources Used</u>
Figure 10: SRS Title II Payments Compared to County Economic Performance	U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR10-3 and ASR18-1; U.S. Department of Interior, Bureau of Land Management, Oregon State Office. County Payments Citizen Advisory Committee, Official Payments to Counties; U.S. Department of Commerce. 2010. Bureau of Economic Analysis, Regional Economic Information System, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Local Area Unemployment Statistics, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Quarterly Census of Employment and Wages, Washington, D.C.
Figure 11: How Will SRS Payments Change if the SRS Formula Adjusts for Economic Performance?	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. http://www.doi.gov/pilt ; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Interior, Bureau of Land Management, Oregon State Office. County Payments Citizen Advisory Committee, Official Payments to Counties. http://www.blm.gov/or/rac/ctypaypayments.php ; U.S. Department of Commerce. 2010. Bureau of Economic Analysis, Regional Economic Information System, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Local Area Unemployment Statistics, Washington, D.C.; U.S. Department of Labor. 2010. Bureau of Labor Statistics, Quarterly Census of Employment and Wages, Washington, D.C.
Figure 12: How Will SRS Payments Change if the SRS Formula Adjusts for Ecosystem Service Values?	U.S. Department of Interior. 2009. Payments in Lieu of Taxes (PILT) National Summary. U.S. Department of Agriculture, Forest Service, Servicewide Automated Timber Sale Accounting (ATSA) tables, Stewardship Contracting Regional Summary, FY 2009; U.S. Department of Agriculture. 2009. Forest Service Final Payment Detail Report ASR 10-3 and ASR 18-1. http://www.fs.fed.us/srs/ ; U.S. Department of Agriculture, Forest Service, Legacy Roads and Trails Remediation Initiative, FY 2008 Project Reports. Methods for ecosystem services valuation can be found in Appendix C.
Figure 13: Where Are Protected Federal Public Lands?	Rasker, R. 2006. "An Exploration Into the Economic Impact of Industrial Development Versus Conservation on Western Public Lands." Society and Natural Resources. 19(3): 191-207; AK Bureau of Land Management 2009; AZ Land Resources Information System, 2009; MT Natural Heritage Program, 2008; Conservation Biology Institute, 2008 (for AR, CA, CT, KS, MN, MO, NE, NH, NY, OH, OK, RI, WI, WV); Conservation Biology Institute, 2006 (for remaining states).

	<u>Data Sources Used</u>
Figure 14: Where Are Federal Public Lands That Have Potential to Gain Protected Status?	Rasker, R. 2006. "An Exploration Into the Economic Impact of Industrial Development Versus Conservation on Western Public Lands." Society and Natural Resources. 19(3): 191-207; AK Bureau of Land Management 2009; AZ Land Resources Information System, 2009; MT Natural Heritage Program, 2008; Conservation Biology Institute, 2008 (for AR, CA, CT, KS, MN, MO, NE, NH, NY, OH, OK, RI, WI, WV); Conservation Biology Institute, 2006 (for remaining states).
Figures 15-18: (Value of Ecosystem Services)	See Appendix C.



PILT (Payments in Lieu of Taxes): Somewhat Simplified

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Congressional Research Service

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Summary

Under federal law, local governments (usually counties) are compensated through various programs for reductions to their property tax bases due to the presence of most federally owned land. Federal lands cannot be taxed but may create a demand for services such as fire protection, police cooperation, or longer roads to skirt the federal property. Some compensation programs are run by a specific agency and apply only to that agency's land. This report addresses only the most widely applicable program, which is called *Payments in Lieu of Taxes* (PILT; 31 U.S.C. §§6901-6907) and is administered by the Department of the Interior (DOI). Under the statute, eligible lands consist of those in the National Park System (NPS), National Forest System (NFS), or Bureau of Land Management (BLM); lands in the National Wildlife Refuge System (NWRS) if they are withdrawn from the public domain; lands dedicated to the use of federal water resources development projects; dredge disposal areas under the jurisdiction of the U.S. Army Corps of Engineers; lands located in the vicinity of Purgatory River Canyon and Piñon Canyon, Colorado, that were acquired after December 31, 1981, to expand the Fort Carson military reservation; lands on which are located semi-active or inactive Army installations used for mobilization and for reserve component training; and certain lands acquired by DOI or the Department of Agriculture under the Southern Nevada Public Land Management Act (P.L. 105-263).

The authorized level of PILT payments is calculated using a complex formula. No precise dollar figure can be given in advance for each year's PILT authorized level. Five factors affect the calculation of a payment to a given county: (1) the number of acres eligible for PILT payments, (2) the county's population, (3) payments in prior years from other specified federal land payment programs, (4) state laws directing payments to a particular government purpose, and (5) the Consumer Price Index as calculated by the Bureau of Labor Statistics.

Before 2008, annual appropriations were necessary to fund PILT. However, beginning with the FY2008 payment and continuing through FY2012, a provision in the Emergency Economic Stabilization Act of 2008 (P.L. 110-343) for mandatory spending ensured that all counties would receive 100% of the authorized payment. The Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) extended mandatory spending to FY2013, although there was a later sequestration of 5.1% for that year. PILT's mandatory spending was renewed for another year in the Agricultural Act of 2014 (P.L. 113-79), resulting in an FY2014 payment of \$436.9 million.

For FY2015, Congress approved \$372 million in discretionary funding for PILT in the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235) and \$33 million in mandatory spending in the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (P.L. 113-291). (The latter measure also included another \$37 million in mandatory spending to be made available on October 1, 2015—the start of FY2016.) For the past several years, PILT payments have been made in June. The total of \$405 million provided in the last two bills resulted in payments that were 89.6% of the \$451.5 million that would be required for full funding.

Over the next few years, the broader debate for Congress might be summarized as four decisions. Congress may decide whether to (1) approve PILT funding through future extensions of mandatory spending (either temporary or permanent); (2) fund PILT through annual appropriations bills; (3) provide full funding or reduce the payments, perhaps through the annual appropriations process or by changing the PILT formula; and (4) add or subtract any lands to the list of those now eligible for PILT payments.

Since the creation of PILT in 1976, various other changes in the law have been proposed. One proposal has been to include additional lands under the PILT program, particularly Indian lands. Other lands also have been mentioned for inclusion, such as those of the National Aeronautics and Space Administration and the Departments of Defense and Homeland Security. Some counties would like to revisit the compensation formula to emphasize a payment rate more similar to property tax rates. Finally, some have argued that all lands in the NWRS should be eligible for PILT, rather than limiting PILT payments to lands reserved from the public domain while excluding acquired lands from PILT payments.

Contents

Introduction.....	1
PILT Legislation: The 110 th to 113 th Congresses	4
PILT Legislation: The FY2014 Appropriations Cycle.....	5
PILT Legislation: FY2015	5
PILT Legislation: FY2016	6
How PILT Works: Five Steps to Calculate Payment	6
Step 1. How Many Acres of Eligible Lands Are There?	7
Step 2. What Is the Population of the County?.....	8
Step 3. Are There Prior-Year Payments from Other Federal Agencies?.....	9
Step 4. Does the State Have Pass-Through Laws?	10
Step 5. What Is This Year's Consumer Price Index?	11
Putting It All Together: Calculating a County's Payment.....	12
National Totals.....	14
Current Issues	14
Inclusion of Indian Lands	15
Inclusion of Urban Lands and Tax Equivalency.....	16
National Wildlife Refuge System Lands	17
County Uncertainty and Fiscal Effects on Counties.....	17

Figures

Figure 1. Total PILT Payments, FY1993-FY2015: Appropriations in Current and Inflation-Adjusted 2014 Dollars	3
Figure 2. Total PILT Payments, FY1993-FY2015 Authorized Amount and Appropriation	4
Figure 3. Ceiling Payments Based on County Population Level, FY2015.....	9
Figure 4. PILT Payment Level as a Function of Specific Prior Payments (FY2015)	10
Figure 5. Steps in Calculating PILT for Eligible Federal Lands	13

Tables

Table 1. Authorized PILT Payments to Selected Urban Counties, FY2015.....	16
Table 2. NWRS Acres Eligible for PILT in Selected States, FY2014.....	17
Table A-1. Total PILT Payments, FY1993-FY2015: Appropriations in Current and Inflation-Adjusted 2014 Dollars	19
Table A-2. Total PILT Payments, FY1993-FY2015: Authorized Amount and Appropriation.....	20
Table A-3. Prior-Year Payment Laws That Are Offset Under Next PILT Payment.....	21

Appendixes

Appendix. PILT Data Tables.....	19
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Contacts

Author Contact Information.....	23
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Introduction

Generally, federal lands may not be taxed by state or local governments unless the governments are authorized to do so by Congress. Because local governments often are financed by property or sales taxes, this inability to tax the property values or products derived from the federal lands may affect local tax bases, sometimes significantly. If the federal government controls a significant share of a county's property, then the revenue-raising capacity of that county may be compromised. Instead of authorizing taxation, Congress usually has chosen to create various payment programs designed to compensate for lost tax revenue. These programs take various forms. Many pertain to the lands of a particular agency (e.g., the National Forest System or the National Wildlife Refuge System).¹ The most wide-ranging payment program is called *Payments in Lieu of Taxes* (PILT).² It is administered by the Department of the Interior (DOI) and affects most acreage under federal ownership. Exceptions include most military lands; lands under the Department of Energy, which have their own smaller payment program; and lands of the National Aeronautics and Space Administration and the Department of Homeland Security.³ In FY2015, the PILT program covered 607.0 million acres, or about 94% of all federal land.

The Payments in Lieu of Taxes Act of 1976 (P.L. 94-565, as amended; 31 U.S.C. §§6901-6907) was passed at a time when U.S. policy was shifting from one of disposal of federal lands to one of retention. The policy meant the retained lands would no longer be expected to enter the local tax base at some later date. Because of that shift, Congress agreed with recommendations of a federal commission that if these federal lands were never to become part of the local tax base, some compensation should be offered to local governments (generally counties) to make up for the presence of nontaxable land within their jurisdictions.⁴ Moreover, there was a long-standing concern that some federal lands produced large revenues for local governments, whereas other federal lands produced little or none. Many Members, especially those from western states with a high percentage of federal lands, felt the imbalance needed to be addressed. The resulting law authorizes federal PILT payments to local governments. The payments may be used for any governmental purpose.

¹ For more information on some of these agency-specific payment programs, see CRS Report RL30335, *Federal Land Management Agencies' Mandatory Spending Authorities*, by M. Lynne Corn and Carol Hardy Vincent; and CRS Report R41303, *Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000*, by Katie Hoover. The program under the Department of Energy (DOE) is described in U.S. General Accounting Office [now Government Accountability Office], *Energy Management: Payments in Lieu of Taxes for DOE Property May Need to Be Reassessed*, GAO/RCED-94-204, July 18, 1994.

² County-by-county Payments in Lieu of Taxes (PILT) payments are shown in U.S. Department of the Interior, Office of Budget, *Payments in Lieu of Taxes: National Summary Fiscal Year 2015*, 2015; hereinafter referred to as *National Summary*. A similar document is issued every year; each contains tables for payments and acreage by state and county. To query data from the most recent fiscal year, see <http://www.doi.gov/pilt/>.

³ A program, commonly referred to as Impact Aid, supports local schools based on the presence of children of federal employees, including military dependents. It provides some support to local governments, and to some extent it compensates for lost property tax revenue when military families live on federally owned land. For more information, see CRS Report RL33960, *The Elementary and Secondary Education Act, as Amended by the No Child Left Behind Act: A Primer*, by Rebecca R. Skinner.

⁴ Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress*, June 1970, pp. 235-241.

Critics of PILT cite examples of what they view as its idiosyncrasies:

- Although there is no distinction between acquired and public domain lands⁵ for other categories of eligible lands, acquired lands of the Fish and Wildlife Service (FWS) are not eligible for PILT. This provision works to the detriment of many counties in the East and Midwest, where nearly all FWS lands are acquired lands.
- Payments under the Secure Rural Schools (SRS) program⁶ require an offset in the following year's PILT payment for certain lands under the jurisdiction of the Forest Service (FS). However, if the eligible lands are under the jurisdiction of the Bureau of Land Management (BLM), there is no reduction in the next year's PILT payment.⁷
- Certain BLM lands (called the Oregon and California Grant Lands) receive payments that do not require an offset in the following year's PILT payment.⁸
- Some of the "units of general local government" (counties)⁹ that receive large payments have other substantial sources of revenue, and some of the counties that receive small payments are relatively poor.
- A few counties that receive very large payments from other federal revenue-sharing programs (because of valuable timber, mining, recreation, and other land uses) also are authorized to receive a minimum payment (\$0.37 per acre)¹⁰ from PILT, thus somewhat canceling out the goal of evening payments across counties.
- In some counties the PILT payment greatly exceeds the amount the county would receive if the land were taxed at fair market value, whereas in others it is much less.

Given such issues, and the complexity of federal land management policies, consensus on substantive change in the PILT law has been elusive, particularly when Congress has a stated goal of reducing federal expenditures.

⁵ *Acquired lands* are those that the United States obtained from a state or individual. *Public domain lands* generally are those that the United States obtained from a sovereign nation.

⁶ See CRS Report R41303, *Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000*, by Katie Hoover. Congress enacted the Secure Rural Schools and Community Self-Determination Act of 2000 (SRS; P.L. 106-393) as a temporary, optional program of payments based on historic, rather than current, revenues.

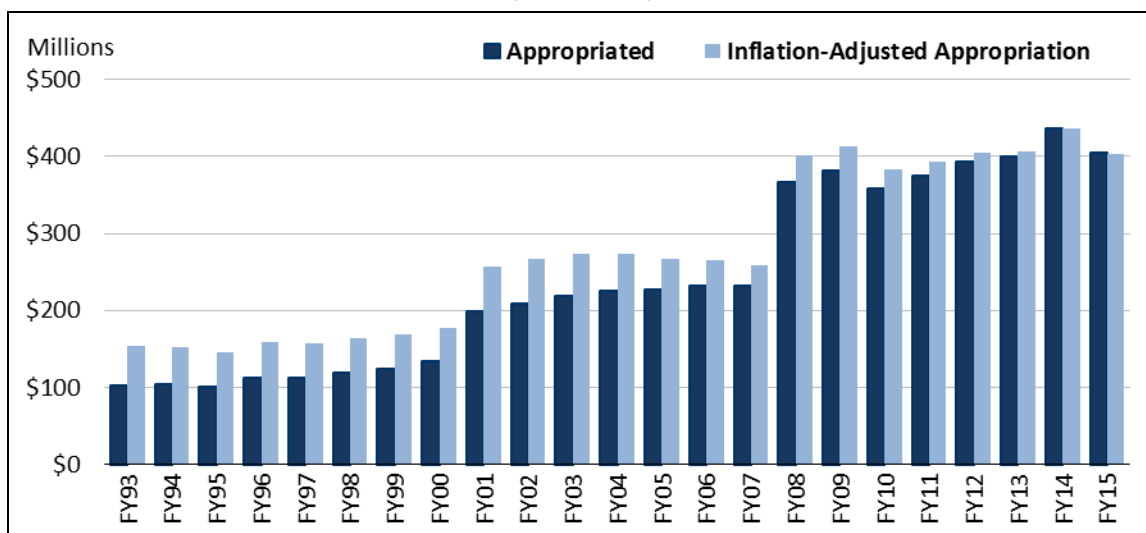
⁷ All the Bureau of Land Management (BLM) lands eligible for SRS payments are in Oregon.

⁸ These lands once were granted to a private company for construction of a railroad. When the company violated the contract, the land reverted back to the federal government. For more on these lands, see CRS Report R42951, *The Oregon and California Railroad Lands (O&C Lands): Issues for Congress*, by Katie Hoover.

⁹ *Unit of general local government* is defined in the law (31 U.S.C. §6901(2)) as "a county (or parish), township, borough, or city where the city is independent of any other unit of general local government, that (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes" plus the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. For simplicity, the word *county* will be used in the rest of this report to refer to a *unit of general local government*, and *county* must be understood here to be equivalent to the above definition. This shorthand is often used by the Department of the Interior (DOI).

¹⁰ This and subsequent references to payment rates and ceilings are based on FY2015 figures unless otherwise noted.

**Figure 1. Total PILT Payments, FY1993-FY2015:
Appropriations in Current and Inflation-Adjusted 2014 Dollars**
(\$ in millions)



Sources: Current dollars from the annual *Payments in Lieu of Taxes: National Summary* reports of the U.S. Department of the Interior's Office of Budget (hereinafter referred to as *National Summary*). Inflation adjustment is based on chain-type price index. Adjustment for FY2015 is based on the index for the first quarter of the year.

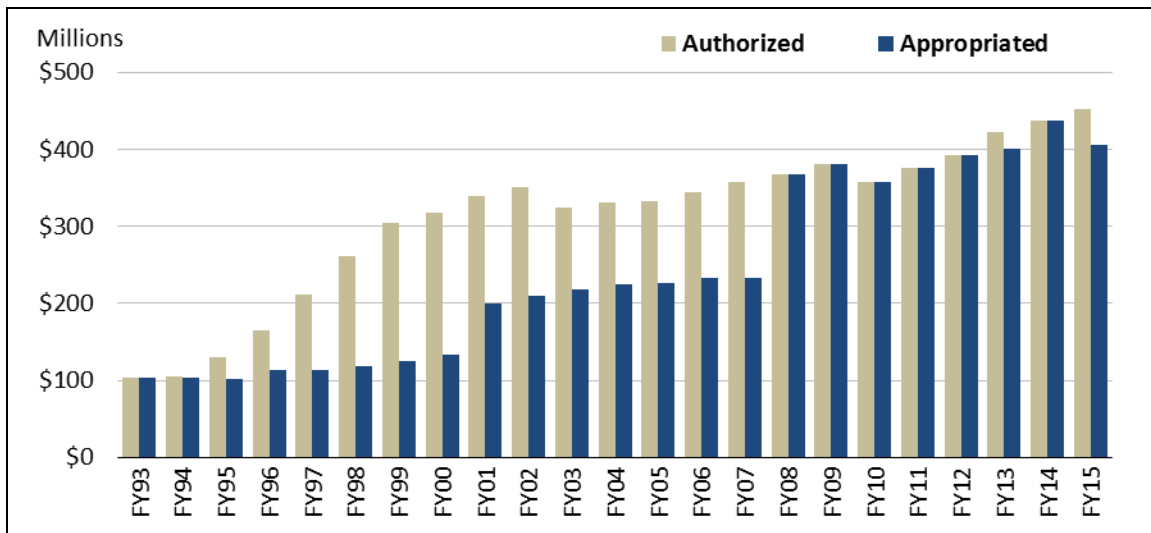
Notes: For the same data in tabular format, see **Table A-1**. PILT = Payments in Lieu of Taxes.

Many of the broader issues of federal compensation to counties that were addressed when PILT was created reemerged over the years. One such issue is the appropriate payment level, which is complicated by erosion of the payments' purchasing power due to inflation. Until about 1994, the full amount authorized under the law's formula generally had been appropriated, with a few exceptions such as sequestration under the Gramm-Rudman-Hollings Act (Title II of P.L. 99-177). For many of PILT's first 15 years, counties held that payments effectively were declining because of inflation. A 1994 amendment (P.L. 103-397) focused on increasing the total payments, building in inflation protection, and making certain additional categories of land eligible.¹¹ The authorized payment level continued to be subject to annual appropriations. **Figure 1** shows a major increase in both the actual and the inflation-adjusted dollars appropriated for PILT from FY1993 to FY2015.¹² The increase in the authorization from the 1990s to the 2000s was not accompanied by a commensurate increase in appropriations. (See **Figure 2**.) The growing discrepancy between appropriations and the rising authorization levels led to even greater levels of frustration among many local governments and prompted intense interest among some Members in increasing appropriations.

¹¹ Other important issues in 1994 were the question of the equity of the payments and the balance struck in the payment formula between (1) heavily and sparsely populated communities; (2) those with federal lands generating large revenues and those with lands generating little or no revenue; and (3) the amounts paid under PILT and the amounts that would be paid if the lands were simply taxed at fair market value. But these issues were not addressed in the 1994 amendments and scarcely have been mentioned in the debate since then.

¹² Inflation adjustments in this report use the implicit price deflator for the Gross Domestic Product, with a base year of 2014. Data for FY2015 use the implicit price deflator for the first quarter of the year. See U.S. Department of Commerce, Bureau of Economic Analysis, "National Income and Product Accounts," available at <http://www.bea.gov/national/nipaweb/DownSS2.asp>. (To reach the relevant table, select desired format; select *Section 1*; select tab *10109Ann* for Table 1.1.9. For additional information on methods, contact author.)

Figure 2. Total PILT Payments, FY1993-FY2015
Authorized Amount and Appropriation
 (\$ in millions)



Sources: Relevant annual *National Summary* reports.

Note: For the same data in tabular format, see **Table A-2**.

PILT Legislation: The 110th to 113th Congresses

The 110th Congress enacted several changes in PILT funding. First, the Continuing Appropriations Act, 2009 (P.L. 110-329), provided funding at the FY2008 level (\$228.9 million) through March 6, 2009. This figure would have constituted roughly 61% of the figure estimated for full payment of the FY2009 authorized level. Subsequently, Section 601(c) of Title VI of the Emergency Economic Stabilization Act of 2008 (P.L. 110-343) provided for mandatory spending of the full authorized level for five years—FY2008-FY2012. (See **Figure 2**.)

Next, the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141, §100111) extended mandatory spending for PILT to FY2013, without making any other changes to the law. Under the Budget Control Act (P.L. 112-25), PILT was categorized as a nonexempt, nondefense mandatory spending program. As such, it was subject to a 5.1% sequestration of the payments scheduled for FY2013, or \$21.5 million from an authorized payment of \$421.7 million.¹³

¹³ A 2013 Office of Management and Budget (OMB) report gave a slightly smaller initial estimate, based on a lower projected authorized level. See OMB, *OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013*, March 1, 2013, p. 36, at http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13ombjcssequestrationreport.pdf.

PILT Legislation: The FY2014 Appropriations Cycle

For the FY2014 appropriations cycle, Congress faced two basic choices for FY2104 funding:

- continue the program through an appropriations act, which is constrained by procedural and statutory limits on discretionary spending; or
- provide funding through some measure other than an appropriations act, which would be treated as mandatory spending. With this choice, funding would be subject to certain budget rules that generally require such spending to be offset.

In either case, failure to find an offset would lead to certain procedural hurdles, such as points of order, although Congress sometimes sets aside or waives such points of order.¹⁴

The option for funding through an appropriations act was rejected when PILT funding was not included in the Consolidated Appropriations Act, 2014 (P.L. 113-76), although the Appropriations Committee members expressed support for the program in general.¹⁵ Instead, funding for the program was included in the Agricultural Act of 2014 (P.L. 113-79, § 12312; H.Rept. 113-333; also called the 2014 farm bill), which extended mandatory spending for one year.¹⁶ The bill was a net reduction in mandatory spending and therefore offset the increase due to PILT payments. The PILT provision provided county governments with the full formula amount in summer 2014.

PILT Legislation: FY2015

The FY2015 payment, following the tradition of the last several years, was paid in June 2015. By statute, it must be paid before the fiscal year ends on September 30, 2015. The Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act (NDAA; P.L. 113-291) included a provision (§3096) for \$70 million in mandatory spending for PILT. Of this amount, \$33 million was made available in FY2015; the remaining \$37 million will be made available after the start of FY2016 on October 1, 2015, leaving some doubt as to whether the amount should be considered a late payment for FY2015 or an early payment for FY2016. In addition, the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235, §11), provided \$372 million in discretionary spending. Together, the two provisions allotted \$405 million, an amount that is 89.6% of the authorized level. The additional \$37 million to be provided under P.L. 113-291 in

¹⁴ For more on procedural matters raised in an appropriations or budget context, see CRS Report 97-865, *Points of Order in the Congressional Budget Process*, by James V. Saturno.

¹⁵ The Joint Explanatory Statement on the Consolidated Appropriations Act, 2014, states that “the Committees have been given assurances that PILT payments for fiscal year 2014 will be addressed expeditiously by the appropriate authorizing committees of jurisdiction in the House and Senate.” See Rep. Rogers, “Explanatory Statement submitted by Mr. Rogers of Kentucky, Chairman of the House Committee on Appropriations Regarding the House Amendment to the Senate Amendment on H.R. 3547, Consolidated Appropriations Act, 2014,” *Congressional Record*, daily edition, vol. 160, no. 9 (January 15, 2014), pp. H475-H1215. See also <http://docs.house.gov/bills/thisweek/20140113/113-HR3547-JSOM-G-I.pdf>.

¹⁶ For House consideration, H.Res. 465 waived all points of order that might have been brought up and thus no objection could be raised against extension of mandatory spending. Broad waivers of points of order have become increasingly common in recent years.

October 2015, if applied to the FY2015 payment cycle, would bring the FY2015 total to 97.8% of the full formula amount.

PILT Legislation: FY2016

The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 (H.R. 2822), was reported to the House on June 18, 2015. It included \$452 million for PILT, an amount that would have been sufficient for full payment in FY2015. Given the inflation protection in the PILT statute, the amount specified may be a bit less than the full formula amount for FY2016.¹⁷ Senate floor action is pending on S. 1645. The bill allows limited adjustments to funding for PILT in FY2016 by balancing past over- or underpayments. It states that “the amount needed to correct a prior year underpayment to an individual county shall be paid from any reductions for overpayments to other counties and the amount necessary to cover any remaining underpayment is hereby appropriated and shall be paid to individual counties.” However, the Senate version does not provide any new funds for the FY2016 payment.

How PILT Works: Five Steps to Calculate Payment

Calculating a particular county’s PILT payment first requires answering several questions:

- How many acres of eligible lands are in the county?
- What is the population of the county?
- What were the *previous* year’s payments, if any, for all of the eligible lands under the other payment programs of federal agencies?¹⁸
- Does the state have any laws requiring the payments from other federal agencies to be passed through to other local government entities, such as school districts, rather than staying with the county government?
- What was the increase in the Consumer Price Index for the 12 months ending the preceding June 30?

Each of these questions is discussed below, and the following section describes how the questions are used in the computation of each county’s payment.

¹⁷ Amendments concerning display of the Confederate flag were raised in floor debate, and proceedings on the bill were halted. Until agreement has been reached on the Confederate flag issue, no further action is anticipated.

¹⁸ Regardless of how many agencies have jurisdiction over eligible lands in a county, all of the payments specified in 31 U.S.C. §6903(a)(1) are added together and deducted from the following year’s single PILT payment. Any other federal lands payments the county may get that are not specified in that provision are not deducted. The formula in 31 U.S.C. §6903 puts a ceiling on the total PILT payment for all of the eligible land in the county.

Step 1. How Many Acres of Eligible Lands Are There?

Nine categories of federal lands are identified in the law as eligible for PILT payments:¹⁹

1. Lands in the National Park System
2. Lands in the National Forest System
3. Lands administered by BLM
4. Lands in the National Wildlife Refuge System (NWRS) that are withdrawn from the public domain
5. Lands dedicated to the use of federal water resources development projects²⁰
6. Dredge disposal areas under the jurisdiction of the U.S. Army Corps of Engineers
7. Lands located in the vicinity of Purgatory River Canyon and Piñon Canyon, Colorado, that were acquired after December 31, 1981, to expand the Fort Carson military reservation
8. Lands on which are located semi-active or inactive Army installations used for mobilization and for reserve component training
9. Certain lands acquired by DOI or the Department of Agriculture under the Southern Nevada Public Land Management Act (P.L. 105-263)

Section 6904/6905 Payments

Two sections of the PILT law (31 U.S.C. §6904 and §6905) provide special payments for limited categories of land, for limited periods. These are described in the FY2015 *National Summary* (p. 12) as follows:

Section 6904 of the Act authorizes payments for lands or interests therein, which were acquired after December 31, 1970, as additions to the National Park System or National Forest Wilderness Areas. To receive a payment, these lands must have been subject to local real property taxes within the five year period preceding acquisition by the Federal government. Payments under this section are made in addition to payments under Section 6902. They are based on one percent of the fair market value of the lands at the time of acquisition, but may not exceed the amount of real property taxes assessed and levied on the property during the last full fiscal year before the fiscal year in which [they were] acquired. Section 6904 payments for each acquisition are to be made annually for five years following acquisition, unless otherwise mandated by law....

Section 6905 of the Act authorizes payments for any lands or interests in land owned by the Government in the Redwood National Park or acquired in the Lake Tahoe Basin under the Act of December 23, 1980 (P.L. 96-586, 94 Stat. 3383). Section 6905 payments continue until the total amount paid equals 5 percent of the fair market value of the lands at the time of acquisition. However, the payment for each year cannot exceed the actual property taxes assessed and levied on the property during the last full fiscal year before the fiscal year in which the property was acquired by the Federal government.

In FY2015, the Section 6904/6905 payments totaled \$620,340, or 0.14% of the total program. California counties received the largest amount (\$110,610). Fourteen states and three territories had no counties receiving payments under these two sections in FY2015. The states were Arkansas, Hawaii, Illinois, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, Rhode Island, South Dakota, Wisconsin, Wyoming, and the territories were Guam, Puerto Rico, and the Virgin Islands.

The payments under Section 6904 cease five years after acquired land is incorporated into a national park unit or a National Forest Wilderness Area. As a result, some counties experience a sudden drop in their PILT payment after five years.

¹⁹ See 31 U.S.C. §6901. The law refers to these nine categories of lands as “entitlement lands,” and the term is used throughout the act. However, because *entitlement* is a word that is used in a very different, and potentially confusing, context in the congressional budget process, this report will refer to these lands as *eligible lands*.

²⁰ These lands are under the jurisdiction of the Bureau of Reclamation, for the most part.

In addition, if any lands in the above categories were exempt from real estate taxes at the time they were acquired by the United States, those lands are not eligible for PILT, except in three circumstances:

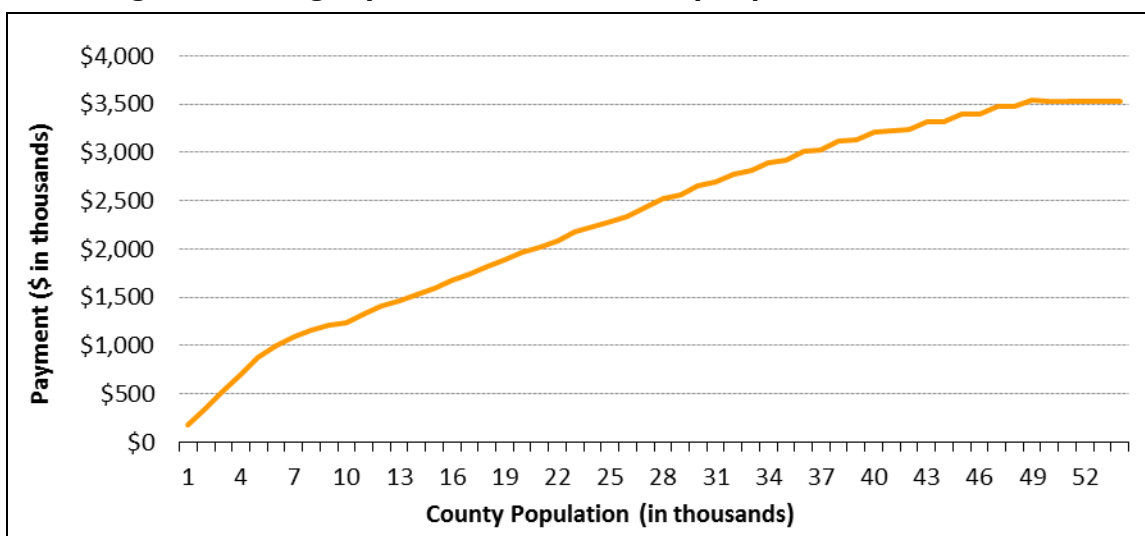
1. Lands received by the state or county from a private party for donation to the federal government within eight years of the original donation
2. Lands acquired by the state or county in exchange for land that was eligible for PILT
3. Lands in Utah acquired by the United States if the lands were eligible for a payment in lieu of taxes program from the state of Utah

Only the nine categories of lands (plus the three exceptions) on this list are eligible for PILT payments; other federal lands—such as military bases, post offices, federal office buildings, and the like—are not eligible for payments under this statute. The exclusion of lands in the NWRS that are acquired is an interesting anomaly, and it may reflect nothing more than the fact that the House and Senate committees with jurisdiction over most federal lands did not have jurisdiction over the NWRS as a whole at the time P.L. 94-565 was enacted.²¹

Step 2. What Is the Population of the County?

The law restricts the payment that a county may receive based on population by establishing a ceiling payment that rises with increasing population. (See **Figure 3**.) Under the schedule provided in Title 31, Section 6903, of the *United States Code*, counties are paid at a rate that varies with population; counties with low populations are paid at a higher rate per person and populous counties are paid less per person. For example, for FY2015, a county with a population of 1,000 people could not receive a PILT payment of more than \$176,670 (\$176.67 per person); a jurisdiction with a population of 30,000 could not receive a payment over \$2.6 million (30,000 people × \$88.36 per person). And no county can be credited with a population of more than 50,000. Consequently, in FY2015, at the authorized payment level of \$70.67 per person, no county could receive a PILT payment over \$3.5 million (50,000 people × \$70.67 per person), regardless of population. **Figure 3** shows the relationship between the population of a county and the maximum PILT payment.

²¹ At the time, jurisdiction over the National Wildlife Refuge System (NWRS) generally was in one committee, while jurisdiction over public domain lands was within the jurisdiction of different committees. This was true in both the House and Senate. The committees considering PILT had no jurisdiction over the acquired lands within the NWRS.

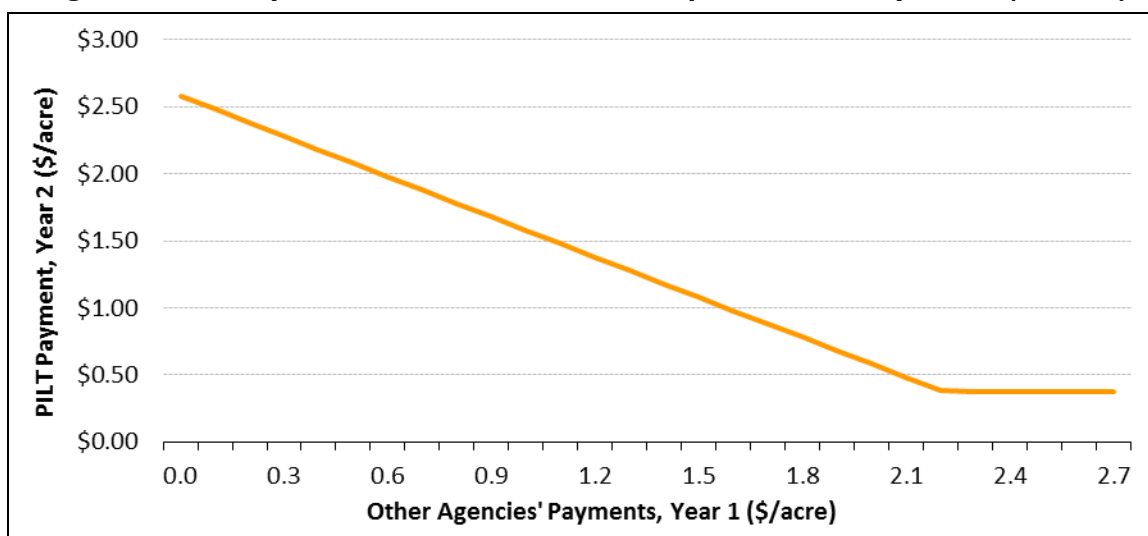
Figure 3. Ceiling Payments Based on County Population Level, FY2015

Source: Calculations based on the FY2015 *National Summary*, p. 14.

Note: With the ceiling limit, no county, regardless of population size, could receive more than \$3.53 million for FY2015.

Step 3. Are There Prior-Year Payments from Other Federal Agencies?

Federal land varies greatly in revenue production. Some lands have a large volume of timber sales or recreation concessions such as ski resorts, and others generate no revenue at all. Some federal lands have payment programs for state or local governments, and these payments may vary markedly from year to year. To even out the payments among counties and prevent grossly disparate payments, Congress provided that the previous year's payments on eligible federal lands from specific payment programs to counties would be subtracted from the PILT payment of the following year. So for a hypothetical county with three categories of eligible federal land, one paying the county \$1,000, the second \$2,000, and the third \$3,000, then \$6,000 would be subtracted from the following year's PILT payment. Most counties are paid under this offset provision, which is called the *standard rate*. In **Figure 4**, the standard rate is shown by the sloping portion of the line, indicating that as the sum of the payment rates from other agencies increases, the PILT payment rate declines on a dollar-for-dollar basis.

Figure 4. PILT Payment Level as a Function of Specific Prior Payments (FY2015)

Source: Calculations based on payment levels cited in the FY2015 *National Summary*.

Note: With the minimum payment provision, no county, however large the prior-year payment, could receive less than \$0.37/acre from PILT for FY2015.

At the same time, Congress wanted to ensure that each county with eligible lands got *some* PILT payment, however small, even if the eligible lands produced a substantial county payment from other agencies. If the county had payments from three federal payment programs of \$1,000, \$2,000, and \$1 million, for instance, subtracting \$1.003 million from a small PILT payment would produce a negative number—meaning no PILT payment to the county at all. In that case, a *minimum rate* applies, which does not deduct the other agencies' payments. In **Figure 4**, the flat portion to the right shows that, after the other agencies' payments reach a certain level (\$2.25 per acre in FY2015), the rate of the PILT payment remains fixed (at \$0.37 per acre in FY2015).

The payments made in prior years that count against future PILT payments are specified in law (16 U.S.C. §6903(a)(1)). Any other payment programs beyond those specified would not affect later PILT payments. These specified payments are shown in **Table A-3**. Eligible lands under some agencies (e.g., National Park Service and Army Corps of Engineers) have no payment programs that affect later PILT payments.

Step 4. Does the State Have Pass-Through Laws?

Counties may receive payments above the calculated amount described above, depending on state law. Specifically, states may require that the payments from federal land agencies pass through the county government to some other entity (typically a local school district) rather than accrue to the county government itself. When counties in a *pass-through* state are paid under the formula that deducts their prior-year payments from other agencies (e.g., from the Refuge Revenue Sharing Fund [RRSF; 16 U.S.C. §715s] of FWS or the Forest Service [FS] Payments to States program [16 U.S.C. §500]),²² the amount paid to the other entity is *not* deducted from the county's PILT payments in the following year. According to DOI:

²² Under 16 U.S.C. §500, these payments are made to the states or territories and must be used for schools or roads in (continued...)

Only the amount of Federal land payments actually received by units of government in the prior fiscal year is deducted. If a unit receives a Federal land payment, but is required by State law to pass all or part of it to financially and politically independent school districts, or any other single or special purpose district, payments are considered to have not been received by the unit of local government and are not deducted from the Section 6902 payment.²³

For example, if a state requires all counties to pass along some or all of their RRSF payments from FWS to the local school boards, the amount passed along is not deducted from the counties' PILT payments for the following year (31 U.S.C. §6907). Or if two counties of equal population in two states each received \$2,000 under the FS Payments to States program, and State #1 pays that amount directly to the local school board but State #2 does not, then under this provision the PILT payment to the county in State #1 will not be reduced in the following year but that of the county in State #2 will drop by \$2,000. State #1 will have increased the total revenue coming to the state and to each county by taking advantage of this feature.²⁴

Consequently, the feature of PILT that apparently was intended to even out payments among counties (at least of equal population size) may not have that result if the state takes advantage of this pass-through feature.²⁵ Under Title 31, Section 6903(b)(2), of the *United States Code*, each governor reports annually to the Secretary of the Interior with a statement of the amounts actually paid to each county government under the relevant federal payment laws. DOI also cross-checks each governor's report against the records of the payment programs of federal agencies.

In addition, there is a pass-through option for the PILT payment itself. A state may require that the PILT payment go to a smaller unit of government, contained within the county (typically a school district; 16 U.S.C. §6907). In this case, one check is sent by the federal government to the state for distribution by the state to these smaller units of government. The distribution must occur within 30 days. To date, Wisconsin is the only state to have elected to pass through PILT payments.

Step 5. What Is This Year's Consumer Price Index?

A provision in the 1994 amendments to PILT adjusted the authorization levels for inflation. The standard and minimum rates, as well as the payment ceilings, are adjusted each year. Under Title 31, Section 6903(d), of the *United State Code*, "the Secretary of the Interior shall adjust each dollar amount specified in subsections (b) and (c) to reflect changes in the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor, for the 12 months ending the preceding June 30." This is an unusual degree of inflation adjustment; no other federal land agency's payment program has this feature. But as will be shown below, increases in the

(...continued)

the counties in which the national forests are located. Each state has its own rules on the mechanics of that transfer, on the proportion to be used for roads and the proportion for schools. Some states direct that the education portion be given directly to school boards. For more information see CRS Report R40225, *Federal Land Management Agencies: Background on Land and Resources Management*, coordinated by Carol Hardy Vincent.

²³ FY2015 *National Summary*, p. 10.

²⁴ Note that even though a county as a whole may benefit from this provision, the county government *itself* will not, because it forgoes the revenues given directly to its school system.

²⁵ However, the Supreme Court has held that states cannot direct counties to spend their PILT payments (i.e., payments under the DOI-managed program described in this report) for particular purposes once they have actually received their PILT payment. *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256 (1985).

authorization do not necessarily lead to a commensurate increase in the funds received by the counties.

Putting It All Together: Calculating a County's Payment

Knowing the answers to these questions, one then can make two comparisons to calculate the authorized payment level for a county. (**Figure 5** shows a flow chart of the steps in these comparisons.) All charts and comparisons in this report are based on FY2015 payment levels.

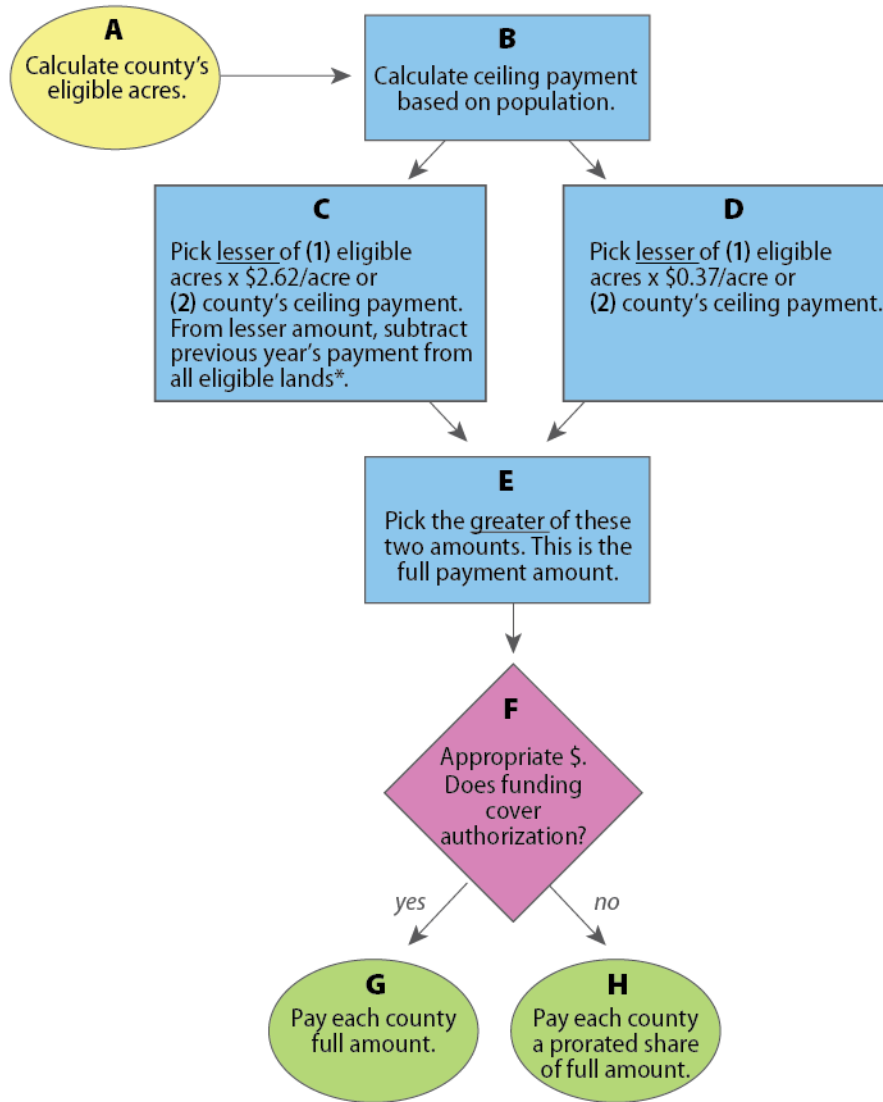
Alternative A. Which is *less*: the county's eligible acreage multiplied by \$2.62 per acre or the county's ceiling payment based on its population? Pick the lesser of these two numbers. From it, subtract the previous year's total payments for these eligible lands under specific payment or revenue-sharing programs of the federal agencies that control the eligible land.²⁶ The amount to be deducted is based on an annual report from the governor of each state to DOI. This option is called the *standard rate*.

Alternative B. Which is *less*: the county's eligible acreage multiplied by \$0.37 per acre or the county's ceiling payment based on its population? Pick the lesser of these two. This option is called the *minimum provision* and is used in counties that received relatively large payments (more than \$2.25 per acre for FY2015) from other federal agencies in the previous year.

The county is authorized to receive whichever of the above calculations—(A) or (B)—is *greater*. This calculation must be made for all counties individually to determine the national authorization level. From the program's inception through FY2007, the authorized payments were subject to annual appropriations. If appropriations were insufficient for full funding, each county received a pro rata share of the appropriation. After passage of P.L. 110-343 and P.L. 112-141, each county received the full authorized amount for FY2008-FY2012; as a result of sequestration (P.L. 112-25), each county received 94.8% of the authorized amount for FY2013. With the enactment of P.L. 113-79, counties received the full authorized amount in FY2014. As mentioned above, P.L. 113-291 and P.L. 113-235 provided 89.6% of the full authorized amount in FY2015. The additional \$37 million to be provided under P.L. 113-291 in October 2015 will bring the FY2015 total to 97.8% of the full formula amount.

²⁶ Payments under the Secure Rural Schools program for Forest Service lands (but not Bureau of Land Management lands) are included among those prior-year payments to be deducted. See CRS Report R41303, *Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000*, by Katie Hoover.

Figure 5. Steps in Calculating PILT for Eligible Federal Lands
(FY2015 payment levels)



Source: Prepared by CRS, based on PILT statute (31 U.S.C §§6901-6907).

Notes: The payments (marked *) are the specific payments for federal lands. The amount subtracted is reduced in states with pass-through laws.

The standard rate, with its offset between agency-specific payments and PILT payments, still does not guarantee a constant level of federal payments to counties because of the time lag in determining PILT payments. Federal payments for a given fiscal year generally are based on the receipts of the prior year. PILT payments of the *following* fiscal year are offset by these payments.

The combination of specific payments and PILT in the standard rate means that reductions (or increases) in those other payments in the previous year could be offset exactly by increases (or reductions) in PILT payments. However, provided the county's population is not so low as to affect the outcome, PILT payments could not fall below \$0.37 per acre for FY2015 (see

Alternative B, above), so the full offset occurs only when the other federal payments in the previous year total less than \$2.22 per acre (i.e., the maximum payment of \$2.62 per acre minus the \$0.37 per acre minimum payment from PILT).²⁷

To illustrate, consider a county whose only eligible federal lands are under FS jurisdiction. If the federal receipts on the FS lands dropped in FY2013 (compared with FY2012), authorized FS payments in FY2014 would fall. Authorized PILT payments will therefore increase to offset the drop—in FY2015. (This example assumes the PILT payment is calculated under the standard rate.) The counties will be authorized to receive at least \$2.62 per acre from FS payments and PILT payments combined,²⁸ but the two payments would not come in the same year. Consequently, if FS payments are falling from year to year, the combined payments in the given year would be less than \$2.62 per acre, but if FS payments are rising, the authorized combined payment in the given year would be more than \$2.62 per acre.

National Totals

Because of the need for annual data, a precise dollar figure cannot be given in advance for each year's PILT authorization level.²⁹ Information from all 2,254 counties with eligible land in FY2015 was needed before an aggregate figure for the nation could be calculated for the most recent payment. As a result, no figure can be given yet for the amount required for full funding in FY2016.

Current Issues

Although the enactment of six years of mandatory spending put the issue of full funding to rest for a time, county governments still show strong support for continuing mandatory spending for PILT. This question of mandatory spending has been the biggest issue facing the program from the 112th through the 114th Congresses. The question of funding for the program has been addressed for the FY2015 payment. At the same time, with congressional debate over spending levels in general, support for greater or mandatory spending for PILT may compete with proposals to modify or even eliminate PILT in later years as a means of reducing federal deficits.

Congressional interest, after the 1994 revisions to PILT, has focused on the three areas cited above: (1) whether to approve mandatory spending (either temporary or permanent) at the full amount or some fixed level; (2) whether to make the opposite choice of reducing the program, either through discretionary appropriations or by changing the PILT formula; and (3) whether to

²⁷ To illustrate more concretely, imagine each county as a large bucket whose sides are marked off in "\$/acre." PILT, in effect, checks the payment already in the bucket from other agencies and then adds at least enough money to the bucket to bring it to the \$2.62/acre mark. Moreover, PILT adds 37¢/acre, regardless of the amount in the bucket already. Consequently, the money bucket could reach levels well above \$2.62/acre, with the last 37¢ added by PILT. The county population ceilings might then be thought of as holes in the sides of some of the buckets that prevent the buckets from filling beyond a certain level for that bucket (i.e., county).

²⁸ An exception would occur if the county's population is so small that the county is affected by the PILT ceiling on payments due to population.

²⁹ DOI does not include estimated full payment levels in its annual budget justification to Congress. It confines itself to the Administration's request for the year. However, DOI's annual report of current year PILT payments to counties includes this information.

add or subtract any lands from the list of those now eligible for PILT payments. PILT payments for FY2015 totaled \$404.6 million in mandatory spending.³⁰ In contrast, FY2015 discretionary appropriations for DOI totaled \$10.7 billion, or about 26 times the PILT program that year. However, for a relatively small fraction of the federal or even departmental budget, PILT garners considerable attention for local reasons: (1) according to the FY2015 *National Summary*, 2,230 counties had lands eligible for PILT payments; (2) the average payment per county (many of which are sparsely populated) was \$181,435; (3) although some counties with eligible lands received no payment (because they have very few federal lands and PILT makes no payments of less than \$100), many received over \$1 million and 14 counties received over \$3 million.³¹ The resulting impact on budgets of local governments helps generate interest despite the comparatively small size of the PILT program. As PILT funding reverts to discretionary spending, counties with large federal land holdings may return to significant fiscal uncertainty.

Several more specific issues also are being debated in Congress or within county governments. Among them are the inclusion of Indian or other categories of lands; tax equivalency, especially for eligible urban lands; and payments affecting the NWRs.

Inclusion of Indian Lands

The inclusion of other lands (e.g., military lands generally or those of specific agencies such as the National Aeronautics and Space Administration) under the PILT program has been mentioned from time to time, and some counties with many acres of nontaxable Indian lands within their boundaries have long supported adding Indian lands to the list of lands eligible for PILT. Their primary arguments are that these lands receive benefits from the county, such as road networks, but Indian residents do not pay for these benefits with property taxes. At the same time, the federal government does not actually own these lands.

The complexity of the PILT formula makes it very difficult to calculate the consequences of such a move, either for authorization levels or appropriation levels. Additionally, Congress would have to decide what sorts of Indian lands would be eligible for such payments and a variety of other complex issues.³² If some categories of Indian lands were to be added to those lands already eligible for PILT, Congress might wish to limit payments to counties with more than some minimum percentage of Indian lands within their borders. Regardless, even a very restrictive

³⁰ A total of \$405.0 million was appropriated for PILT in FY2015; from this figure, \$0.4 million was deducted for administrative expenses.

³¹ *National Summary*, FY2015. The 14 counties were in 8 states: Arkansas (1), Arizona (3), California (3), Colorado (1), Nevada (3), New Mexico (1), Utah (1), and Wyoming (1).

³² The many classifications of *Indian lands* include trust lands, restricted lands, and fee (private) lands, both on and off reservations. *Trust lands* are lands held by the federal government in trust for an Indian tribe or individual. *Restricted lands* are lands held by an Indian tribe or individual but subject to federal restrictions on alienation (e.g., sale) or encumbrance (e.g., mortgaging). Most, but by no means all, Indian trust and restricted lands are on Indian reservations. Trust and restricted lands, whether on or off reservations, are not subject to state or local land taxes. *On-reservation* Indian fee lands may or may not be subject to state and local land taxes, depending on the federal statute under which the land was fee patented. *Off-reservation* Indian fee lands generally are subject to state and local land taxes. (Indian reservations may also include non-Indian fee lands, which are subject to state and local taxation.) Alaskan Native corporation lands (none of which are trust lands) are affected by limits on state taxation in the Alaska Native Claims Settlement Act (P.L. 92-203). Congress would have to decide which of these many classifications of Indian lands would become eligible for PILT benefits. Further, Congress might choose to distinguish between Indian lands that have never been taxed by a county or state versus those Indian lands that once were taxable but were acquired into nontaxable status after some specified date.

definition of *Indian lands* seems likely to add many millions of acres to those already eligible. Even if the criteria for eligibility were determined, it still would be difficult to anticipate the effect on authorization levels. To paint an extreme example, if all of the eligible Indian lands were in counties whose PILT payments already were capped due to the population ceiling, inclusion of Indian lands would have no effect on PILT authorization levels.

If mandatory spending of the full formula amount is in place, appropriations would go up to fund the newly eligible lands. If spending is not mandatory and annual appropriations are less than the authorized level, each county would receive a pro rata share of the authorized full payment level. Individual counties whose eligible acres had jumped markedly with the inclusion of Indian lands might receive substantially more than in the past. Other counties (particularly those with few or no eligible Indian acres) would receive a smaller fraction of the authorized amount as limited dollars would be distributed among more lands.

Inclusion of Urban Lands and Tax Equivalency

Some observers have wondered whether urban federal lands are included in the PILT program. The response is that urban lands are not *excluded* from PILT under the current law. For example, in FY2015, the counties in which Sacramento, Chicago, and Cleveland are found, as well as the District of Columbia, all received PILT payments (see **Table 1**), although the property tax on similar, but nonfederal, lands likely would have been substantially greater.

Table 1. Authorized PILT Payments to Selected Urban Counties, FY2015

County	Eligible Acres	FY2015 Appropriated Amount (\$)
Sacramento County (CA)	9,618	22,580
Cook County (IL)	139	326
Cuyahoga County (OH)	2,594	6,090
Arlington County (VA)	27	0 ^a
District of Columbia	6,980	16,537

Source: *National Summary*, FY2015.

Notes: The urban counties and the District of Columbia were selected to show a wide range in the amount of eligible lands and resulting payments.

- a. Under the PILT formula, Arlington County's 27 eligible acres (all under the National Park Service) would generate a payment of \$70. However, under the law, no payment is made for amounts under \$100.

Eastern counties, which tend to be small, rarely have both large populations *and* large eligible acreage in the same county. By contrast, western counties tend to be very large and may have many eligible acres, and some, like Sacramento, may have large populations as well. Furthermore, as the cases of Arlington County and the District of Columbia illustrate, PILT payments are by no means acting as an equivalent to property tax payments. If the 6,980 acres in the District of Columbia or the 27 acres in Arlington County were owned by taxable entities, those acres would result in much more than \$16,537 or \$0, respectively, in property taxes.³³

³³ For a concrete example, the 2014 real property tax rate in Arlington County was \$0.996 per \$100 of assessed valuation. At that rate, to generate \$70 in property taxes, the county's assessed value of the 27 acres would have been \$7,028, or about \$270/acre. Actual assessed values in Arlington County tend to be higher by an order of magnitude or (continued...)

Because the formula in PILT does not reflect property taxes, counties such as these might support a revised formula that would approach property tax payments.

National Wildlife Refuge System Lands

As noted above, NWRS lands that were withdrawn from the public domain are eligible for PILT, and those that were acquired are not. In addition, the National Wildlife Refuge Fund (NWRF, also called the Refuge Revenue-Sharing Fund, or RRSF) relies on annual appropriations for full funding. For FY2015, payments for NWRF were approximately 23% of the authorized level. For refuge lands eligible for PILT, some or perhaps all of the NWRF payment will be made up for in the following year's PILT payment, but this will not occur for acquired lands because they are not eligible for PILT. Congress may consider making all refuge lands eligible for PILT and/or providing mandatory spending for NWRF, as it has for PILT. Eastern counties could be the largest beneficiaries of such a change, although some western states also may have many NWRS acres that currently are not eligible for PILT. (See **Table 2** for selected state examples.) Adding the 9.7 million acres of NWRS lands under the primary jurisdiction of FWS but currently ineligible for PILT would increase PILT lands by about 1.6%.

Table 2. NWRS Acres Eligible for PILT in Selected States, FY2014

State	NWRS Acres Reserved from Public Domain	Total NWRS Acres	Percent Eligible for PILT
Alabama	0	71,573	0.0
Arizona	1,553,465	1,743,846	89.0
Iowa	334	120,586	0.3
Maine	0	69,744	0.0
Montana	433,135	1,539,372	28.
Ohio	77	9,446	0.8
Oregon	266,475	591,020	45.0

Source: Compiled from *Annual Report of Lands Under Control of the U.S. Fish and Wildlife Service As of September 30, 2014* (the most recent year available).

Notes: States were selected to show a wide range in NWRS acreage and amount of public domain lands. NWRS = National Wildlife Refuge System; PILT = Payments in Lieu of Taxes.

County Uncertainty and Fiscal Effects on Counties³⁴

The PILT program, as a mandatory spending program, provided a relatively certain flow of funds to recipient jurisdictions. Some observers and policymakers are concerned that returning PILT to discretionary spending or eliminating the program would destabilize the fiscal structure of some jurisdictions receiving PILT payments. Nationally, however, the relative size of the PILT

(...continued)

more.

³⁴ This section prepared by Steven Maguire, section research manager, Government Finance and Taxation Section (7-7841, smaguire@crs.loc.gov).

payments would seem to mitigate the impact and PILT reductions would not seem to have a measurable fiscal impact on most county budgets that receive PILT transfers. Locally, the impacts may be greater, perhaps substantially.

Reliance on property taxes is important for most counties. Nationwide, in FY2012, local property taxes (for counties, cities, and special districts) comprised roughly 47.2% of own-source revenue or just over \$446 billion in total revenues.³⁵ However, in FY2015, the PILT program was very much smaller: the appropriated \$405 million in PILT payments is roughly 0.1% of property tax revenue nationally.³⁶ For counties that receive a significantly larger PILT payment, however, the impact would be greater. First, for the 14 counties that received over \$3 million in FY2015, the government services provided by the county could be adversely affected in the near term (although restructuring the property tax or raising other local fees or taxes could likely compensate for the reduced federal payment). Second, smaller payments also would be important in low-property value, low-population counties with relatively greater shares of federally owned land.

³⁵ Own-source revenue is all revenue that is *not* a transfer from the state or federal government. Data are from the Jeffery L. Barnett, Cindy L. Sheckells, Scott Peterson, and Elizabeth M. Tydings, "State and Local Government Finance Summary: 2012," Appendix Table A-1, Governments Division Briefs, U.S. Census Bureau, December 17 2014, at http://www2.census.gov/govs/local/summary_report.pdf. The report contains the most recent data available.

³⁶ It is important to note that 30% of all counties in the country have no lands eligible for PILT and thus the two figures are not entirely comparable. Specifically, it is not clear what fraction of the own-source revenue is produced in the 70% of counties with lands eligible for PILT payments. For more on the number of counties by state, see U.S. Census Bureau, "2012 Census of Governments: Organization Component Estimates."

Appendix. PILT Data Tables

The first two tables below show the data presented in **Figure 1** and **Figure 2**. The third shows the agency payments that offset payments under PILT in the following year.

**Table A-1. Total PILT Payments, FY1993-FY2015:
Appropriations in Current and Inflation-Adjusted 2014 Dollars**
(\$ in millions)

Year	Appropriation	Inflation-Adjusted Appropriation
1993	103.2	154.7
1994	104.1	152.8
1995	101.1	145.3
1996	112.8	159.3
1997	113.1	157.0
1998	118.8	163.1
1999	124.6	168.5
2000	134.0	177.2
2001	199.2	257.6
2002	209.4	266.7
2003	218.6	272.9
2004	224.7	273.0
2005	226.8	267.0
2006	232.5	265.5
2007	232.5	258.7
2008	367.2	400.7
2009	381.6	413.2
2010	358.1	383.1
2011	375.2	393.3
2012	393.0	404.7
2013	400.2	406.0
2014	436.9	436.9
2015	404.6 ^a	403.7

Sources: Current dollars from each annual *National Summary*. Inflation adjustment is based on chain-type price index. Adjustment for 2015 is based on the index for the first quarter of the year.

Notes: For the same data in a bar chart, see **Figure 1**.

- a. A total of \$405.0 million was appropriated for PILT in FY2015; from this figure, \$0.4 million was deducted for administrative expenses.

Table A-2. Total PILT Payments, FY1993-FY2015:
Authorized Amount and Appropriation
(\$ in millions)

Year	Authorized	Appropriated
1993	103.2	103.2
1994	104.4	104.1
1995	130.5	101.1
1996	165.1	112.8
1997	212.0	113.1
1998	260.5	118.8
1999	303.7	124.6
2000	317.6	134.0
2001	338.6	199.2
2002	350.8	209.4
2003	324.1	218.6
2004	331.3	224.7
2005	332.0	226.8
2006	344.4	232.5
2007	358.3	232.5
2008	367.2	367.2
2009	381.6	381.6
2010	358.1	358.1
2011	375.2	375.2
2012	393.0	393.0
2013	421.7	400.2
2014	436.9	436.9
2015	451.5	405.0 ^a

Sources: Relevant annual *National Summary* reports.

Notes: For the same data in a bar chart, see **Figure 2**.

- a. A total of \$405.0 million was appropriated for PILT in FY2015; from this figure, \$0.4 million was deducted for administrative expenses. An additional \$37.0 million will become available on October 1, 2015.

Table A-3. Prior-Year Payment Laws That Are Offset Under Next PILT Payment

Federal Agency Making Payment	Short Title of Law or Common Name	P.L. or Date	U.S. Stat.	U.S. Code	Lands Eligible for Payments	Payment Rate
Forest Service	25% payments or Payments to States	Act of May 23, 1908 (ch. 192, §13)	35 Stat. 260	16 U.S.C. §500	All national forest (NF) lands	25% of gross receipts to state for roads and schools in counties
	None	Act of June 20, 1910 (ch. 310)	36 Stat. 557, §6	Not codified	NF lands in AZ and NM	Proportion of lands in NFs reserved for schools times proceeds from sales in NF
	None	Act of June 22, 1948 (ch. 593, §5); Act of June 22, 1956 (ch. 425, §2)	62 Stat. 570, 70 Stat. 328	16 U.S.C. §577g, §577g-1	Lands in Superior NF, MN	0.75% of appraised value (in addition to 25% payments above)
	Mineral Leasing Act for Acquired Lands (§6)	Act of Aug. 7, 1947	61 Stat. 915	30 U.S.C. §355	NF lands with mineral leasing	50% of mineral leasing revenues to states for counties
	Material Disposal Act	Act of July 31, 1947 (§3)	61 Stat. 681	30 U.S.C. §603	Net revenues from sale of land and materials	Varies depending on type of receipt and agency
	Secure Rural Schools and Community Self-Determination Act ^a	P.L. 106-393, as amended	114 Stat. 1607, as amended	16 U.S.C. §§7101 et seq.	NF lands (but not lands under Land Utilization Program [LUP] or National Grasslands) if this option is chosen by county instead of 25% payments	Complex formula; see CRS Report R41303, <i>Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000</i> , by Katie Hoover
	Bankhead-Jones Farm Tenant Act	Act of July 22, 1937 (ch. 513, §33)	50 Stat. 526	7 U.S.C. §1012	National Grasslands and LUP lands managed by FS ^b	25% of revenues for use of lands to states
Bureau of Land Management	Mineral Lands Leasing Act	Act of February 25, 1920 (ch. 85, §35)	41 Stat. 450	30 U.S.C. §191	Public lands	50% of leasing revenues to states for counties
	Taylor Grazing Act	Act of June 28, 1934 (ch. 865, §10)	48 Stat. 1273	43 U.S.C. §315i	Public lands	12.5% of grazing receipts to states for counties

Federal Agency Making Payment	Short Title of Law or Common Name	P.L. or Date	U.S. Stat.	U.S. Code	Lands Eligible for Payments	Payment Rate
	Bankhead-Jones Farm Tenant Act	Act of July 22, 1937 (ch. 513, §33)	50 Stat. 526	7 U.S.C. §1012	National Grasslands and LUP lands managed by BLM	25% of revenues for use of lands to states
	Mineral Leasing Act for Acquired Lands (§6)	Act of Aug. 7, 1949	61 Stat. 915	30 U.S.C. §355	Public lands with mineral leasing	50% of mineral leasing revenues to states for counties
	Material Disposal Act	Act of July 31, 1947 (§3)	61 Stat. 681	30 U.S.C. §603	Net revenues from sale of land and materials	Varies depending on type of receipt and agency
Fish and Wildlife Service	Refuge Revenue Sharing Act	Act of June 15, 1935 (ch. 261, §401(c)(2))	49 Stat. 383	16 U.S.C. §715s(c)(2)	Public domain lands in NWRS ^c	25% of net receipts from timber, grazing, and mineral sales directly to county; remaining 75% to counties under other formulas
Federal Energy Regulatory Commission	Federal Power Act	Act of June 10, 1920, (ch. 285, §17)	41 Stat. 1072	16 U.S.C. §810	NF and public lands with occupancy and use for power projects	37.5% of revenues from licenses for occupancy and use to states for counties

Sources: 31 U.S.C. §6903(a)(1), *National Summary*, FY2015, p. 13. The latter document has typographical errors that are corrected here, as noted. Because the various payment laws are identified in some documents by title, in others by a U.S. Code citation, and in still others by the Statutes at Large, date, or Public Law, all of these are cited here, where they exist.

- a. When payments are made for lands under FS jurisdiction for the Secure Rural Schools (SRS) program, the payments result in a reduction (offset) in the following year's PILT payment. However, if the lands are under BLM jurisdiction, no offset is made in the following year's PILT payment. All BLM lands eligible for SRS payments are in Oregon.
- b. The table shown in *National Summary*, FY2015, p. 13, indicates that these payments are made only to BLM lands and omits mention of FS lands. However, the majority of Bankhead-Jones lands are in the FS National Grasslands, and DOI makes payments for these lands regardless of which of the two agencies own them. Therefore, this payment is shown in the table for both agencies.
- c. Acquired lands in the National Wildlife Refuge System (NWRS) are not eligible for PILT payments. See text.

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Recommendations for Making Payments to States and Counties

Report to Congress

Submitted by Forest Counties Payments Committee

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Table of Contents

Executive Summary	3
Acknowledgements	5
Forest Counties Payments Committee Members and Staff	6
Chapter 1: Introduction	7
Chapter II: Communities and Federal Forest Lands, the Historical Context	10
• Communities and Forest Reserves	10
• Revested Oregon and California Grant Lands	14
• Addressing the Impact to Communities	15
Chapter III: Methods Used	18
– Listening Session Locations and Dates Graphic	19
– Forest Counties Payments Committee Public Hearing Questions Graphic	19
Chapter IV: Payment Options and Recommendations	20
• Alternatives and Criteria	20
– Alternatives Considered Graphic	20
– Criteria Important to Alternatives Graphic	20
• Recommended Payment Method	21
• Other Feasible Alternatives	22
• If Congress Does Not Pass New Payment Legislation	25
• Alternatives Considered and Rejected	25
Chapter V: Related Findings and Recommendations	28
• Importance of Federal Payments to Schools	28
– Number of Pupils for Selected Years Graphic	28
• Local Governments' Dependency on Payments	30
• Resource Advisory Committees	31
• Regulations and Statutes	33
• Implementation of P.L. 106-393. Evaluation of Title II and Title III	34

Chapter VI: Other Observations	37
• Effects on States and Counties from Changes in Historic Multiple Use Management	37
• Costs and Benefits to Local Communities from Public Lands	38
• Payment Statutes and Other Laws	39
• Collaborative Efforts	40
• Forest Sustainability	41
Chapter VII: Report Summary	42
• Chapter I: Introduction	42
• Chapter II: Communities and Federal Forest Lands, the Historical Context	42
• Chapter III: Methods Used	43
• Chapter IV: Payment Options and Recommendations	44
• Chapter V: Related Findings and Recommendations	45
• Chapter VI: Other Observations	46
Appendix A. Historical Studies on Payments to States and Local Governments	48
Appendix B. Historical Payments	52
Appendix C. Federal Payments to States for Certain Geographic Areas from 1908 25% Payment Act	53
Appendix D. Trend of National Forest and O&C Timber Sales	54
Appendix E. Payments to States and Counties Fiscal 2001 P.L. 106-393	55
Appendix F. Future Outlook for Receipt Collections from the National Forests	58
Appendix G. Language to Prevent States from Substituting Federal Funds	59
Appendix H. Letter to the Committees of Jurisdiction	60
Appendix I. Establishment of the Advisory Committee on Forest Counties Payments	61
Appendix J. Definitions	64
Appendix K. Bibliography	65

The *Recommendations for Making Payment to States and Counties Report to Congress* was written and edited by members and staff of the Forest Counties Payments Committee.

Executive Summary

Introduction

The Federal Government has recognized its responsibility to compensate State and local government for lands it sets aside to benefit all Americans. It does this through a variety of payment statutes and grants, many of which may have specific requirements for their use. Communities adjacent to Federal lands have come to depend on these payments to provide education and transportation services to their citizens. Public lands have played an important role in the economies of many communities, as well as providing amenity values that contribute to the quality of life of many residents and visitors.

The public lands, in turn, have benefited from adjacent communities. Local citizens have been an important source of assistance for firefighting. Volunteer firefighters are often the first to arrive at the scene of wildfires, and extinguish many fires quickly. Search and rescue organizations provide life-saving services for visitors to national forests and the Revested Oregon and California Grant Lands (O&C lands). Local residents have historically provided much of the labor for forest management operations and lumber manufacturing. Local communities have been important partners with Federal agencies constructing recreation facilities, performing important watershed restoration actions, and implementing wildlife and fish habitat projects. Thus, an interdependent relationship exists between public lands and adjacent communities.

Concerns about fair and equitable compensation, healthy rural economies and good schools, and costs and benefits to communities adjacent to public lands have been the focus of several studies over the past 50 years. Directed by Congress, this study presented by the Forest Counties Payments Committee provides a long-term recommendation for making payments to States and counties. It presents information provided to the Committee by elected officials and the public from 10 listening sessions held around the country. This study also discusses the importance of Federal payments to local government finances and to education. The findings and recommendations support the continuation of collaborative efforts underway as a part of the Secure Rural Schools and Community Self Determination Act, P.L.106-393—the most effective means to find common ground on forest management issues are local efforts.

Highlights

Recommended Payment Method

Reauthorize P.L. 106-393 With Amendments: After considering eight alternatives, the Committee believes that many of the provisions of the interim legislation, P.L. 106-393, provide adequate payments. Congress has already debated and agreed on many aspects of the current legislation, which will expire in 2006. However, to improve the legislation, other provisions need to be added. Specifics of the recommendation are presented in Chapter IV.

Findings

Several important findings emerged during the course of gathering information and taking input from the public. They are discussed further in Chapter V, as well as within the important observations in Chapter VII. Some of the more significant findings follow:

- Rural schools are still highly dependent on Federal revenue sharing payments.
- About 39 percent of the revenue-sharing payments from the Twenty-five Percent Fund and P.L. 106-393 is spent on schools.
- Federal payments under the Secure Rural Schools and Community Self Determination Act and the Twenty-five Percent Payments Act are not reaching some local schools as intended.
 - When all methods of allocating the school portion of payments by States and counties are considered, it is determined that 63 percent of the money from P.L. 106-393 and the Twenty-five Percent Fund has no direct effect on the budgets of school districts in the counties where these public lands are located.
- Schools that did receive additional funds restored or kept education programs that would have been lost without those payments.
- Loss of historical revenue sources has caused some counties to raise taxes, at a time when higher-paying jobs have been lost in some communities.
- The areas of greatest expense to counties from the presence of Federal lands are search and rescue, law enforcement, road maintenance, and fire control.

- In the first year of implementation:
 - Seventy-six percent of eligible counties elected to receive payments totaling \$448 million (including Title II designations).
 - \$32.6 million was designated for Title II projects on Federal lands.
 - \$20 million set aside for Title II projects on national forests generated an additional \$10.6 million in other funds.
 - A total of 650 projects were developed on national forest and O&C lands with Title II funds.
 - The majority of projects accomplished were watershed and wetlands restoration, noxious weed eradication, recreation trails, road maintenance, and fish habitat improvement.
 - Seventy-two percent of all projects on national forests used contracts to accomplish work, creating a positive impact on local economies.
- Counties designated a total of \$43 million, or 57 percent of their elections, to Title III projects.
 - Categories receiving the greatest number of projects were search and rescue, forest related educational opportunities, and county fire prevention and planning.
 - The total payment available under P.L. 106-393 influenced whether a county elects only Title III projects, or a combination of Title II and Title III.
- Payments made under the 1908 Twenty-five Percent Act were not intended as compensation for loss of property taxes due to Federal ownership, but as grants to mitigate the effects on local communities from lands being retained in Federal ownership.

Recommendations

This report contains specific recommendations for the payment method, as well as recommendations related to issues identified in the direction from Congress to the Committee. Some of the recommendations are included here. A complete list can be found in Chapter V.

- Retain payment levels established under the Secure Rural Schools Act (P.L. 106-393).
- Provide statutory language prohibiting States from offsetting State education dollars with Federal forest payments.
- Future payments made to States and counties should not be subject to annual appropriations, and should be fixed at levels established under P.L. 106-393 for the first 10 years.
- Allow more flexibility for local governments to spend the non-school portion of Federal payments.
- Title III should be continued under long-term legislation, and categories expanded to allow for expenditure of funds for non-reimbursed services provided to public lands by local governments.
- Long-term payment legislation should contain provisions for resource advisory committees.
- The Forest Service and the Bureau of Land Management should initiate regulations to clarify administrative questions to provide consistency for Titles II and III.
- Congress and the administration should consider designating additional funds from other sources for use by resource advisory committees, especially in those national forests and counties where available dollars for Title II projects are limited.

Acknowledgements

The Forest Counties Payments Committee would like to express its appreciation to the United States Department of Interior (USDI) Bureau of Land Management, and the United States Department of Agriculture (USDA) Forest Service. Both agencies provided funding to the Committee, logistical support for public listening sessions, and information pertaining to implementation of P.L. 106-393. The International Programs and Freedom of Information Staff of the Forest Service assisted the Committee with administrative support, office space, and processing of Federal Register Notices to inform the public of meetings. Computer support was provided by Pat Micielli of the Forest Service, and the Committee's Web site was developed and supported by Bill Disbrow, also with the Forest Service.

Historical information and important literature was made available from the files of the Congressional Research Service, the Pinchot Institute for Conservation, and the Association of Oregon Counties. Judy Keen, from The National Agricultural Library, assisted the Committee in locating publications important to its research. Court decisions pertaining to Federal payments were made available by the USDA Office of General Council, and reviewed by Kevin Davis, Attorney to the Association of O&C Counties, and Special Counsel to the Association of Oregon Counties.

The Government Printing Office provided invaluable assistance in developing the Committee's Interim Report to Congress. John Tobiason, of the GPO, assisted with

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The Committee would like to express its gratitude to congressional staff, especially those from the committees of jurisdiction. Majority and Minority staff from the Senate Energy and Natural Resources Committee assisted with briefings and review of documents developed by the Committee. Staff members from the House Resources and Agriculture Committees were especially helpful in contacting congressional members who had an interest in the work of the Committee and scheduling briefings with their representatives. The Committee would like to express special appreciation to Senator Larry Craig, Senator Tom Daschle, and Senator Ron Wyden, and their staff, for the time they took to meet with Committee members and the executive director to provide feedback and guidance. Members of Congress, through their representatives, attended public listening sessions, assisted with logistics, and provided input to the public record.

Elected officials and the public provided significant amounts of information to the Committee. The members of the Forest Counties Payments Committee would like to thank those who took the time to respond to information requests, and provided testimony at listening sessions. Every effort was made to provide opportunities for input, and the Committee attempted to address issues presented to it.

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Chapter I: Report of the Forest Counties Payments Committee

The Federal Government is the largest single landowner in the United States. It currently owns 657 million acres, about one-third of the Nation's entire land area. Federal lands comprise about 48 percent of the land area in 11 western States, and almost 67 percent of Alaska is federally owned. The Federal Government owns about 5 percent of the land area in the remaining 38 States. The presence of federally owned land can have profound effects on the fiscal and economic base of a community, as well as on its social fabric. These effects can be both positive and negative. As the Federal estate was reduced from a total of 1.8 billion acres to its current size, numerous laws were passed to offset the impacts from these lands on States and local communities, and to compensate local governments for the loss in tax revenue. There are 21 separate statutes that provide some form of payment to State and local governments from public lands and federally owned natural resources.

Introduction

In 2000, Congress passed the Secure Rural Schools and Community Self Determination Act, Public Law 106-393. It is considered to be one of the most significant natural resource laws passed in the last 20 years. The act restored historical payment levels made to States and counties from the Federal Government for road and school purposes. Under certain conditions, it provides for the creation of citizen advisory committees, public lands projects, and county projects that meet specific criteria. During the 1990s, Federal payments to States, local governments, and schools, which are mandated through several laws, were being severely affected by reductions in receipts collected from the sale of timber on the national forests and certain BLM lands. These receipts, as well as the economies supported by the harvest of timber, were critical to rural education, transportation, and local economies. Payments to many counties and schools from receipt collections under the Twenty-five Percent Fund Act of 1908 (16 USC. 500), declined by an average of 70 percent from 1986 through 1998 (Appendix C). The Secure Rural Schools and Community Self Determination Act provides for a 6-year period to test new concepts for allocating funds, and for participation by citizens who have a vested interest in management of the public lands. However, the act is not permanent, and expires in 2006 unless Congress passes new payment legislation.

In order to advise it on a long-term solution for making payments to States and local governments, Congress created, under separate legislation, the Forest Counties Payments Committee. In accordance with Public Law 106-291, the Committee is to recommend solutions to Congress for making "adequate" payments to States and counties where national forests and Oregon and California Grant Lands exist. The Committee is comprised of seven members, two who are appointed by the President pro tempore of the Senate, and two appointed by the Speaker of the House of Representatives. The remaining three members are from the Executive Branch, and represent the White House Office of Management and Budget, USDI

Bureau of Land Management, and the USDA Forest Service. Names of Committee members and their affiliation are provided at the front of the report.

This report provides a long-term recommendation to Congress for making future payments to States and counties. It also provides information and recommendations to Congress and the administration about certain Federal payment programs, the source of those payments, and the effect that national forests and O&C lands have on local communities. In developing its recommendations, the Committee considered the following areas specified in the legislative direction:

- a. Evaluation of methods by which payments are made to eligible States and counties.
- b. Consideration of the impact on States and counties of revenues from historical multiple-use of Federal lands.
- c. Evaluation of the economic, environmental, and social benefits that accrue to counties containing Federal lands.
- d. Evaluation of the expenditures by counties on activities on Federal lands, which are Federal responsibilities.
- e. Monitoring and reporting of payments made to eligible States and counties.

During the process of gathering information, the Committee received comments about the loss of potential taxes from Federal lands. The Federal Government does not pay taxes on property it owns, which was established under the Doctrine of Tax Immunity by the Supreme Court in *McCulloch vs. Maryland* in 1819. A number of comments were received about the adequacy of payments to counties from the Payments in Lieu of Taxes Law (PILT). This report does not make recommendations about PILT, but does provide information about the effects of P.L. 106-393 on PILT payments, and compares the combined payments of those two statutes on the tax value of Federal lands for a sample of counties.

The Committee found strong evidence that payments made under the 1908 Twenty-five Percent Payments Act should not be considered as in-lieu tax payments. There is good reason to believe Congress intended that payments made under the Twenty-five Percent Fund be considered as grants, or compensation, to inhabitants of local areas for impacts associated with the presence of Federal lands. In other words, for economic and private development opportunities forgone. The Committee reviewed rulings by State appeal and superior courts, and Federal District and Appeal courts, regarding the intent of Congress when it passed the 1908 Twenty-five Percent Act. The courts consistently ruled that Congress did not intend that payments made to States and counties under the 1908 Act be regarded as “in-lieu” tax payments.

Previous Studies

The Committee reviewed and evaluated numerous studies about the adequacy of Federal payments to local governments, costs and benefits of public lands to communities, and the impacts of Federal lands on local communities. Both Congress and the Executive Branch have investigated these issues in studies that date back to 1943. Several of these studies evaluated similar issues, but reached very different conclusions. Virtually all of the studies recognized that the presence of Federal lands can have an impact on local communities, but they disagreed on the nature of the effects and the solutions. Also, in at least one comprehensive study on the equity of Federal payments to local governments, significant benefits were attributed to local economies from the level of commodity production that was occurring, and would likely occur well into the future. Significant benefits from improvements constructed and maintained by the Federal Government, primarily transportation systems, were considered to be benefits derived by local communities. These benefits, if they did exist, were not sustained over time. Commodity programs that benefited manufacturing industries were reduced significantly from approximately 12 billion board feet annually in 1980, when the Advisory Commission on Intergovernmental Relations (ACIR) study was completed, to current day levels of 1.7 billion board feet. Benefits from transportation systems mentioned in a previous study have experienced a similar decline, where about 1,000 miles of roads are closed to passenger cars each year on the national forests because of unsafe conditions, and more than 1,000 bridges are substandard and in need of replacement. This illustrates the difficulty in quantifying, with any confidence, the costs and benefits that State and local governments receive from the presence of public lands;

unforeseen circumstances make it a moving target. However, the Committee attempted to evaluate the issue, but used a different approach than previous studies.

The Case for a New Approach

For many years, local governments and schools adjacent to national forests received very predictable levels of funding that were important for maintaining quality education and transportation systems in their communities. The Committee listened to many accounts from elected officials and the public about the difficulties they faced in the past 10 years in providing educational services and opportunities to the children in their communities. In several cases, county and school officials explained that the fiscal impacts are the result of a set of connected actions. The loss of traditional manufacturing industries removed an important component of own-source revenues that local governments depend on for funding basic services such as law enforcement, medical, social services, and transportation systems. At the same time, payments to States and local governments from receipts collected on the national forest and O&C lands were declining significantly. The combination of reduced own-source revenues, along with reduced Federal payments, created significant financial hardships for many local governments. The Committee was interested in how communities attempted to mitigate these financial impacts.

From information submitted to the Committee, it is apparent that communities pursued several strategies to compensate for fiscal losses. In a general sense, they either raised taxes, or reduced services. Several county officials indicated they raised property taxes to the maximum allowable under State law. According to information submitted by the Bolle School for People and the Environment, this compounds the financial burden to taxpayers. People who lost wages from the closure of wood manufacturing facilities were now paying higher property taxes to maintain basic services.

The laws in some States do not permit increases in property taxes without voter approval. In those situations, or where tax rates are at their upper limit, the only solution is to reduce services. The Committee heard numerous accounts from local officials and people living in forest communities about the unsafe condition of roads where school buses had to travel daily to transport children to school. An official from Mono County, CA, told the Committee the only hospital facility in the county had to be closed, due to the loss of historical revenues.

The examples presented to the Committee about the condition of education in some rural communities are of particular concern. There is no question that Federal payments from public lands receipts were critical for funding education programs and facilities in rural areas. Various formulas used by States to allocate State funds to their school districts may have increased the importance of the Federal payments. If State funds were allocated on a per-student basis, then schools that lost enrollment due to out-migration of families who lost jobs from mill closures would realize reductions in State funding. It is clear the Secure Rural Schools and Community Self Determination Act provided funding at a critical time when reduction of education programs and school closures were being contemplated in most forest communities. However, the potential benefits to education in some rural communities

have been reduced substantially where States have reduced State education funds by supplanting them with the Federal dollars. Lawsuits in the States of Washington and Oregon have challenged the way those States have allocated Federal payments they received.

The following chapters in this report provide a discussion of the historical relationship between the public lands and communities, and an evaluation of payment options considered and recommended by the Committee. There are also a number of findings and related recommendations. In some cases, the committee was presented with information that it believed should be provided to Congress, but without a specific recommendation. This information is presented in a separate chapter.

Chapter II: Communities and Federal Forest Lands, the Historical Context

Much has been written about the history and purposes of the national forests and the O&C lands. As a result, there are differing interpretations about what Congress intended when it passed laws creating the forest reserves and later designating them as national forests, and when legislation was written to direct the management of the O&C lands. The Committee reviewed publications, judicial interpretations, legislative history, and interviewed knowledgeable individuals to better understand the intended purposes of these lands. This report will not attempt to describe all of the history behind the creation of national forests and the O&C lands. Other publications better serve that purpose. Instead, this chapter will briefly describe some of the key aspects and purposes of these lands as the committee came to understand them.

Of particular interest to the Committee, for the purpose of this report, is the relationship between local communities and the Federal lands. A review of many documents and publications revealed an interdependent relationship between many communities and the adjacent public lands. This relationship was recognized by Congress during debates on the creation of forest reserves, national forests, and the O&C lands. Subsequent laws contained language that attempted to protect communities, or ensured their sustainability, along with the sustainability of the forests. Therefore, it is important to understand the history of these relationships that were established through statute, regulation, and practice.

Communities and Forest Reserves

National concern over western public lands began to surface in the 1860s, following passage of the Trans-Continental Railroad Act and the Homestead Act. These acts combined to encourage the construction of a railroad to the west coast and to offer free homesteads to citizens who would build homes and settle on the land. These actions greatly accelerated the transfer of public land into private ownership. During the 19th Century, one-half of the Nation would be transferred into private ownership in 160- and 640-acre parcels through land sales, homesteading, and grants to railroads and to States. Railroad grants were in 40- to 80-mile-wide strips along the rights of way. As a result, the railroads controlled vast tracks of land. For example, the Northern Pacific Railroad controlled 22 percent of the State of Montana. In all, about 1.1 billion acres were transferred from the public domain into private ownership. It wasn't until 1976, with the passage of the Federal Land Policy Management Act (FLPMA), that Congress formally declared it was national policy to generally retain the remaining 700 million acres of Government lands in Federal ownership (Gorte and Baldwin, 1999).

From 1860 to 1920, the U.S. population grew by 70 million people, and intense pressure was placed on the public domain from settlers moving west in greater numbers. Settlers rode the trains west, settled near the railroads in order to ship their grain products east, and found themselves locked in an interdependent relationship. Not surprisingly, charges of monopoly and speculation spawned nationwide public land debates in and out of Congress during this time period. Also, abuse of the

natural resources, along with large wildfires, captured the attention of newly formed conservation organizations and Congress, and numerous reports were prepared raising these concerns. Every President from Grant forward sent messages to Congress about the question of a forest policy. By 1898, more than 200 bills on forestry had been introduced in Congress and were primarily focused on five areas. They were to:

1. Preserve forests for the protection of navigable rivers.
2. Protect forests from destruction by fire.
3. Protect forests by blocking public access allowed under various land laws.
4. Protect forests by regulating the sale of timber from public lands.
5. Protect forests in order to protect water supplies needed for irrigation of arid western lands.

In 1891, a bill to repeal the Timber Culture Act, and amend various Homestead Acts, was amended in Conference Committee to give the President sweeping executive powers to set aside public forest lands into Federal reserves. The amendment language was as follows:

"The President of the United States may from time to time set apart and reserve, in any State or territory having public land bearing forests, in any part of the public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. (26 Stat. 1095)."

The bill was signed into law on March 3, 1891, and the amendment would become known as the Forest Reserve, or Creative Act of 1891. Days later, on March 30, 1891, President Harrison, using his newly granted executive powers, signed a proclamation setting aside the Yellowstone Park Timber Land Reserve, later to become the Shoshone National Forest, as the first Federal forest reserve.

Prior to 1891, lands had been withdrawn from the public domain, but for specific purposes, such as the creation of Yellowstone Park in 1872, and Federal Live Oak Plantation reserves for military shipbuilding.

Defining the Purposes of the Reserves

It was soon apparent that Congress had not defined the purposes of the new forest reserves in the 1891 law, and immediately set about to clarify the reasons for their existence. Legislation introduced in 1892, by Congressman McRae of Arkansas, was the first effort to define the purposes of the forest reserves. Much of the language in McRae's Bill would be included 5 years later when Congress passed the Organic Act. In the final analysis, this process would take 6 years. In the meantime, lands placed in the reserves were withdrawn from entry under the land laws and no management was authorized. During the next 6-year period, over 40 million acres were placed in the forest reserves by presidential proclamation.

"While the presidents were reserving lands under the Forest Reserve Act of 1891, comprehensive legislation on the national forest languished in Congress from 1894 through 1896. During this period, as a result of the vague terms of the 1891 proclamation, the reserves were functioning as quasi-parks and were not being managed."

However, after 1894, U.S. Marshals used the authority under various trespass acts to slow fire and sheep trespass. On February 22, 1897, President Grover Cleveland, with less than a month remaining in his term, signed proclamations to set aside 21 million acres as forest reserves, as had been recommended by the Forest Reserve Commission appointed by the National Academy of Sciences in 1896. Through these proclamations, the Forest Reserves doubled in size with a single stroke of the President's pen, and without prior consultation with the affected States or their representatives in Congress. Across the West, rural county commissioners, school superintendents, and school boards expressed grave concerns about the withdrawal of these large blocks of public land from settlement and economic development. Some communities were highly dependent

on these lands as sources of wood for homes and forage for livestock (Rupp, 1981). Uncertainty about how these lands would be managed, and what appeared to be a reversal in policy of transferring public domain lands into private ownership created great concerns. All of this generated a public outcry regarding the inability of rural forest counties to provide public school and public road services with a compromised private land base and an inability to expand the local economy and tax base. By the time the Black Hills Reserve was established in 1897, opposition was so great that 30,000 people gathered in Rapid City, SD, in a demonstration condemning the Reserve as disastrous to the economy of the Black Hills (Rupp 1982).

While support for management of the forest reserves was strong, significant opposition to defining the purposes and management of the reserves still existed, especially in the Senate, where western representation on key congressional committees was strong. An amendment offered by Senator Richard Pettigrew of South Dakota helped resolve the fears of communities throughout the West about the management of those lands. A final bill emerged from Congress in 1897, and was signed by President McKinley on June 4, 1897. The law contained the following three purposes for how national forests would be managed:

1. Improve and protect the forest within the reservation; or
2. Securing favorable conditions of water flows; and
3. Furnish a continuous supply of timber for the use and necessities of citizens of the United States.

Members of Congress recognized that significant differences existed between the reserves, to the extent that adequate administrative procedures could not be prescribed through statute. Therefore, sufficient latitude needed to be afforded to the Executive Branch to interpret the purposes of the act, and develop appropriate regulations and policies. This proved to be significant in allowing the Forest Service in 1905, under the leadership of Gifford Pinchot, to put into place the management philosophies and practices that would guide the agency for the better part of the 20th Century. In his book published in 1907 entitled "The Use of The National Forests," Pinchot summarized the actions of the 1890s as follows:

"In 1891 Congress authorized the President to establish forest reserves (now called National Forests), and President Harrison created the first one—the Yellowstone—that same year. Congress took this action because the forests of the great mountain ranges in the West were being destroyed very rapidly by fire and reckless cutting. It was realized that unless something was

done to protect them, the timber resources of the country and the many industries dependent upon the forest would be badly crippled. So the law aimed to save the timber for the use of the people, and to hold the mountain forests as great sponges to give out steady flows of water for use in the fertile valleys below. At the start there was much opposition to the forests. Often this opposition was just; for although Congress had set apart the lands and their resources it had made no provision for their use or their protection. The timber was simply locked up and left to burn. This mistake was remedied in 1897, when a law was passed which made it possible to use all of the resources and give them suitable protection."

From 1900 through 1908, these purposes were further refined and clarified, and the relationship between forest counties and communities was debated and addressed. In 1905, the assistant commissioner of the General Land Office testified before Congress and indicated that the public use of the forest reserves was necessary in order to avoid the hostilities of local communities.

"The general policy of the Forestry Bureau and of our office, so far as these reserves are concerned, is to utilize them to the largest degree possible consistent with good administration. It is necessary to the successful policy and administration of the forestry work to allow the largest use possible of the reserves consistent with proper protection."

During this same era, the difference between national forests (the name was changed from forest reserves in 1907) and national parks was being clarified. In 1913, the Chief Forester in his annual report stated:

"The national forests are set aside specifically for the protection of water resources and the protection of timber... The aim of the administration is essentially different from that of a National Park in which economic use of material resources come second to reservation of the natural conditions on aesthetic grounds."

This understanding by local communities that the national forests would be used for utilitarian purposes, and not set aside for parks, would last until the 1960s, and was the basis for the development and expansion of communities in and adjacent to national forests, especially after 1950, when Federal timber harvests increased substantially (Appendix 4 displays historical harvest volumes). This sustained-yield management approach is clearly set forth by Gifford Pinchot in his 1907 book, wherein he states:

"National forests are for use by all of the people. Their resources are now used in such a common-sense way that instead of being used up they keep coming. They are for present use, for use a few years ahead, and for use a long time ahead."

Even though the purposes of the forest reserves had been clarified in 1897, it was almost a decade later, in 1906 that Congress began to recognize the perceived inequities to rural areas created by the reservation of our national forests. In 1906, the Committee on Public Lands noted:

"In many instances a large proportion of the lands in organized counties are included in forest reserves, and thereby permanently reserved from settlement and entry under the provisions of the General Land Laws. This condition of affairs works great hardship. If it were not for this permanent reservation the lands would gradually pass into the hands of private individuals, lumbering and grazing industries would be built up and the lands would return considerable revenues to the States and counties in taxes. Under present conditions, however, these vast areas produce practically no revenues to support the local government."

To partially offset these perceived inequities, Congress acted in 1906 to set aside 10 percent of all money received from each national forest during any fiscal year, which was to be paid at the end of each year to the State or territory treasury, and to be expended as the State or territory prescribed for the benefit of the public schools and public roads of the county or counties in which the forest reserve was situated.

On May 23, 1908, Congress, after a lengthy debate, approved an amendment to an appropriations bill and increased the payments from national forest lands from 10 percent to 25 percent of revenues received from all activities. An examination of comments and debates during the period from 1890 to 1908 indicates Congress recognized that strong rural communities were essential for the Nation to prosper, and further recognized that viable communities adjacent to the forest reserves, with adequate roads and schools, were essential to the development and preservation of these national treasures. Thus, by 1908, the economic "compact" between rural forest counties and schools and the Federal Government with respect to mitigating the effects of reserving national forests was complete. This 1908 mitigation mechanism functioned effectively for over 75 years (revenues were low between 1908 and 1950), until a change occurred in the values of many Americans about the purposes of the national forests.

The historical philosophy that forests should be managed for their sustained yield of timber began to be replaced by one that emphasized other resources.

The intent of Congress to hold local communities harmless for public land withdrawals was reiterated in subsequent legislation in 1911 (The Weeks Act), in 1914, and in 1958, when the Federal Government imposed the requirement that States would have to grant consent for Federal land acquisitions for purposes of expanding the National Forest System. It was clear, that without guaranteed payments, required approval by States for land purchases, and a Federal commitment to manage forests for their practical use, support in the West for the National Forest System would have vanished. Thus, the “compact with the people” of rural counties to actively manage these lands in a multiple-use manner in perpetuity, and to share the revenues derived from the land, is part of the very foundation of the National Forest System. Both State and Federal courts have ruled that payments made under the “Twenty-five Percent fund Act” of 1908 (16 USC. 500), Payments Act, were not to be considered as payments in lieu of taxes, but as “grants,” or payments as compensation for impacts associated with the removal of land from potential development.

The Forest Service, created in 1905 to manage the national forests, developed an exceptionally effective fire suppression program, provided a steady supply of timber and fiber for housing and expanding the Nation, issued grazing permits to ranchers, developed a variety of recreational opportunities for the citizens of America, and discovered ways to manage and preserve wildlife populations.

While there is no statutory requirement for the Federal Government to ensure community stability associated with national forests, it was the cornerstone of Forest Service practice in the development of the sustained yield concept. In 1914, Regulation S-2 was developed to codify the policy of restricting annual harvest to annual growth on each national forest. That policy was expanded in the 1920s to include provisions to ensure supplies of forest products to local communities (Parry, Vaux, and Dennis, 1987). The most significant recognition by Congress of the relationship between local communities and the national forests was in 1944, with the passage of the Sustained-Yield Forest Management Act (58 Stat. 132). One of the major purposes of the legislation was to promote the stability of forest-dependent communities. In 1963, the Forest Service adopted a timber policy based on even flow of timber. The policy stated:

“so far as feasible, an even flow of national forest timber in order to facilitate the stabilization of communities and of opportunities for employment” (CFR 221.3(a)(3).

These actions all served to create a dependency on the resources of the national forests, as well as expectations for future economic stability.

During the 1960s through the 1980s, Congress considered and enacted a series of environmental and forest management laws designed to direct the actions of Federal land management agencies and further define and restrict management approaches on the national forests. In 1960, Congress passed the Multiple-Use Sustained Yield Act. This new act was determined, through court cases, to be supplemental to, but not in “derogation of,” the purposes for which the national forests were established as set forth in the act of June 4, 1897 (Organic Act). In the 1970s, significant court challenges for both the timber and water sections of the 1897 act would be played out. Throughout the 1960s and 70s Congress would act on a wide array of environmental and forest management issues. In general, by enacting the National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and the Clean Water Act, Congress provided specific management mandates regarding the application of the multiple-use and sustained yield concepts in our national forests. Numerous court rulings in the 1980s and 1990s further narrowed the management options utilized by the Federal land management agencies. Also, during this era, significant portions of the national forests were designated, through law, as wilderness and wild and scenic rivers. In addition, special management requirements were created for certain wildlife species and roadless areas by administrative and judicial procedures. As a result, the land base available for sustained-yield timber management was reduced significantly.

It would be inaccurate to state that negative effects to local economies are entirely due to reductions in timber from public lands. Market forces certainly played a role, as it did in the early part of the 1980s, where serious effects to rural communities occurred when timber companies defaulted on sales, primarily due to market conditions, and thousands of jobs were lost. Globalization of markets also creates serious effects on rural economies, which are more dependent on manufacturing. However, the Committee believes there is a strong nexus between the downturn in the national forest timber program, reduced receipt collections, and the economic health of many rural communities in the West.

Revested Oregon and California Grant

The history of the O&C lands can be traced back to the period when settlement of the public domain was at a highpoint. As mentioned earlier, the railroads played an important role in settling the West. One of the regions of the country where attempts were made to increase settlement was in western Oregon. Between 1866 and 1870, Congress granted nearly 4 million acres of land in Oregon to the Oregon and California Railroad Company. In exchange for the land, the company was required to build a railroad through western Oregon, and the lands were to be conveyed to settlers in 160-acre tracts for \$2.50 per acre.

The railroad was built, but the Oregon and California Railroad, and later the Southern Pacific Railroad, did not honor its obligation to sell O&C lands to settlers. As a result, Congress directed the attorney general to enforce the terms of the grant against the railroad. However, the U.S. Supreme Court refused to require forfeiture of the lands still owned by the company, but ordered that any additional sales by the railroad be in accordance with the law. The court also suggested that Congress develop a remedy to the situation. Congress passed the Chamberlain-Ferris Act, on June 9, 1916. The act provided that all grant lands still held by the company be revested in the United States and provided for compensation to the railroad for the O&C lands turned back to the United States.

Congress recognized that removing the lands from private ownership would create an impact on the tax base, and on the future development potential of those lands. Also, many local residents felt strongly that schools and transportation systems would suffer because significant public ownership of lands would reduce the tax base. The Chamberlain-Ferris Act therefore established the "Oregon and California Land Grant Fund" within the U.S. Treasury, and provided a method for distribution of income from the lands. Funds were to be distributed in the amount of 25 percent to the O&C counties, 25 percent to the State of Oregon and the remainder to the United States.

Payments to the O&C counties and the State of Oregon never materialized, because very little revenue was collected between 1916 and 1926. To assist the O&C counties, Congress passed the Stanfield Act in 1926. The act provided for payments from the general fund of the U.S. Treasury to the O&C counties. The payments were in lieu of taxes which the O&C counties could have collected, had the O&C lands been privately owned. The Stanfield Act

established in lieu payments to O&C counties from a Land Grant Fund that was to be offset by collections made from revenues generated from the O&C lands. Because the O&C counties' share of revenues was insufficient to reimburse the United States for in lieu payments, the act was repealed.

In 1937, Congress passed the Oregon and California Act. The new legislation provided a new system for distributing revenues from the O&C lands, and repealed prior, inconsistent legislation. The act provided that the O&C counties were entitled to a total of 75 percent of all revenues from the O&C lands. The remaining 25 percent was to be available for the costs of administering the sustained-yield program under which the lands were to be managed by the USDI. However, payments to O&C counties would be reduced until the Federal Government was reimbursed for payments it made to landowners who had purchased grant lands from the railroad and subsequently had their lands revested to the Government in 1916. From 1938 to 1951, revenues from the O&C lands were \$30,169,274. Accordingly, 75 percent of those revenues would have totaled \$22,626,956. Reimbursement to the Federal Government, for reasons already stated, plus payments made for in lieu of taxes, resulted in payments to counties in the amount of \$15,126,259.

By 1952, the Federal Government had been reimbursed for all of its investment costs in the O&C lands, and O&C counties began to receive their full 75 percent share that year. At the same time, the counties were presented with a proposal to reduce the amounts paid to them, and provide a portion of their receipts to be spent on the administration of the O&C lands by the BLM and Forest Service. By 1960, the counties were reinvesting one-third of their receipts in recreational facilities, reforestation, forest protection, and general maintenance and operating expenses. The counties have actually received 75 percent of sale proceeds in only one year out of the 65 years since the O&C Act was adopted. By "plowing back" a portion of the revenue to which they were otherwise entitled, the O&C counties raised the productivity of the lands. The present value of the O&C counties' investment in the O&C lands exceeds \$2 billion.

The legislative mandate for the O&C lands provides clear direction for sustainable management of timber resources and community stability. In 1937, when the legislation was passed, there was a genuine concern for jobs and economic stability - the country was at the height of the Great

Depression, and the current science of forestry was towards sustained-yield management. These two factors, along with recognition that the public lands would create a burden on local communities, greatly influenced the language of the act. The actual language of the act best describes the intent of the legislation for lands classified as timberlands.

“They shall be managed for permanent forest production, and the timber thereon shall be sold, cut and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.”

Additional requirements were specified in the 1937 legislation. The following is specifically stated:

1. Timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained-yield capacity shall be sold annually;
2. The lands shall be administered “to provide, insofar as practicable, a permanent source of raw materials for the support of dependent communities and local industries of the region”; and
3. “Due consideration shall be given to establishing lumbering operations in [administering] such lands when necessary to protect the economic stability of dependent communities.”

A significant difference exists between the legislative direction for the national forests and the O&C lands. Where the national forests exist under a mandate that requires consideration of multiple resources, the O&C lands are dedicated to perpetual timber production for the benefit of local communities. At least four Federal appeals court decisions have reviewed the 1937 O&C Legislation and affirmed this mandate. “Much of western Oregon developed on the understanding that these lands would provide for the citizenry in perpetuity.” “In 1937, the Congress of the United States promised the people of western Oregon that they could safely invest their lives and fortunes in communities made stable by sustained-yield forestry on the O&C lands.” “The people of Oregon took Congress at its word, and built communities around the promised even flow of timber.” County budgets are highly dependent on revenues from Federal timber receipts, or the “safety net” substitutes paid to counties in recent years. Combined with revenues from Forest Service lands, O&C Act revenues support more than 20 percent of the total budgets of nine O&C counties.

In the private sector, direct employment in lumber and wood products industries accounts for tens of thousands of jobs in the O&C counties. Direct employment in these basic industries results in additional indirect and induced employment. The generally accepted ratio is 1.4 indirect and induced jobs for every direct job in lumber and wood products. This does not include Government employment for several thousands made possible by shared timber receipts.

Addressing the Impact to Communities

Several events during the 1980s and 1990s brought about significant changes to local economies and Federal payments for schools and roads. A downturn in the lumber market in the early 1980s resulted in a loss of jobs to communities and reduced payments from receipts. However, by 1985, the market was recovering and receipt collections and payments to States and counties had improved. Public concern about the condition of the environment and the health of public forests continued to grow during this period. National and local organizations actively challenged forest management activities using Forest Service and BLM administrative procedures. Both agencies experienced an increase in litigation, which resulted in several landmark court decisions that served to reduce forest management activities and outputs. The resulting restrictions on management actions created a steep decline in timber harvesting during this period.

Resource dependent businesses and industries in forest counties during this time suffered severe losses, resulting in unprecedented closures of small businesses and sawmills. Many rural communities in western States experienced the closure and removal of most or all of their wood-products-based manufacturing facilities and the exodus of their skilled workforces. While not as widespread as in the West, some counties in the eastern United States also experienced reductions in timber manufacturing industries.

Unemployment, mortgage defaults, and related social problems such as divorce, alcoholism, and domestic violence increased in communities impacted by the collapse of the natural resource-based economy. Payments to many counties and schools from receipt collections under the 1908 Act declined by an average of 70 percent during the years from 1986 through 1998.

Congress began to address the problem in 1993, when a safety-net was put into place for selected California, Oregon, and Washington counties in the Northern Spotted Owl Recovery Area under the Northwest Forest Plan. Counties included in the Northwest Forest Plan were protected from their actual decline in 25 percent receipts and limited to a 3 percent decline each year for 10 years.

Unfortunately, this act only protected 70 of the 780 forest counties nationwide from a decline in national forest and O&C receipts (Appendix 3). County commissioners, school superintendents, school board members, and local business persons in the unprotected counties were increasingly more alarmed as their 25 percent receipts and their overall economies declined, in many cases as much as 95 percent. With no Federal relief in sight, by 1998 these interest groups came together and formed an umbrella coalition of national, State, regional, and local organizations known as the National Forest Counties and Schools Coalition. They developed a set of commonly-held principles focused on restoration of sustained multiple-use management of Federal forest lands, to ensure healthy forests and healthy communities. This coalition joined with members of Congress to support enactment in 2000 of P.L. 106-393, the Secure Rural Schools and Communities Stabilization Act. This landmark piece of legislation co-authored by Congressman Allen Boyd (D) Florida, and Congressman Nathan Deal (R) Georgia in the House of Representatives, and Senator Larry Craig (R) Idaho, and Senator Ron Wyden (D) Oregon, was passed by unanimous consent in both the House and Senate before being signed by President William Clinton. This bill provided a 6-year temporary safety-net payment to forest counties and schools at 85 percent of the average of their three highest receipt years under the Twenty-five Percent Fund Act from 1986-1999. It simultaneously provided an additional 15 percent to support either projects on Federal lands (Title II) or on specified county-based projects (Title III). The bill also authorized establishment of diverse 15-person resource advisory committees to recommend projects on national forests and O&C lands using county-allocated Title II funds. Under the law, resource advisory committees (RACs) of balanced local stakeholder groups were encouraged to combine Title II funds with other funds to complete projects of increased scale and positive effect. The resource advisory committee structure included in P.L. 106-393 was the first attempt to create community involvement in directing on-the-ground projects on the national forests on a system-wide basis.

When P.L. 106-393 was passed in the fall of 2000, the Nation had just concluded one of the worst fire seasons in history with 7.3 million acres burned, many homes destroyed, and lives lost. During the fall of 2000, Congress approved the National Fire Plan and appropriated funds to expand firefighting equipment and manpower to rehabilitate and restore fire-damaged ecosystems, reduce fuels, and to work with local residents to reduce fire risk and improve fire protection. In 2001, 17 western Governors and a diverse group of local leaders reached agreement on a 10-year fire plan implementation strategy to reduce the threat of severe fires and promote healthy forests. This strategy called for active forest management, through thinning and prescribed burning, to reduce the unnatural build-up of forest fuels.

However, just 2 years later in 2002, the Nation once again experienced another significant fire season, with many acres burned, more homes destroyed, and additional lives lost. The media was filled with stories of uncontrollable wildfires, loss of life and property. The fuse of public concern about the health and future of our national forests had been ignited. According to information cited by the White House, there are currently 190 million acres of public land and surrounding communities at increased risk from extreme fires. Solutions to these problems are being debated across the country, and there are no simple answers.

One approach that appears to have promise is for people in communities to work together to find solutions. Early indications are that resource advisory committees created under the Secure Rural Schools Act are working well.

Several other examples are worth mentioning. One of the early efforts, the Quincy Library Group in California, was developed because land management activities had almost come to a standstill. They received encouragement and support from the administration during the 1990s, and ultimately received congressional support with passage of the Herger-Feinstein Quincy Library Act. In 2002, a court in Montana ordered the parties in a lawsuit to find a solution over disagreements about logging trees killed by a wildfire in the Bitterroot Valley. They were able to do so. In South Dakota, groups reached agreement on management actions that would be acceptable to them, and their efforts were supported by elected officials. In July, 2002, Senator Tom Daschle (D), South Dakota, then Majority Leader of the Senate, attached an amendment to an appropriations bill which exempted segments of the Black Hills National

Forest in South Dakota from administrative appeal and litigation in order to expedite forest thinning, fuels reduction, and restoration activities. On August 22, 2002, President George W. Bush announced his Healthy Forests Initiative to prevent wildfires and promote stronger forest communities. More than 10,000 people, mostly rural citizens, attended the President's Conference in southern Oregon to show their support for this effort.

An important lesson learned from these efforts is that it is difficult to design a process that works well for everyone—Congress recognized this when it passed the Organic Act in 1897. It is also evident that local communities, and communities of interest, cannot do it alone. They need the support and assistance from State and Federal officials, as well as their elected officials.

It is ironic, that at the dawn of the 21st Century, over 100 years after the creation of the forest reserves, we find ourselves focused again on protecting our forests from devastating wildfires, and concerned about watersheds, wildlife, and the homes and lives of those living on our forest lands—the very same concerns echoed by the Nation 100 years ago. We are engaged in revisiting and re-clarifying

the purposes of our national forests and BLM lands, and defining the management actions that will most effectively lead us toward sustaining these lands for future generations of Americans. At the same time, we must again define how to effectively mitigate the rural economic inequities created when this Nation reserved millions of acres of forest lands and formed our National Forest System.

The history of our national forests reveals a close, mutually beneficial association with local counties and communities in the development and protection of our national forests. The approach of sustained-yield and multiple-use management, accompanied by a system of effective revenue sharing with rural counties and schools, removed opposition to establishing the national forests at the turn of the century and led to strong local support for over 75 years.

Today, our challenge is to take the actions necessary to restore and protect the health and vitality of our public forests and to restore economic and social stability to forest communities through an active program of sustainable forest management. Healthy forests and healthy communities have historically been, and continue to be, essential to the interdependent success and survival of each other.

Chapter III: Methods Use

The Forest Counties Payments Committee (FCPC), was directed by Congress to consider and evaluate several issues in developing its recommendations to Congress. The timeframe the Committee was given to develop recommendations (18 months), was a key factor in determining what the Committee was able to accomplish with regards to development and evaluation of information. For the most part, information used by the Committee in evaluating subjects identified in the legislation was obtained from previous research, and from information presented by the public in response to specific questions posed by the Committee.

The Committee relied on data from existing studies to the extent possible. Several studies on tax equivalency, cost and benefits of Federal lands to local communities, and the effects to communities from changes in multiple use management were reviewed. New information was developed to evaluate the dependency on Federal payments by schools and counties, and to compare the tax equivalency of Federal lands with the increase in payments from P.L. 106-393 and other Federal payment statutes. The cost and benefit to counties from the presence of Federal lands was evaluated from information gathered through a survey of 118 counties. Data gathering and evaluations were performed by the research unit for Economic Aspects of Forest Management on Public Lands, Rocky Mountain Research Station, Forest Service, and by Committee staff. Data related to implementation of P.L. 106-393 was supplied by the Forest Service and the BLM. Committee staff evaluated the information and provided an analysis included in this report.

The Committee held 10 listening sessions throughout the country to give the public and elected officials the opportunity to present information directly to Committee members, and for the Committee to better understand the issues presented. Listening sessions were held in certain locations to provide adequate geographical representation, and to honor requests by members of Congress. These sessions were published in the Federal Register and notices were placed in local newspapers. A court reporter was used to provide a complete record of oral presentations and discussions at the listening sessions, and is available in a supplement to this report. The location and dates of the sessions are shown on page 19.

Twelve questions were developed to guide the collection of information to be used for consideration by the committee. They are listed on page 19 in this chapter. The public and elected officials were asked to provide comments and information responsive to the questions, or other pertinent information.

Additional outreach and notification included letters to Governors of every State where national forests and O&C lands exist. Letters were also sent to many national, regional, and local groups who represent conservation, industry, environmental, local government, and education interests. Interviews were also conducted with school officials to determine the benefits to education from payments under P.L. 106-393. Business meetings were held in locations around the country and were open to the public. Committee members and staff provided briefings to members of Congress and their staff, and to individuals and groups who expressed an interest. A Web site was established that included information about the work of the Committee, copies of past studies, minutes from listening sessions, and a pathway for providing comments.

Information Collected

Significant amounts of information exist about issues evaluated by the Committee. Relevant data from the U.S. Census Bureau was used as well as information from existing studies, historical data from the Forest Service and BLM files, and from the research study commissioned by the Committee with the Forest Service. Existing laws and regulations pertinent to the responsibilities of this Committee were also reviewed.

The Committee relied heavily on information submitted by respondents who took the time to provide very detailed accounts about relevant issues in their communities and adjacent public lands. The public was afforded numerous opportunities to provide information and ideas. A total of 92 public and elected officials addressed the Committee in the listening sessions held around the country.

Information about expenditures made under the Secure Rural Schools and Community Self Determination Act (P.L. 106-393), in accordance with legislative direction is included in this report. The interim report submitted to

Congress in May 2002 did not include this information, because data for Titles II and III had not been supplied to the Committee.

The creation of resource advisory committees (RACs), under Title II of the act provides an opportunity to study the long-term feasibility of community collaboration in public lands management. A study plan was developed with the Forest Service, and the Watershed Center located in Hayfork, CA. However, this study plan has not been executed due to funding constraints, and because the Committee is uncertain whether Congress intended for it to pursue such a study.

Listening Session Locations and Dates

Pendleton, OR	Aug. 20, 2001
Portland, OR	Aug. 21, 2001
Boise, ID	Nov. 14, 2001
Albuquerque, NM	Nov. 29, 2001
Jackson, MS	Dec. 11, 2001
Tallahassee, FL	Dec. 12, 2001
Reno, NV	April 20, 2002
Rapid City, SD	May 17, 2002
Washington, DC	July 10, 2002
Rhineland, WI	Sept. 27, 2002

Forest Counties Payments Committee Public Hearing Questions

When developing comments, Committee members ask the public to consider the following questions:

1. Do counties receive their fair share of Federal revenue-sharing payments made to eligible States?
2. What difficulties exist in complying with and managing all of the Federal revenue-sharing payments programs? Are some more difficult than others?
3. What economic, social, and environmental costs do counties incur as a result of the presence of public lands within their boundaries?
4. What economic, social, and environmental benefits do counties realize as a result of public lands within their boundaries?
5. What are the economic and social effects from changes in revenues generated from public lands over the past 15 years, as a result of changes in management on public lands in your State or county?
6. What actions has your state or county taken to mitigate any impacts associated with declining economic conditions, or revenue-sharing payments?
7. What effects, both positive and negative, have taken place with education and highway programs that are attributable to the management of public lands within your State or county?
8. What relationship, if any, should exist between Federal revenue-sharing programs, and management activities on public lands?
9. What alternatives exist to provide equitable revenue-sharing to states and counties and promote "sustainable forestry"?
10. What has been your experience regarding implementation of P.L. 106-393, The Secure Rural Schools and Community Self-Determination Act?
11. What specific changes in law, policy, and procedures in the management of public lands have contributed to changes in revenues derived from the historic multiple-use of Federal lands?
12. What specific changes in law, policy, and procedures regarding public land management are needed in order to restore the historical revenues derived from the multiple-use of Federal lands?

Chapter IV: Payment Options and Recommendations

Eight alternatives were evaluated to develop recommendations that meet the needs of communities and consider the sustainability of national forests and O&C lands. The alternatives were displayed on the Committee's Web site and in its Interim Report for review and comment by the public. The Forest Service, BLM, and Office of Management and Budget were provided the opportunity to make comments and recommendations through their representatives on the Committee.

The following recommendations represent agreement by all members of the Committee, and are in response to information received as a result of extensive public involvement efforts and direction to the Committee contained in legislation. The public presented many comments about past and present payments, and several ideas for developing long-term solutions. The Committee attempted to be responsive to those ideas to the greatest extent possible. Policy issues raised by the public, local officials, and interest groups were also considered when deemed appropriate.

Alternatives and Criteria

Congress has several options available for making payments to States and counties in the future. However, one option best meets the original intent of payment legislation to mitigate impacts to local governments for the presence of public lands. The recommendation is explained on page 21, and is based on information gathered and evaluated by the Committee.

It is important to keep in mind that the interim legislation will have only been in effect for 2 years when this report is submitted. Information about the effectiveness of advisory committees and requirements for how some payments must be spent should be evaluated over time. Figure 1 shows alternatives considered by the Committee.

Figure 1. Alternatives Considered

1. Historic Laws Remain in Effect with Modifications After P.L. 106-393 Expires:
 - O&C Grant Lands Payments
 - Coos Bay Wagon Road
 - 1908, Twenty-five Percent Payment Act
 - Weeks Act
2. Reauthorize P.L. 106-393, with Modifications.
3. Payments Based on Sustainable Economic Asset Value of Resources.
4. Payments Based on Land Value.
5. Payments Based on Tax Equivalency Value.
6. Payments Based on Projected Value of Forest Plan Implementation.
7. Certain Lands Are Managed as Trust Lands for Counties and Schools.
8. Payment Made to States and Counties with No Connection to Receipts.

Several themes emerged early during the public listening sessions, and were consistent issues in almost every location the Committee visited. These themes were developed as criteria to evaluate different payment options. They are important to ensure that recommendations meet the original intent of laws establishing payments to States and counties, and are responsive to direction provided by Congress. They are displayed in Figure 2.

Figure 2. Criteria Important to Alternatives

- a. Payments are adequate and stable.
- b. Payment amounts are predictable.
- c. Forest health and sustainability are improved.
- d. Community participation is encouraged.

Adequacy and Stability of Payments

Many people supplied comments and information regarding the need for payments that do not fluctuate from year to year, and are adequate to meet the educational needs of many rural children. Also, county officials presented information about the poor condition of roads and bridges that are needed to serve their communities. Loss of funding over the past 10 years has resulted in serious public safety concerns. Previous commissions did not identify this as an important issue because Federal timber harvest levels were fairly constant during the 1970s, averaging 10 billion board feet annually. As a result, payments to States and counties did not experience great fluctuations. The Advisory Commission on Intergovernmental Relations acknowledged in their 1978 Report that abrupt changes in national forest program levels could have significant effects on some local

economies - a reality of the 1990s. A downturn in the lumber market during the early 1980s had a slight effect on payments, but was short-lived.

Payment Amounts Are Predictable

The Committee heard from many county and school officials and from organizations like the National Education Association about the importance of the predictability of payments from one year to the next. Rural schools find it difficult to provide such programs as foreign language and advanced placement courses necessary for students to be competitive when there is little predictability in funding. The “safety net payments” from the Secure Rural Schools Act allowed educators to plan multi-year budgets and retain important education programs that would have otherwise been lost. The same holds true for county and other local governments that must develop budgets for important transportation facilities that are multi-year in nature.

Forest Health and Sustainability

Legislative direction to the FCPC stated that recommendations should be “consistent with sustainable forestry.” Therefore, alternatives should have some relationship to actions that promote the sustainability of forest resources.

The public felt this issue important, given the responses made to questions posed by the committee. People are concerned about the long-term health of public lands. Wildfires resulting from unnatural conditions in forests have threatened to significantly alter the very resources national forests and O&C lands were created to sustain. Serious safety concerns exist for people who live adjacent to, or visit the public lands, and aesthetic values important to travel and tourism have been severely affected. There is no question that future generations will not have the availability of some of these resources for their use and enjoyment if current trends continue.

Community Participation

Participation in forest management actions by people who have an interest in, and depend on, public lands is critical to resolving conflicts among various interests. Indications are that resource advisory committees created under the interim legislation will be successful. Discussions with members from several advisory committees revealed they are finding common ground for developing resource management projects. The Committee believes people can work out their differences under the right circumstances. Therefore, a long-term payment alternative should provide citizens the opportunity to be actively involved with Federal land managers in decisions about public lands.

Recommended Payment Method

The following recommendation will go a long way to fulfill commitments made by Congress almost 100 years ago, when it passed the 1908 Twenty-five Percent Payments Act, and later payment legislation for the O&C lands, but with different intended purposes. It will also meet many of the expectations held by communities adjacent to O&C lands and national forests. However, none of the options will completely mitigate the effects on communities when forests are not managed on a sustainable basis. Impacts to local economies, community infrastructure, and reduced services to citizens from loss of manufacturing industries cannot be completely replaced through these Federal payments. Travel and tourism industries are important components to many rural economies, are dependent on public lands for high quality recreation, and are affected when forests are not managed to sustain their aesthetic values. The demand for water from public lands to meet municipal, agriculture, and power generation needs will continue to grow as other sources are depleted. It is unacceptable for our Federal forests to be out of balance ecologically, when, once lost, it may take hundreds of years to restore those values. Significant numbers of people appearing before the Committee at listening

sessions around the country voiced their belief that multiple use management of national forests and O&C lands is critical to sustaining natural resources, and meeting the needs of society.

Reauthorize the Secure Rural Schools and Community Self Determination Act of 2000 (P.L. 106-393), with Modifications

The Secure Rural Schools and Community Self-Determination Act has accomplished much in a short time. It provides predictability and stability to payments, so that counties and schools can more effectively plan their budgets. Payment levels have been restored to their more historic levels, thus allowing for some schools to keep their doors open, and for counties to provide improved road maintenance that is critical for public safety. If P.L. 106-393 is re-authorized, then the following modifications should be considered:

- Retain provisions for RACs, with changes to membership categories, term of membership, and possible expansion of committee roles;

- Provide for periodic adjustments to payments based on inflation;
- Establish a minimum payment that would increase, should revenues from receipts rise above that amount in the future;
- Minimum payment amounts should be the same as those established for the Secure Rural Schools and Community Self Determination Act (P.L. 106-393), and should be funded from a combination of receipts and treasury funds. Payment methods and amounts should be reviewed every 10 years;
- Counties should continue to have the option of remaining under the 1908 Twenty-five Percent Payment Act, consistent with the provisions described under P.L. 106-393. Continuation of this option should be reviewed every 10 years in conjunction with a review of methods and amounts described above;
- Counties should have greater latitude in the kinds of road activities for which Title I funds can be used. The governing board of any county receiving Title I revenue based on historic payment from the Twenty-five Percent Fund Act of 1908, or from payments under new legislation, should be permitted to allocate whatever portion of revenues received that exceed those necessary for annual operation, maintenance and projects, to offset the cost of law enforcement activities necessary to maintain the county road system (i.e., county road patrol);
- Consider revision of Title III categories for expenditures. An example would be to allow for more flexibility in environmental education programs. Current language requires that these programs be “after school.” There is greater value in making environmental

education programs more broadly available.

Expenditures for law enforcement operations on national forest and O&C lands should also be allowed under Title III;

- Payments would not be subject to annual appropriations. Payments that are intended for education and important rural infrastructure should not be subject to the uncertainties of annual appropriations. The history of appropriations for PILT and Special Education offers good examples of programs that have not been fully funded as were intended, or expected by people who depend on these funds;
- Increase Federal funding for Title II projects. This would provide greater incentives for creating resource advisory committees in locations where historical receipt payments have not been high;
- Federal payments for education and roads are intended to be supplemental to other funds, and should not supplant State, local, or other Federal funds. New legislation should contain language sufficient to ensure that payments accomplish their intended purposes. Prohibition language found in the Individuals With Disabilities Education Act, 20 U.S.C., 1412(a)(18)(C), and the Impact Aid Program Statute (Title VIII of the Elementary and Secondary Education Act of 1965), as amended through August 2, 2002, provides good examples where Congress has included the necessary prohibitions against supplanting. Recommended language to be used in future legislation is presented in Appendix 7; and
- New payment legislation should carry a requirement for some portion of Title I to be used for public education.

Other Feasible Alternatives

Other payment options are feasible, but may not satisfy all of the criteria, or information is lacking to fully evaluate them. Other alternatives that could potentially provide a long-term solution for payments are:

- Make payments based on Economic Asset Value; and
- Estimate a payment level that has no connection to receipts generated from the public lands, and no requirement for county or public lands projects.

Make Payments Based on Sustainable Economic Asset Value of Resources

The national forests and O&C lands provide multiple benefits and have tremendous asset value. Management of

these lands for long-term sustainability will ensure that forests remain healthy and continue to provide multiple benefits as they have in the past. However, there have been serious concerns expressed by members of Congress, and the public, about the sustainability of Federal forests. Increases in acreage burned by wildfires, increase in insect infestations and disease, and the spread of noxious weeds all affect the ability of forests to meet the needs of future generations. Decisions we make about the allocation of resources also influence their availability in the future.

The Committee received numerous comments about the condition of Federal lands, and the impacts to local economies from the loss of tourism and forest products manufacturing. Managed on a sustainable basis, public

lands have the potential to generate substantial payments to local governments and provide significant economic contributions to many rural communities. In a way, payments then become a by-product of good management. Previous commission studies attributed substantial benefits to local communities from the development of consumptive forest resources. The assumptions at that time were that production levels would continue, and possibly increase, well into the future.

However, during the last 10 to 15 years, economic and social values associated with forest resources have changed. Concern about ecosystem health has created new methods for managing forest resources. At the same time, new technologies and markets have created good opportunities for industries that add value to forest products that were unimaginable a few years ago.

This alternative establishes a value for consumptive forest resources based on allocation decisions made in forest plans. A payment to states and counties is then calculated based on the receipts that would be generated from development of these resources at levels established in forest plans. Payments would be made, regardless of whether the sale and collection of receipts for these resources actually occur. If approved levels of production were not achieved, then the balance of payments from lost receipts would be made up with treasury payments.

There are several advantages to this approach. First, State and local governments are not negatively impacted by unachieved production levels. Many factors influence the ability to meet objectives. Budget and program levels developed by agencies, budget levels appropriated by Congress, and legal challenges can all influence production levels. Secondly, there would be a greater incentive for Congress to address policy issues and provide adequate budgets to achieve forest plan levels. This would minimize payments that would come from the Treasury to make up for the loss of receipts.

Calculations would only be made for consumptive resources, which include timber and other forest products such as grazing, water, minerals, energy, and some recreation activities. Non-consumptive resources include biodiversity preservation, research and knowledge, and some recreational activities. Models exist for calculating non-consumptive values, but they are not as easily determined, because markets have frequently not been established. This is due in part because user preferences differ, and many forest resources are interrelated from a

biological, physical, and economic nature, irrespective of geo-political boundaries. Consideration of these values is included under the Forest Planning Alternative, which was not recommended for reasons explained later in this chapter.

In some cases, a resource may have more than one value associated with its use. Water is a good example for which there are numerous valuations depending on the intended use, whether it is power generation, irrigation, or domestic supply. There are also different values associated with the same use. Prices charged by the Western Area Power Administration vary significantly from market rates, which tend to be higher. However, market rates would be the preferable method for establishing values of all resources as they more accurately represent the true value of the product, and are a more realistic estimate of assets that would have contributed economic benefits to local communities if they had been in private ownership.

A previous study completed in 1985 (Huebner, Hickman, and Kaiser), addressed a variation of this alternative where the tax value of resources, and land, were used to calculate a payment to counties. A floor, or base funding level, was established using historical payments from receipts. Payments would be made directly to counties, and would never be less than the floor level. Payment amounts would be established by the local taxing jurisdiction, and there would be no restrictions placed on the use of funds, only that they be used for public purposes. The source of funds to pay for this method would be from the National Forest Fund, which would continue to collect receipts as authorized by 16 U.S.C. 499.

The study sample included eight states from different regions of the country in order to compare various State tax laws, and determine the effects on historic payments. Payments to counties made under the PILT were calculated to determine net payment effects. This study provides a good indication of effects from adoption of this alternative, as well as the tax equivalent alternative rejected by the Committee. While comparing only eight States, the study concluded that imposing a tax value on land and resources without a base level would reduce overall payments to counties by more than 50 percent. It also concluded that there was great variability between State tax laws, and that all States would have to be evaluated to fully understand the implications of this approach. In addition, many counties in the Rocky Mountain Region lose money under this approach, because of the effects to PILT payments. The study also recognized the difficulty in valuing some resources. Time and cost to assess land and resource values,

as well as who would pay for the assessments, were raised by State and county personnel.

It is likely that applying parameters from the Huebner Study to present-day property values, with a new floor level similar to what was used in P.L. 106-393, would result in significantly higher payments to counties than are currently provided under P.L. 106-393. However, estimating an amount is difficult for the same reasons cited in the 1985 study.

Legislation enacting this alternative should include the same provisions against supplanting Federal funds as described in the recommended alternative.

Make Payments Based on a Pre-Determined Amount with No Connection to Receipts Generated from Public Lands, and No Requirement for County or Public Lands Projects

Some input was received from the public that suggested payments made to States and counties should have no relationship to receipts generated from the public lands. This method was proposed by the Forest Service in 1998, and was an option featured in at least one bill in congress. This alternative was evaluated without including provisions for resource advisory committees, because they were not featured in original proposals.

The following features are included as a part of this alternative:

- Provide permanent, fixed payment based on 76 percent of the average of the three highest payments received during 1986-1995;
- The connection between receipts from O&C lands and National Forests, and payments to States, is completely severed;
- Payments are dependent on treasury funds; and
- There is no requirement for counties to spend any portion of their payments on public lands projects, and no requirement for creating resource advisory committees.

Some groups and individuals commented that payments should have no relationship to receipts, or should be

“decoupled.” The Southern Appalachian Forest Coalition, the Bolle Center for People and Forests, and the Wilderness Society include some of the groups who made this recommendation. In considering this issue, the Committee does not find strong evidence to support the notion that revenue-sharing payments by themselves create a “perverse incentive” for cutting more timber. Timber harvest levels from public lands have a greater effect on local economies than do receipt payments. Annual harvest levels on national forests and O&C lands are influenced more by court rulings, timber program levels requested by the agency, and appropriations by Congress. A review of Forest Service annual reports confirms this.

Two of the four criteria, predictability and stability of payments, are assumed to be achieved under this alternative if payments are off-line and not subject to annual appropriations. There are several examples where the Administration has not requested full funding for important payment programs, and the Congress has not appropriated the full amount as authorized. Examples include PILT and funding for Special Education. There is no assurance that another payment program subject to annual appropriations would fare any better. Some members in the Senate and House of Representatives of Congress have attempted to correct the funding level for PILT. However, these bills had not been acted on at the time this report was finalized.

The other two criteria, Forest Sustainability and Community Participation in Management Activities are not addressed through this alternative. Resources are sustained, for example, through activities that help reduce wildfire occurrence and severity, restore degraded streams, and educate people about appropriate management activities. Community participation in developing these projects creates a sense of ownership among communities of interest with the potential to change the paradigm of controversy and gridlock that has been prevalent during the past 20 years. Based on these reasons, the committee can find no basis to recommend this alternative.

If Congress chooses to adopt this approach in future legislation, a prohibition against supplanting Federal funds as described in the recommended alternative should be included.

If Congress Does Not Pass New Payment Legislation

If Congress does not act to authorize the recommendations contained in this report, payment authorities would revert to the historical statutes beginning October 1, 2006. For National Forests, the Act of May 23, 1908 (25 percent payments), and Section 13 of the Act of March 1, 1911 (Weeks Act) would apply. For O&C lands and Coos Bay Wagon Road lands, the acts of August 28, 1937, and the act of May 24, 1939, would apply respectively. If that happens, certain measures should be enacted to mitigate the effects to local communities. Appendix 6 provides trend information on receipts and estimated payments under the Twenty-five Percent Payments Act since P.L. 106-393 was passed.

For most counties and local governments, reverting to a payment system based entirely on receipts would see a return to the conditions that existed prior to enactment of the Secure Rural Schools and Community Self Determination Act. Receipts will remain low as long as program levels on public lands are affected by legal challenges, inadequate funding to meet forest plan levels, and changed conditions from wildfires and insect and disease infestations.

Previous studies have recognized the impacts that can occur to local government finances when Federal agencies

make abrupt changes to program levels that can affect receipts (ACIR, 1978). Administrative appeals and litigation of activities can delay implementation of projects for one or more years. Program levels may also be affected by budgets and market conditions. When this happens, the stability and predictability of payments for education and transportation systems become uncertain.

The following provisions would be needed to mitigate the impacts associated with payments based solely on receipts.

- Agency programs and budgets should reflect forest plan levels. This has not been the case with past budget requests by the administration, nor in appropriations made by Congress. As a result, significant “backlogs” have been allowed to accumulate in many resource and facility programs.
- Regulations affecting the implementation of forest plans should be streamlined to improve timeliness and effectiveness of program accomplishment. The Forest Service conducted an analysis of statutes and regulations in conflict, but additional work is needed to develop specific proposals.
- If Congress chooses to adopt this approach in future legislation, a prohibition against supplanting Federal funds as described in the recommended alternative should be included.

Alternatives Considered and Rejected

A range of payment options was available for public comment and consideration by the Committee. Several of these alternatives were discarded for various reasons, which are described in this section. However, some might be viable under other circumstances. The following options were removed from further consideration:

- Payments based on land value;
- Payments based on tax equivalency;
- Payments based on projected value of forest plan implementation; and
- Certain lands are managed in trust for local governments and schools.

Payments Based on Land Value

This option adopts the provisions of the Payments to Minnesota Act, signed into law in June 1948. This payment method is used to reimburse the State of

Minnesota and three national forest counties in that State. It is based on three fourths of one percent of the appraised value of the public lands as determined by the Secretary of Agriculture. Lands are re-appraised every 10 years.

The Committee did not recommend this alternative after considering comments from the Forest Service raising concerns about the costs associated with appraising approximately 192 million acres across the Nation. The Forest Service indicated the re-appraisal of lands in Minnesota constitutes a significant workload and a major commitment of personnel to accomplish the appraisal.

This method would offer a very clear and understandable means for calculating payments, but it is doubtful that the appraisal work could be done to meet required timeframes, and would be heavily dependent on appropriations from Congress, money that might otherwise be used to accomplish resource programs.

Payments Based on Tax Equivalency

While this alternative might appear appealing at first, there are some problems associated with this method. The methodology associated with having each county calculate the tax value of national forest and O&C lands within their respective boundaries is not difficult. Most local governments have the ability to make such calculations. However, there are a number of different property tax systems used by local governments across the country. The problem is compounded when considering that some States have special tax considerations for timber and other agriculture uses that would possibly create significant differences between States and local governments. Tax rates are also established through law in some States, which require voter approval to raise the tax value. Other States impose a ceiling to limit the tax rate assessed by local governments. This could have the effect of undervaluing the public lands. It is also doubtful the Forest Service and BLM have adequate staffing to verify tax values claimed by each and every county or local government.

Another important factor resulted in this alternative being removed from further consideration. Research conducted by Committee staff revealed differences in congressional intent for in-lieu tax payments and revenue-sharing payments. State and Federal courts have reviewed and interpreted the legislative record for the 1908 Twenty-five Percent Receipts Statute. The courts found that these payments were not to be considered as in-lieu tax payments, but as payments or grants, to compensate local communities for economic impacts created by the withdrawal of these lands from future development. The Committee calculated the sum of payments made under the Secure Rural Schools Act and PILT to make a comparison of tax value. The information indicates when payments under P.L. 106-393 and PILT are considered together, they do not equal the taxable value of Federal lands for the aggregate of all counties. However, as stated elsewhere in this report, several court rulings have determined Congress did not intend for revenue-sharing payments made under the 1908 Twenty-five Percent Act to compensate counties for a denied tax base.

Payments Calculated on the Value of Goods and Services Identified in Land Management Plans

Land and resource management plans are developed for each national forest in accordance with the National Forest Management Act of 1976. These plans are to be revised every 10 to 15 years, a process which takes an average of

four years to complete. Among other things, each forest plan establishes levels of use for different resources over the life of the plan. This allows for the calculation of values associated with the implementation of a particular forest plan. For example, timber harvest levels calculated for 10-year intervals allow for average-annual harvest amounts to be determined. Decisions about recreation development, grazing, and oil and gas leasing are also made in the forest plans.

This alternative would provide for the calculation of payments based on a percentage of the value of commodity and non-commodity resources to be developed during a 10-year period. Payments would be made regardless of whether the forest plan projects actually occur or not. This would ensure that local governments and schools are not adversely affected when forest plans are not fully implemented.

Many factors affect the eventual production of goods and services predicted in forest plans. In some cases the local land manager has little or no control over producing expected levels identified in the plans. Those can be greatly influenced by external factors such as budget levels, complexity of environmental analyses, court decisions, and market conditions. In fact, few forest plans have ever received full funding for implementation.

This alternative was removed from further consideration for several reasons. The primary concern is that calculation of non-consumptive values is very difficult. As mentioned previously in this chapter, user preferences differ, potential market uses may not be well developed, and many uses are interrelated and cross geo-political boundaries. Uncertainty about which resources to include in calculations would create difficulties in making calculations.

The current backlog of national forest plan revisions creates another problem that was a factor in this alternative not being recommended. There are currently 49 forest plan revisions behind schedule. Therefore, there is no assurance that revisions would keep pace with the need to periodically update values for calculating payments to states and counties. This is more problematic for non-consumptive uses than many of the consumptive uses previously identified. While citizen participation would occur during revisions, there is no provision for resource advisory committees.

Input received from the Forest Service was in agreement with the Committee's evaluation of this alternative. The agency suggested another option would be to establish

“base level” funding for each forest and calculate payments as a percentage of that level. However, that approach has no relationship to resource values, or needed management actions.

Certain Lands are Managed in Trust for Local Governments and Schools

This alternative proposes to set aside lands with very specific management objectives: to manage certain public land resources for maximum revenue generation for schools and local governments. Many States manage lands in trust with similar objectives of maximizing revenue.

Very little input was received on this alternative, and after consideration by the Committee, was determined to be

infeasible. The closest example of this approach being tested was the Sustained Yield Act of 1944. The purpose of that act was to “promote the stability of forest industries, of employment, of communities and taxable forest wealth, through continuous supplies of timber.” The Sustained Yield Act provided for the pooling of Federal and private lands into sustained-yield units. It also allowed the formation of blocks of timber on Federal land where communities depended on Federal stumpage. Lands held in trust, as this alternative prescribes, would have an even narrower set of objectives. Establishment of certain lands to be managed in trust for schools and local governments could come into conflict with the multiple use purposes of the national forests and the purposes defined in statute for management of the O&C lands.

Chapter V: Related Findings and Recommendations

There were many comments, concerns, and ideas presented to the Committee. Some information suggested ideas for future payment options and for improving the management and sustainability of the national forests and O&C lands. Others described concerns about current management, the state of local economies, and very serious concerns about meeting education needs in communities adjacent to the national forests and O&C lands. Many of the comments and suggestions came from individuals who have a vested interest in the health of the public lands, and who also have the responsibility for meeting the needs of citizens in their communities.

This chapter presents recommendations that should be considered by Congress for any action it takes on legislation for long-term payments. They are responsive to the topics identified in the legislative direction to the Committee, and attempt to address many of the ideas and concerns expressed by the public, local officials, and State agencies.

Some information received was not directly related to issues Congress asked the Committee to evaluate or recommend, or they are issues for which the Committee has no recommendation. However, they are important observations of which Congress and the administration should be aware. They are presented in Chapter VI.

Importance of Federal Payments to Schools

Education is one of the historic purposes of the Federal payment statutes. That purpose should be retained and possibly strengthened under a new payment statute. There are differences among States in their approach to complying with the education requirements of Federal payment statutes, and information presented to the Committee causes concerns about whether the intended purposes for Federal dollars are being met. One fact emerged from repeated discussions with rural school officials, local citizens, and with the National Education Association—many rural schools in public lands counties are better off as a result of the Secure Rural Schools and Community Self Determination Act. Forest communities that are more dependent on manufacturing and natural resources have been experiencing dramatic changes during the past decade. Education is one of the most critical resources that rural people need, both youth and adults, in finding the means to guide economic and community change (Lee, 1987). Without this assistance into the future, many rural schools are likely to fall farther behind in providing students with the learning environment needed to be competitive. The following findings and recommendations would accomplish this:

Findings

- Rural schools are highly dependent on Federal forest payments.

The committee received powerful testimony from school superintendents, teachers, and citizens on the importance of Federal funds to their schools. Education funding for many rural communities is more critical now than in the past.

Rural schools represent 22 percent of all public schools, but only receive about 12.5 percent of Federal funding, 14 percent of State funding, and only 11 percent of local funding (Rural Policy Research Institute). Many States provide funding to school districts on the basis of student enrollment, and a set amount per pupil. The Committee reviewed information that indicated a significant loss in student enrollment for rural counties adjacent to public lands. In many cases, this translates into a loss of total funding for those schools. While it may appear that fewer students may require fewer teachers and facilities, there is a basic funding level required to maintain educational services to all students. Therefore, the Federal payments that go to education frequently fill an important gap. Table 1 shows the loss of student enrollment for selected counties in Oregon, Montana, Idaho, and California.

Table 1. Number of Pupils for Selected Years

County State	Grant Oregon	Lincoln Montana	Clearwater Idaho	Plumas California
1994-95	1602	3911	1761	3851
1998-99	1491	3569	1589	3540

While not all schools in forest-dependent communities experienced similar reductions, many did. Diversity of economies, quality of transportation systems, and the remoteness of the community are all factors affecting student enrollment, thus affecting funding levels for school districts. Schools and local governments in many rural areas do not have the financial flexibility their counterparts have in urban areas. Revenues collected by local

governments tend to fluctuate more in rural areas, because the primary industries are generally agriculture and manufacturing. These industries are more sensitive to market fluctuations, whereas economies in urban areas are more closely associated with service industries, and do not experience the same kinds of fluctuations under similar market conditions.

- **Federal payments under the Secure Rural Schools Act and the 1908 Twenty-five Percent Payment Act are not reaching many local schools as intended.**

In all, there are 41 States receiving payments from P.L. 106-393 and the Twenty-five Percent Fund. The issue of whether States are meeting the intent of the Secure Rural Schools and Community Self Determination Act, and the 1908 Twenty-five Percent Payment Act, is one of the greatest concerns expressed by school officials and citizens from rural areas. Funding for education in some States is designed to provide “equal access to education.” In many cases this provides the same level of funding per student regardless of location. However, education costs per student are frequently higher for rural areas. Language in the Twenty-five Percent Payment Act, and P.L. 106-393, provide for State legislatures to determine the division of monies between public schools and public roads. The law also directs that the payments should be for the county or counties in “which such national forest is situated.” The Committee was able to make the following determinations about how States are allocating Federal payments they receive from P.L. 106-393 and the Twenty-five Percent Payment Act:

- Of the 41 States receiving payments, 14 (34 percent) allocate between 41 and 60 percent of the money to schools. All but one split the payments 50/50 between schools and roads;
- About 39 percent of the revenue-sharing payments from the Twenty-five Percent Fund, or P.L. 106-393, is spent on schools;
- While these 14 States allocate the largest percentage of payments to education, they only receive about 8 percent of the money;
- Five states receive almost 50 percent of the payments, but only allocate between 21 to 40 percent of the money to education;
- Almost 56 percent of payments go to nine states where revenue sharing payments are deducted from State aid; and
- When all methods of allocating the school portion of payments by States and counties are considered, it is

determined that 63 percent of the money from P.L. 106-393, and the Twenty-five Percent Fund has no direct affect on the budgets of school districts in the counties where these public lands are located.

The Committee believes these situations defeat the intended purposes of the Federal payments to communities where public lands exist.

- **Stability and predictability of Federal forest payments is important to maintaining educational services and student activity programs.**

The stability and predictability of Federal payments were criteria used to evaluate payment alternatives. They are absolutely critical to the operation of schools and greatly influence the ability of school administrators to add, or maintain, certain education and student activity programs. Officials are reluctant to make commitments for these services, when funding to maintain them is uncertain at best. In many cases, these programs are vital to ensure that rural children have similar educational opportunities to those enjoyed by their urban counterparts.

Recommendations

- **Retain payment levels established under the Secure Rural Schools Act (P.L. 106-393).**

The method of calculating payments developed for the Secure Rural Schools Act takes into consideration the significant changes that occurred to the timber management programs in the Forest Service and the BLM during the 1990s. Court decisions, along with decisions made by previous Congresses and administrations significantly reduced program levels and precipitated the downward spiral of Federal revenue-sharing payments. Prior studies predicted this kind of action would have significant effects on local communities. The Committee considered an approach that reduces payments by an amount equal to the benefits received by State and local governments. Two previous studies attempted to do so (Public Land Law Review and ACIR), but were unable to find an approach that was credible. In addition, that method would only measure direct financial losses and gains, and would not address the original purpose of the 1908 Act. In the final analysis, the Committee could find no better method for making payments.

- **Continue to make payments directly to States for counties adjacent to national forests.**

A number of people provided recommendations that payments be made directly to counties and other local governments, rather than to the State level of government. The Committee evaluated this option and requested input from the Forest Service. The agency recommended against changing the initial recipient of the payments for several reasons. The first concerned the mechanics in making payments to approximately 774 national forest and BLM counties, rather than making one payment to each State. While making payments to States may be somewhat easier on the agency, the capability to make payments electronically to the national forest and BLM counties should not create an undue burden. The second reason cited provides a better rationale—in the event of disagreement over payment amounts, the States would be the appropriate level for resolving issues related to payment amounts, rather than the Federal Government.

- **Provide statutory language prohibiting States from offsetting State education dollars with Federal forest payments.**

Congress intended that communities adjacent to national forests and O&C lands should not suffer because of the Federal ownership of those lands. State laws that prevent Federal funding from reaching targeted areas for specific purposes interfere with the intent of legislation. Funds associated with laws similar to Federal Impact Aid are examples where Congress included specific language to ensure Federal dollars reach the intended target group.

In this case, schools in communities adjacent to public lands are the target group. Appendix 7 provides suggested language to prohibit supplanting of Federal funds by States in future legislation.

- **Future payments made to States and counties should not be subject to annual appropriations, and should be fixed at levels established under P.L. 106-393 for the first 10 years. Receipts collected from public lands should be used to reduce the total cost to the Treasury.**

Payments for schools and roads in communities were relatively stable and predictable for many years, because programs that generated those payments did not fluctuate. P.L. 106-393 has restored that level of stability and predictability. If payments associated with new legislation were appropriated on an annual basis, there is no assurance they would not fluctuate as they have during the 1990s. Several examples illustrate the risk of appropriating payments annually. PILT and Special Education Programs have not realized the full amounts that were specified when they were authorized. New payment legislation partially dependent on annual appropriations would have to compete with other funding considerations, which would possibly affect their stability and predictability. Also, a connection to receipts collected from public lands would provide an identifiable source of revenue to partially offset the cost of payments made under new legislation.

Local Governments' Dependency On Payments

Local governments display varying degree of dependency on the Federal payments. Nationally, the largest single revenue source for counties is state-level aid, followed by other county revenue, property taxes, retirement accounts, and Federal payments. Revenue sharing payments represented a decreasing portion of total county revenue in virtually all regions of the country where public lands are located. This is likely the result of the decrease in receipt collections and associated payments that occurred during the 1990s in some regions of the country. According to county officials, loss of revenues from traditional forestry manufacturing industries has increased the dependency on other sources of payments, and forced some local governments to increase property taxes in order maintain traditional services. In some instances, services have been lost. The Committee developed findings and recommendations from information that was presented by citizens and local officials.

Findings

- **Some counties are assessing the maximum tax rate allowable under law, yet revenues remain insufficient to maintain basic services for their residents and visitors to public lands.**

County officials indicated if current payments are not continued, and receipt collections remain low, property taxes would likely be increased, where possible, to replace revenues historically generated by timber manufacturing in their counties.

- **Costs to counties for maintaining local roads and providing services to those visiting public lands have increased due to reductions in Federal timber programs, Federal revenue-sharing payments, and**

increased visitation to national forests and O&C lands.

County governments report that transportation facilities, previously maintained through the Federal timber program, must now be maintained with county funds, or are closed to the public. This comes at a time when Federal payments to local governments have been significantly reduced. Additional payments received through the Interim Legislation (P.L. 106-393) are providing much needed attention to health and safety issues on local highways. Approximately 61 percent of the \$326 million of Twenty-five Percent Fund, or P.L. 106-393 payments are going to roads.

- **Costs to local governments for certain services they provide associated with public lands have increased.**

County governments indicated they are not fully reimbursed for some services such as law enforcement activities conducted on national forests. Funding currently received through Agency Cooperative Law Enforcement Programs does not cover all of the law enforcement and search and rescue activities. These findings are consistent with the studies conducted by Schuster in 1999, and in 2002. The study found the areas of greatest expense to local governments were search and rescue, law enforcement, road maintenance, and fire control. County officials identified the same kind of expenses in their comments to the Committee.

Recommendations

- **Further study is needed to fully understand the costs to local governments associated with the presence of public lands.**

Costs and benefits to local communities from the presence of Federal resource lands are extremely complex. Different tax and financing structures among States and local governments make it difficult to identify direct costs and benefits, as well as indirect costs and benefits, which can be substantial. A comprehensive review of financial records of local governments would be necessary to completely understand these relationships. This approach might help identify areas where Federal assistance could be targeted, and would assist local governments in understanding critical factors to be considered in land use planning and the costs of providing services.

- **Allow more flexibility for local governments to spend the non-school portion of Federal payments.**

The governing board of any county receiving Title I revenue based on historic payment from the Twenty-five Percent Fund Act of 1908, or from payments under new legislation, should be permitted to allocate whatever portion of revenues received that exceed those necessary for annual operation, maintenance and projects, to offset the cost of law enforcement activities necessary to maintain the county road system (i.e., county road patrol).

- **Title III should be continued under long-term legislation, and categories expanded to allow for expenditure of funds for non-reimbursed services provided to public lands by local governments.**

Expanding the categories under Title III could allow for reimbursement of law enforcement related to public lands and other public land-related services when approved by the local governing body.

Resource Advisory Committees

These committees, created under the Secure Rural Schools Act, are most prevalent where payments to counties are large enough to pay for costs associated with developing projects. Interest by local managers of the Forest Service and the BLM also influence the county's willingness to set aside money for Title II projects. Most resource advisory committees have been operating for 1 year or less. Therefore, the effectiveness of these committees needs to be monitored. The Forest Counties Payments Committee met with members of several RACs and was impressed with the enthusiasm members displayed. There are many examples of improved relationships among RAC members who have been at odds for years. The FCPC initiated a study to answer some of the questions raised about the long-term

potential of this type of citizen involvement. The study is ongoing, and the Committee will provide periodic reports to Congress and the Secretary about information and findings developed. The Committee has the following findings and recommendations to make about resource advisory committees at this time:

Findings

- **Resource advisory committees are working well.**

The Committee received testimony and written letters from people who are members of resource advisory committees. Committee members and staff also attended

advisory committee meetings and participated in telephone discussions with RAC members. Even though most advisory committees have not been together very long, there are already examples of improved relationships. One respondent (not a RAC member) commented that RACs were not working well, but offered no examples that could be verified by the Committee.

An evaluation of Title II and III projects is provided on subsequent pages.

- **The success of resource advisory committees has been in their ability to work together to develop projects, and the availability of funding to implement them.**

One of the more powerful aspects of RACs under the interim legislation that is emerging is their ability to work together when they have a common purpose, and resources, to implement projects. Committees that have primary roles of advice and counsel may not function as effectively.

- **The success of resource advisory committees is greatly influenced by the interest of the local Federal manager.**

Resource advisory committees can have difficulties operating when participation by the local Federal official is not consistent. Frequent changes of personnel assigned as the Designated Federal Official to the RAC can give the impression that it is not a high priority. It can also undo positive relationships developed with members of the RAC. The formation of a resource advisory committee can also be influenced by the amount of interest displayed by a Federal official.

- **The size of payments to counties influences whether they elect to allocate funds for Title II projects on national forests and O&C lands.**

In the first year, 31 percent of counties receiving in excess of \$100,000 elected to place funds in Title II, and establish resource advisory committees. The remaining counties kept their funds in Title III. Counties that had higher payments were more likely to place funds in both Title II and Title III. More counties indicated they will likely place funds in Title II in future years.

- **Some advisory committees had difficulty filling all of the categories for membership, especially where a separate county elected to form a committee rather than set up a multi-county RAC.**

The 15 subcategories currently specified in the legislation may not accurately describe the communities of interest for national forests and O&C lands. Representatives from Wild Horse and Burro groups have been difficult to recruit according to information received from some resource advisory committees.

- **Streamlining the RAC process is needed, including the replacement of members that leave, and aligning the time limits of the RAC Charter with the term limits of RAC members.**

These issues can be addressed administratively, through the RAC charter.

Recommendations

- **Long-term payment legislation should contain provisions for resource advisory committees.**

While advisory committees established under P.L. 106-393 have only been operating for a short period of time, there are already indications that they have been effective in building relationships among people with different ideas about how public lands should be managed. Most committees are able to develop projects using multiple sources of money and partners. Significant investments are being made on public lands with payments.

- **The Forest Service and the BLM should initiate regulations to clarify administrative questions to provide consistency for Titles II and III.**

Legislative language cannot anticipate all questions that need to be addressed in implementation. Many of the operational provisions should be developed through rulemaking with public input. This provides an easier way to make changes when needed.

- **After further monitoring, consider broadening membership categories to allow for participation by relevant local interests.**

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After further monitoring, consider broadening membership categories to allow for participation by relevant local interests.

The intent is to have a diversity of interests represented on an advisory committee. Some areas of the country may not be able to fulfill membership requirements, because there may be no one affiliated with a particular category, and/or local interests may vary in different parts of the country. An example would be the current category for wild horse and burros. Representatives of that particular interest are not present in many parts of the country.

- **Consider expanding the role of resource advisory committees beyond current duties and clarifying the current requirements for restoration projects under Title II.**

Future legislation should expand the role of resource advisory committees to address many different management activities on public lands. Their ability to find agreement with various interests represents an opportunity to accomplish important forest management projects.

- **Congress and the administration should consider designating additional funds for use by resource advisory committees, especially in those national forests and counties where available dollars for Title II projects are limited.**
- **Monitor the long-term effectiveness of using citizen advisory committees.**

Resource advisory committees represent an excellent learning opportunity to understand the factors that contribute to successful collaboration. Comparing committees established under P.L. 106-393 with other collaborative efforts will improve the understanding among Congress, the administration, and the public about methods for involving competing interests in managing the public lands. There is currently no study addressing this.

Regulations and Statutes

Many comments and examples were presented during listening sessions that highlighted concerns and frustrations about the National Environmental Policy Act, Endangered Species Act, and the Forest Service Appeal Regulations (36CFR215). The Committee did not attempt to conduct an in-depth review of these statutes and policies because several efforts to address these concerns are currently underway by Congress, the Council of Environmental Quality, and the Forest Service. The Committee felt it was important to focus much of its attention on developing a recommendation on a method of payment, and at the same time, identify some of the policy issues that affect Federal payments and local communities adjacent to public lands.

Findings

- **Regulations and some laws governing implementation of forest management projects are causing significant delays in treating forest health problems, and can reduce payments to State and counties, as well as affect some local economies.**

The recent report issued by the Forest Service entitled the “Process Predicament” provides a good discussion of the effects to forest management actions when regulations conflict with each other, and create “gridlock.”

- **There is a great deal of frustration with the Forest Service Appeal Regulations.**

In the Committee’s public listening sessions, many people voiced concerns and provided examples about the frustration that exists over the appeal regulations currently used by the Forest Service. The public and elected officials described situations where appeals stopped fuels reduction projects in community watersheds that might be destroyed if a wildfire ever happened there. People also described situations where local citizens worked together to find agreement, but their efforts were un-done by those who did not participate, and who simply filed an appeal.

Recommendations

- **Revise the Forest Service Appeal Regulations to recognize the role of collaborative efforts and prevent unwarranted appeals from interfering with critical forest management actions related to insect and disease infestations, wildfires, and health and safety. NOTE: The Committee forwarded a recommendation to Congress about the Forest Service Appeal Regulation (36CFR215). The letter can be found in Appendix H.**
- **Congress should continue to address statutes, regulations, and policies that affect forest health.**

P.L. 106-393 Implementation

In 2001, approximately 76 percent of the eligible counties elected to receive payments totaling \$448 million in Titles I and III. An additional \$32.6 million was designated for Title II projects on Federal lands, which amounts to a total for all Titles of \$480.6 million. The remaining counties (24 percent) elected to remain under the 1908 Twenty-five Percent Payments Act. About 75 percent those counties electing to receive payments under the Twenty-five Percent Fund are in the East. Many eastern counties had not experienced the severe decline in receipt payments like counties in the West when Congress passed P.L. 106-393. However, Appendix 6 shows that receipts for the Northeast and Southeast dropped by 27 percent from 2000 to 2001.

The Secure Rural Schools and Community Self-Determination Act (P.L. 106-393), provided counties with the option of designating between 15 and 20 percent of their payments for projects on the national forest and O&C lands (Title II), or projects that accomplish other local objectives (Title III), and satisfy specific criteria. The legislation established objectives for Title II of creating additional employment opportunities; improving cooperative relationships; improving the maintenance of existing infrastructure; creating stewardship objectives that enhance forest ecosystems; and restoring and improving land health and water quality. Examples of projects Congress envisioned as meeting these objectives include:

1. Road, trail, and infrastructure maintenance;
2. Soil productivity and improvement;
3. Improvements in forest ecosystem health;
4. Watershed restoration and maintenance;
5. Restoration, maintenance, and improvement of wildlife and fish habitat; and
6. Control of noxious and exotic weeds.

In the first year of implementation, approximately 31 percent of national forest counties receiving more than \$100,000 elected to spend some portion of that in Title II projects, setting aside about \$25 million. Fifteen of the 18 O&C and Coos Bay counties elected to allocate \$7.7 million dollars for Title II projects.

Title III, or "County Projects," were selected by a large percentage of counties receiving less \$300,000. All counties selecting the full payments amount, and receiving more than \$100,000, placed some of their funds into Title III. County projects had to meet specific criteria as follows:

1. Search and rescue, and emergency service performed on Federal lands
2. Community service work camps
3. Easement purchases
4. Forest related educational opportunities
5. Fire prevention and county planning
6. Community forestry

Table 2 shows the distribution for all three Titles by region of the country.

Table 2

	Title I Amount	Title II Amount	Title III Amount
East	\$35,223,895	\$447,113	\$4,931,347
Interior	\$48,125,927	\$3,174,650	\$4,750,332
Pacific	\$312,866,311	\$28,628,321	\$32,535,887
Alaska	\$7,795,000	\$367,734	\$1,000,865
TOTAL	\$404,011,132	\$32,617,817	\$43,218,431

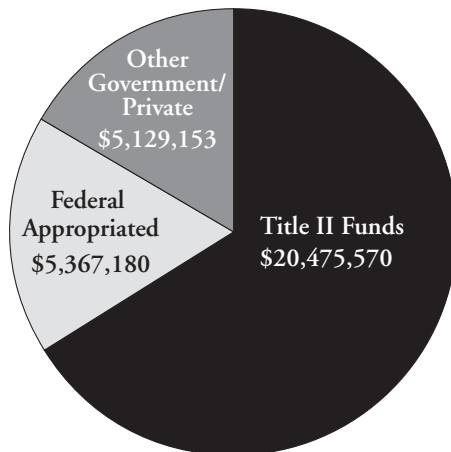
Title II Accomplishments

In the first year of implementation, county governments set aside approximately \$32.6 million to accomplish much needed work on the national forests and O&C Lands. Of all funds set aside for Title II and Title III, 43 percent were designated for Title II projects. While the Title II funds alone are significant, other funds generated by these projects is remarkable. Approximately \$20 million set aside for projects on the national forests will generate an additional \$10.6 million and create 504 projects. For every dollar of Title II funds allocated to national forest projects, an additional \$.50 of other funding was generated. The two primary sources were Federal appropriated dollars and county and State funds. However, funds were also contributed from private sources.

Approximately 145 projects funded by Title II were reported by the BLM, with expenditures totaling \$8 million. Since county elections for Title II in 2002 totaled

\$7.7 million, it can be assumed that projects were able to attract other sources of funding. Administrative costs related to these projects, and operation of resource advisory committees was approximately 11.5 percent.

National Forest Title II Project Funding



Pie Chart Showing the Distribution of Funding Sources

Kinds of Projects Selected

Resource advisory committees have recommended projects covering virtually every category specified in P.L. 106-393. For national forests, watershed and wetlands restoration constituted the largest number of projects. Resource advisory committees also recommended many projects covering recreation, noxious weed eradication, fish habitat, and trail and road maintenance activities. Projects on the O&C lands are very similar with watershed restoration, fish habitat improvement, and road and trail maintenance having the greatest number of projects. Wildlife and fish habitat restoration, hazardous fuels reduction, vegetation restoration, and environmental education were frequent recommendations by resource advisory committees. Some projects took a holistic approach and brought in private lands and dollars to address an issue across multiple ownerships. After reviewing 650 projects, the Forest Counties Payments Committee can see no indication that RACs are favoring projects that harvest commercial trees as some feared might happen. In fact, there were only 14 pre-commercial timber stand improvement projects on the national forests out of 504 total projects reviewed, and some of those served the mutual purpose of reducing hazardous fuels near roads.

Methods of Accomplishing Projects

Title II projects are being accomplished using volunteers, other government organizations such as State and county personnel, youth groups, and Forest Service personnel. However, the use of contracts to accomplish projects constitutes the most prevalent method. Contracts are being used in about 72 percent of the projects that identified a method; about 289 out of 399 projects. The high percentage of projects accomplished through contracts should have a positive effect on job and economies in local communities. A number of projects reported efforts to involve youth such as YCC, and school groups in accomplishing projects. These efforts serve to provide work experience for young people, and increase their knowledge about natural resource management and restoration.

From the information gathered, there appears to be good participation by State and county governments in accomplishing Title II projects. Grazing permit holders and timber industry employees participated and assisted in accomplishing several projects involving restoration activities.

Title III Projects

Nationally, counties designated a total of \$43 million, or 57 percent of their elections to Title III projects. National forest counties set aside a slightly higher percentage to Title III, 58 percent, than O&C counties, which designated 53 percent of their elections. Counties in the Eastern United States designated a higher percentage to Title III than Western States. From comments received, it appears there is a strong correlation between the size of the payment, and the likelihood a county will elect to put funds into Title II. The attitude of the local Federal official can also influence a county's decision to establish a resource advisory committee.

The National Association of Counties conducted a survey of counties to identify decision criteria counties used in determining whether to allocate funds to Title II, or Title III. The survey also sought to determine whether counties might change their election mix after a year of experience with the legislation. Unfortunately, very few responses were received by NACO. Of 447 national forest counties participating in the program, 32 responded. However, those responses provide an insight into how counties used the funds.

In response to the question of why counties allocated funds to Title II, three consistent responses were given; the desire

to work more closely with Federal land managers, to participate with an advisory committee, and to limit reductions in PILT payments (Title III elections may reduce a counties PILT payment). Counties where advisory committees were established during the first year of implementation did not indicate any problems, and stated they will continue to fund projects under Title II.

The majority of counties responding to the survey indicated they selected Title III over Title II, because there was a need for the type of projects specified in the

legislation. Counties also indicated concern about difficulty implementing Title II projects, and maintaining control of their funds. The categories that received the greatest number of projects were search and rescue, forest related educational opportunities, and county fire prevention and planning. Additional comments indicated that the amount of money received also influenced their election decisions. Counties may not believe it is worth the effort to establish an advisory committee when payment amounts are relatively small.

Chapter VI: Other Observations

During the 18 months the Committee has been together, it has talked with people in almost every region of the country. Members and staff met with leaders of organizations representing conservation, environmental, and local, State, and Federal governments. Over this period, a great deal of information was received about issues that may not have been directly related to subjects mentioned in legislative direction, or for which the committee chose to not make recommendations. Observations and information related to the topics are provided in this Chapter.

Effects on States and Counties from Changes in Historic Multiple Use Management

The Committee considered the effects to communities from changes to Federal multiple use management programs in developing recommendations, and it has been referenced in other chapters of this report. A tremendous amount of information exists about this subject; more than can be presented here. Therefore, some of the input, along with key points will be summarized. One of the questions posed to the public was to describe the effects from changes to historical programs, and what efforts they had taken to mitigate those impacts. Committee staff also reviewed pertinent literature and discussed issues related to this topic with knowledgeable individuals. The following summarizes the Committee's observations on this subject:

- **Many communities have not recovered from the loss of historic timber management programs.**

Communities that are more remote, lack major highway or interstate access, and are primarily tied to agricultural industries are not generally resilient. As a result, there are still significant unemployment issues in some regions of the country where public lands exist. The inland Northwest is a good example. This region, consisting of eastern Oregon and Washington, and parts of Idaho and western Montana, had substantial timber harvest levels at one time. However, they were not included in the economic adjustment programs that were available to the Pacific Northwest region. Even where those programs were available in the Northwest, they have not fully mitigated the impacts associated with the loss of such a dominant industry. In other regions of the country, the size of historic forest industries was not as great, but still provided a significant contribution to the local economy. Appendix 3 provides a comparison of timber receipt payments by geographic area for the Pacific and inland Northwest States, and northern California. This information shows that counties in eastern Oregon experienced the greatest percentage reduction in receipt payments from 1990 to 1998. A similar situation exists for northern California counties outside of the area covered by legislated payment levels from the 1993 Omnibus Budget Reconciliation Act.

- **Loss of revenue sources has resulted in the reduction of medical services in some communities.**

It is uncertain how extensive this issue is, but several officials provided information about the closure of medical facilities, or reduced medical facilities in rural communities. They cited two primary causes. The first was a loss of revenues from tax revenues generated by a wood manufacturer that had closed. The other reason was the increased costs associated with medical services to people using the public lands, and for which they were not able to fully obtain reimbursement for services provided.

- **Cost of social services, law enforcement, and correctional facilities has increased.**

Communities that have experienced high unemployment from the loss of historic forest industries indicate that crime rates have increased, the need for social services to assist families is in greater demand, and inmate numbers have increased requiring expansion of local detention facilities. The extent of this problem is uncertain, but may be consistent with the loss of any industry that creates high unemployment in a community.

- **A loss of higher wage jobs has resulted in a loss of population in some counties, along with student enrollment, teachers, and "social capital."**

Most sociologists and educators agree that a key factor in a community's ability to rebound after the loss of a major industry is education and the availability of resources. When a community begins losing students because families leave to find higher paying jobs, it can have a profound effect on funding, teachers, and programs available to those students who remain. In rural communities, schools and fire stations are two of the more important institutions that bind the members of the community together. As activities such as athletics and music associated with schools cease to exist, the social interaction in the community can be adversely affected. Concurrently, as Federal and State

agencies downsize and close facilities, a significant loss of highly educated people from the community may occur. This can hamper a community's ability to create new opportunities and develop new job skills in the community.

- **Value-added wood products and community forestry industries are emerging.**

Traditional timber manufacturing has been replaced by value-added industries in some communities. These industries produce a variety of products and utilize smaller diameter trees. Community forestry organizations focus on restoration and forest management activities, in addition to the manufacture of the final product. Some of the following observations apply to these industries:

- Federal statutes and agency policies, such as contracting, may not be flexible enough to facilitate development of these industries;
- Local Federal managers may not fully understand the important role they should play in supporting these efforts;
- The success of community forestry industries is frequently dependent on the leadership of a few individuals in a community; and

- Other communities would benefit from leadership training and access to information and venture capital.

- **Many local governments have created economic development authorities and programs.**

Most communities and local governments realize the value of diversification. Their economies are affected by market conditions as well as supply of raw materials. Some counties have been successful in adding facilities to attract foreign interests, and one county was able to receive a commitment from the Dell Corporation to construct a facility that would provide significant employment opportunities. Others have initiated job skills training programs when resources were available. Counties have also realized that there is strength in forming regional coalitions to draw on each other's skills.

Some communities have taken advantage of resources available through the Department of Commerce and various State agencies. Creation of "Hub Zones" makes it easier for small businesses to compete for Federal contracts, and is an example of one method being used to assist communities.

Costs and Benefits to Local Communities from Public Lands

Costs and benefits to local communities from the presence of public lands has been the subject of several studies dating back to the Public Land Law Review Commission Report of 1970. Two other studies since 1970 have not been able to fully quantify direct benefits and costs from the public lands. The public was asked to present information on costs and benefits in responding to questions posed by the Committee. Also, a study conducted by the Forest Service in 1999 was provided to the Committee. In that study, 118 counties were surveyed to identify direct costs and benefits to local governments from the presence of Federal lands. Responses were based on experience and professional judgment, not on a detailed examination of fiscal records or accounts. An examination of county records would involve significant time and resources, and was not an option given the timeframe the Committee had to provide a Report to Congress.

- **An increase in second home construction adjacent to public lands may increase the financial burdens of local governments to provide transportation and fire protection services to these areas.**

One of the more commonly held beliefs about public lands are the potential they offer for additional residential development, increases in property values, and added tax revenue. The 1999 survey of county officials conducted by the Forest Service provides additional confirmation that the presence of public lands has an effect on property values. Most regions of the country indicated increased value to private lands from the adjacent Federal lands. While the increased demand for properties adjacent to public lands has raised private land values, residential construction, especially second home construction, may actually create additional stress on local services that are not offset by increased tax revenue. Additional research on this issue would be helpful to local governments in their planning efforts.

- **Public lands provide multiple benefits to residents of rural communities and to urban populations.**

Many people commented about the environmental benefits provided by national forests and the O&C lands. Clean air and water, recreation, contribution to economies, and a preferred way of life were identified as positive attributes

from the presence of public lands. The survey of county officials conducted in 1999 indicated that benefits to people and communities from Federal land were possibly more important than direct fiscal costs and benefits. This is possible, because many county services that create a direct impact on local budgets are not influenced by the presence of public lands. County officials and the public commented during listening sessions that benefits such as hunting and fishing, and other recreational activities supplied by the Federal lands are of benefit to local communities.

Direct fiscal costs and benefits to counties from Federal lands are small for most services provided by counties with the exception of four areas.

The 1999 survey concluded that Federal lands do not create significant direct fiscal impacts, or benefits to many counties, because Federal lands generally do not depend on most services that counties provide. County officials did identify where public lands do create a moderate to significant cost to counties. They are search and rescue, law enforcement, road maintenance, and fire control. This agrees with recent testimony by county officials at listening sessions, and comprises the type of projects counties most frequently spent Title III funds on.

Payment Statutes and Other Laws

Payment in Lieu of Taxes (PILT)

The Committee's interest in PILT is the result of interest expressed by elected officials and the public at several listening sessions and from information contained in letters received by Committee staff. Concerns included inadequate funding levels, whether Federal payments adequately compensated counties for lost taxes, and the effects of P.L. 106-393 on PILT payments. To answer these questions, the Committee contracted with the Rocky Mountain Research Station of the Forest Service. To address the question of tax equivalency, tax and Federal payment relationships developed in 1997 were adjusted to FY 2002 price levels. Data were obtained from a nationwide sample of 100 counties containing 75 million acres of Federal land, and involved the coordinated efforts of study personnel, Forest Service personnel, tax officials, and the executive officer in each sampled county. The tax value of the Federal lands was determined to be almost \$16 billion. The Study found the following facts:

- **Payment in Lieu of Taxes (PILT) has not been fully funded as authorized, and creates confusion among some counties, because of its relationship to other payment statutes.**

In 2002, PILT payments were in excess of \$200 million, but when expressed in constant dollars, reflect only 80 percent of the value of the original \$100 million paid in fiscal year 1977.
- **Decreases in revenue sharing payments in the 1990s resulted in reduced PILT payments to counties that have a high dependency on this payment statute.**

Because prior year revenue sharing payments are deducted from a county's PILT payment (under certain circumstances), as Federal revenue sharing payments decreased during the 1990s the prorated share of each county's PILT payment decreased. The largest shortfall was in FY 1999, when PILT was only funded at 40 percent of the authorized amount.

- **Passage of the Secure Rural Schools and Community Self Determination Act relieved pressure on PILT appropriations.**

Because the interior West contains the highest percentage of Federal lands, counties in this region receive a higher percentage of the PILT payments (62 percent). With the influx of payments under P.L. 106-393, the prorated factor used to adjust the PILT shortfall changed from 58.7 percent to 65.2 percent. Therefore, all counties, even those with no land related to the Secure Schools Act, were made better off. Even though payments to counties electing the full payment amount would go down, increased payments under 106-393 more than offset the decrease. The bottom line is that while PILT payments to counties selecting payments under P.L. 106-393 dropped by almost 5 percent, payments to other counties rose by about 9 percent.

- **When considered together, payments from the Secure Rural Schools and Community Self Determination Act and PILT are less than the tax per acre.**

Overall, the estimated tax bill on Federal lands is about \$1.17 per acre. PILT payments average about \$.27 per acre while revenue sharing payments are about \$.59 per acre. These figures are for the aggregate of all counties, where some counties would be tax equivalent with increased revenue sharing payments, and some would not. The regions that have the greatest disparity between payments and tax value are the interior West and the East, and for those counties that are not tax equivalent, the tax bill is 10 times that faced by tax equivalent counties.

Federal Environmental Laws and Statutes

- **Implementation of Federal environmental laws and regulations is not efficient and can create adverse impacts on communities.**

Most people believe that environmental laws are well intended. However, they also believe that certain statutes and regulations designed to implement these laws, and different methods employed by Federal agencies, have created an unworkable situation and should be reviewed. As a result, the health of communities and forest resources are suffering.

Collaborative Efforts

There are numerous community collaboration efforts taking place across the country. There are some significant differences between them, and there may be important variables that determine their success.

- **Advisory committees that have financial resources to manage, and have a decision-making role, may experience a sense of accomplishment that improves working relationships.**

There may be an important distinction between advisory committees that provide advice versus committees that have funds to develop projects. Advisory committee members interviewed indicated they were able to find agreement on many projects because they were in a position to recommend projects. The benefits of these improved relationships may extend beyond the Committee into the community.

- **Forest Service units would benefit from the creation of advisory committees similar to those established under the Secure Rural Schools and Community Self Determination Act of 2000.**

Some national forests may not be developing advisory committees because receipt payments are not high, and establishing a committee under other authorities may be difficult. Other reasons cited include limited budgets to support the administrative needs of a committee, and the amount of time required to work with them.

- **Several questions about the operation of advisory committees were identified. These are examples of issues that can be addressed under legislation, or through administrative procedures.**

- Timing of elections for Title II or Title III by local governments and identification of projects by RACs needs to be clarified.
- Some national forests and counties had little incentive to participate with an advisory committee, when few dollars are available for projects on public lands. Funds to cover administrative costs and salaries are also scarce on some national forests.

- **Experience gained from participation in an advisory committee may help build capacity of citizens to work together in their communities to develop solutions for improving their economies.**

Mitigating impacts from loss of traditional timber manufacturing requires the capacity to build effective coalitions in communities to seek venture capital, create start-up business, and gain political support. Leadership skills gained through participation in these types of committees may help build this type of capacity.

- **Agency field managers differ in the way they view their responsibilities in working with local communities to improve social and economic conditions.**

Several examples were observed where involvement by the land manager was important for efforts in communities to develop new businesses dependent on forest resources with sustainability objectives. There were different levels of interest and involvement shown by agency employees. Local

managers should play an important role with communities to address various options for improving the quality of life within the context of the forest plan.

- **Relationships between the local governments and the Federal agencies have improved as a result of the Secure Rural Schools and Community Self Determination Act.**

Relationships between local officials and agency personnel have become strained in some communities over the past several years. Agency managers have become frustrated as well, by an inability to solve

problems beyond their control. The Secure Rural Schools and Community Self Determination Act brought Federal and local officials together, working toward a common objective, with financial resources.

The Committee observed instances where guidelines for involving local elected officials in project decisions under Title II are either unclear, or do not exist. Some local elected officials also expressed uncertainty about the level of involvement they should expect for other types of projects and forest planning efforts.

Forest Sustainability

- **There is a link between sustainable forests and sustainable communities.**

Many people believe that there is an interdependent relationship between communities and forests. Examples of this are evident in the United States, and in other parts of the world. When communities suffer economically, then forests may suffer as well.

- **The long-term sustainability of public forests is a concern to many people.**

Testimony was given to the Committee that cited examples where increased mortality to trees from insects and diseases, wildfires, and other factors were affecting the health of forests, local economies, and the quality of life in communities.

Chapter VII: Report Summary

This Chapter summarizes the key aspects of the report. Highlights from chapters are presented without a detailed discussion. For more information about each subject, refer to the appropriate chapter.

Chapter I: Introduction

Chapter I provides information about the purpose of the report and the factors that created the need for addressing payments to States and counties. The following topics are addressed:

- Payments to counties and schools from receipt collections under the 1908 Act declined by an average of 70 percent during the years from 1986 through 1998;
- Passed by Congress in 2000 to provide temporary relief to local governments, the Secure Rural Schools and Community Self Determination Act, Public Law 106-393, is considered to be one of the more significant natural resource laws passed in the last 20 years;
- Congress created the Forest Counties Payments Committee to recommend long-term solutions for making “adequate” payments to States and counties where national forests and Oregon and California Grant lands exist; and
- The Committee is charged with the following tasks:
 - a. Evaluate methods by which payments are made to eligible States and counties;
 - b. Consider the impact on States and counties of revenues from historical multiple-use of Federal lands;
 - c. Evaluate the economic, environmental, and social benefits that accrue to counties containing Federal lands;
 - d. Evaluate the expenditures by counties on activities on Federal lands, which are Federal responsibilities; and
 - e. Monitor and report payments made to eligible States and counties.
- Several studies conducted in the past looked at similar issues, but came to different conclusions. Most of the studies recognized the impacts to local communities from the presence of Federal lands, but they disagreed on the nature of the effects. While previous studies acknowledged that local communities also received benefits from adjacent public lands, it was virtually impossible to quantify them.
- Abrupt changes in commodities sold from Federal forests significantly impacted many local communities. Business closures, loss of tax revenue, and loss of “family-wage” jobs, along with reduced Federal receipt payments combined to create a tremendous hardship on rural areas.
- The Secure Rural Schools Act provided funding at a critical time when school closures and reduction of education programs were being contemplated in some communities.
- Disagreements exist over methods used by some States for allocating Federal forest funds to local governments. Lawsuits have been filed against some States to challenge these methods.

Chapter II: Communities and Federal Forest Lands, the Historical Context

Much has been written about the history behind the creation of the national forests. The Committee felt it was important to discuss the relationship between local forest communities and the public lands. Information about this history is presented in Chapter II.

- From 1860 to 1920, the United States population grew by 70 million people, and intense pressure was placed on the public domain from settlers moving west in greater numbers.
- During the 19th Century, one-half of the Nation’s land would be transferred into private ownership.
- The Forest Reserve Act of 1891 set aside vast areas of the public domain from settlement and other uses.
- Rural elected officials, school superintendents, and school boards expressed grave concerns about the withdrawal of these large blocks of public land from settlement and economic development.
- The Organic Act of 1897 attempted to address concerns of many rural communities and defined the

purposes of the forest reserves. They were for the protection of the forests from fire, protection of the forests for watershed purposes, and protection of the forests for timber purposes.

- Congress recognized there were perceptions that communities adjacent to national forests would experience certain hardships, and passed legislation to provide payments as compensation, or grants for education and highways.
- Congress later passed legislation to reimburse local governments for Revested Oregon and California Grant Lands.
- Early policies of the Forest Service recognized the need to provide for the economic stability of local communities. This intent was also emphasized by Congress when it passed the Sustained Yield Act in 1944.
- These actions all served to create a dependency on the resources of the national forests, as well as expectations for future economic stability.
- Beginning in 1960, Congress passed the Multiple Use Sustained Yield Act, which served to codify the intent of the 1897 Organic Act.
- The period between 1960 and 1980 would see numerous laws passed by Congress to provide for protection of species, ensure that environmental issues would be addressed in the management of the public lands.
- Court challenges during the 1980s and 1990s would further define the intent of these laws.
- Legal challenges, along with a change in public values about the management of natural resources would result

in a significant change in the levels of timber harvest on the Federal forests.

- Many rural communities experienced the closure and removal of most, or all, of their wood products-based manufacturing facilities and the exodus of their skilled workforces. Unemployment, mortgage defaults, and related social problems such as divorce, alcoholism, and domestic violence increased in communities impacted by the collapse of the natural resource-based economy.
- Payments to States and local governments from receipts declined an average of 70 percent, and schools and county governments faced mounting financial problems.
- In 2000, Congress passed the Secure Rural Schools and Community Self Determination Act, P.L. 106-393, to provide a 6-year period of stable payments until a long-term solution could be developed.
- Counties that select the interim legislation and receive more than \$100,000, must designate 15 to 20 percent of their funds for either public lands projects, county projects, or both.
- A unique feature of the legislation is the creation of citizen advisory committees that use funds set aside to accomplish resource management projects on the national forests and O&C lands.
- Implementation of this legislation comes at a time when significant concerns over forest health exist, and the increase in hazardous fuels on the public lands has led to significant acreage being burned.
- The President, Congress, and many citizen groups are working to find a solution to bring the forests back into ecological balance.

Chapter III: Methods

The Committee established a schedule to complete the Report to Congress consistent with the 18-month timeframe specified in the Legislation. An extensive public outreach effort was undertaken in order to gather as much information as possible. The following actions and methods were used to gather and analyze information.

- Information used by the Committee was obtained from existing information, studies commissioned by the Committee, interviews, and from information

presented by the public in response to specific questions posed by the Committee.

- Studies about the effects from changes in historical multiple use management were evaluated to the extent that the Committee could identify their existence, and to the extent that they were deemed relevant.
- A previous study on costs and benefits and tax equivalency was updated through an agreement with the Forest Service.
- Ten listening sessions were held across the country. The dates and locations are shown in Chapter III.

- Locations and dates of listening sessions were published in the Federal Register and notices were placed in local newspapers. Court reporters were used to provide a complete record of oral presentations.
- Outreach included letters to governors, and many national, regional, and local groups representing diverse interests.
- A Web site was developed that included information about the work of the Committee, copies of past studies, minutes from listening sessions, and a pathway for providing comments to the Committee.
- The report considered information submitted by respondents.

Chapter IV: Payment Options and Recommendations

- Eight alternatives were evaluated to develop recommendations that meet the needs of communities and consider the sustainability of national forests and O&C lands.
 1. Historic laws remain in effect, with modifications, after P.L. 106-393 expires:
 - O&C Grant Lands payments;
 - Coos Bay Wagon Road;
 - 1908 Twenty-five Percent Payment Act; and
 - Weeks Act.
 2. Reauthorize P.L. 106-393, with modifications.
 3. Payments based on sustainable economic asset value of resources.
 4. Payments based on land value.
 5. Payments based on tax equivalency value.
 6. Payments based on projected value of forest plan implementation.
 7. Certain lands are managed as trust lands for counties and schools.
 8. Payment made to States and counties with no connection to receipts.
- The following four criteria were developed to evaluate them against one another.
 1. Payments are adequate and stable. They should not fluctuate from year to year, and must be adequate to meet the educational needs of rural children.
 2. Payment amounts are predictable. Payments must be predictable so that schools and local governments can adequately plan multi-year budgets and retain important education programs and services to residents.
 3. Forest health and sustainability are improved. People are concerned about the long-term health of public lands. Alternatives should have some relationship to actions that promote the sustainability of forest resources.
 4. Community participation is encouraged. Alternatives should provide citizens the opportunity to be actively involved with Federal land managers in decisions about public lands.
- ***Recommended Payment Method—Reauthorize the Secure Rural Schools and Community Self Determination Act of 2000 (P.L. 106-393), with modifications.***
 1. Retain provisions for resource advisory committees with some modifications.
 2. Periodically adjust payments based on inflation.
 3. Establish a minimum payment level consistent with P.L. 106-393 that would increase if receipts rise above that level.
 4. Title I expenditures should be more flexible for the county portion of funds.
 5. Broaden the category of expenditures that may occur with Title III funds.
 6. Future payments should not be subject to annual appropriations, and should be fixed at levels established under P.L. 106-393 for the first 10 years.
 7. Increase Federal funding for Title II projects.
 8. Require that some portion of Title I to be used for public education, and prohibit supplanting of payments by States.
- Other feasible alternatives.
 1. Make payments based on economic asset value.
 2. Estimate a payment level that has no connection to receipts generated from the public lands, and no requirement for county or public lands projects.

- Alternatives considered, but rejected.
 1. Payments based on land value.
 2. Payments based on tax equivalency.
 3. Payments based on projected value of forest plan implementation.
 4. Certain lands are managed in trust for local governments and schools.
- If Congress does not pass new payment legislation, all counties would revert to the historic payment statutes. The following changes should be made to ease the associated impacts.
 1. Agency programs and budgets should reflect forest plan levels.
 2. Regulations should be streamlined to improve timeliness and effectiveness of program accomplishment.

Chapter V: Related Findings and Recommendations

During the course of gathering and analyzing information, a number of issues were identified that pertained to the issues Congress instructed the Committee to evaluate. They are presented as findings and recommendations.

Findings

- Rural schools are highly dependent on Federal forest payments.
- About 39 percent of the revenue-sharing payments from The Twenty-five Percent Fund, or P.L. 106-393 is spent on schools.
- Federal payments under the Secure Rural Schools Act do not reach many local schools as they were intended.
 - While 34 percent of States allocate 50 percent of the monies to education, those States only receive about 8 percent of the payments.
 - Almost 56 percent of payments go to nine States where revenue sharing payments are deducted from State aid.
 - When all methods of allocating the school portion of payments by States and counties are considered, it is determined that 63 percent of the money from P.L. 106-393, and The Twenty-five Percent Fund has no direct affect on the budgets of school districts in the counties where these public lands are located.
- Stability and predictability of Federal forest payments is important to maintaining education services and student activity programs.
- Some counties are assessing the maximum tax rate allowable under law, yet revenues remain insufficient to maintain basic services for their residents and visitors to public lands.
- Costs to local governments for maintaining and reconstructing local roads and bridges have increased due to reductions in Federal timber programs and Federal revenue-sharing payments.
- Costs to local governments for services they provide associated with public lands have increased. The greatest expense to local governments from Federal resource lands is search and rescue, law enforcement, road maintenance, and fire control.
- In the first year of implementation of P.L. 106-393 76 percent of eligible counties elected to receive payments totaling \$448 million (including Title II designations).
 - Approximately \$32.6 million was designated for Title II projects on Federal lands.
 - About \$20 million that was set aside for Title II projects on national forests generated an additional \$10.6 million in other funds.
 - A total of 650 projects were developed on national forests and O&C lands with Title II funds.
 - The majority of projects accomplished were watershed and wetlands restoration, noxious weed eradication, recreation trails, road maintenance, and fish habitat improvement.
 - Seventy-two percent of all projects on national forests used contracts to accomplish work, thus creating a positive impact on local economies.
- Counties designated a total of \$43 million, or 57 percent of their elections to Title III projects.
 - Categories receiving the greatest number of projects were search and rescue, forest related educational opportunities, and county fire prevention and planning.
- The total payment available under P.L. 106-393 influences whether a county elects only Title III projects, or a combination of Title II and Title III.
- The success of resource advisory committees has been in their ability to work together to develop projects, and the availability of funding to implement them.
- The success of resource advisory committees is greatly influenced by the interest of the local Federal manager.
- Some advisory committees had difficulty filling all of the categories for membership, especially where a separate county elected to form a committee rather than set up a multi-county RAC.

- Several questions about the operation of advisory committees were identified. These are examples of issues that can be addressed under legislation, or through administrative procedures.
- Regulations and some laws governing implementation of forest management projects are causing significant delays in treating forest health problems, and can reduce payments to State and counties, as well as affect some local economies.
- There is a great deal of frustration with the Forest Service Appeal Regulations.

Recommendations

- Retain payment levels established under the Secure Rural Schools Act (P.L. 106-393).
- Continue to make payments directly to States for counties adjacent to national forests.
- Provide statutory language prohibiting States from offsetting State education dollars with Federal forest payments.
- Future payments made to States and counties should not be subject to annual appropriations, and should be fixed at levels established under P.L. 106-393 for the first 10 years. Receipts collected from public lands should be used to reduce to total cost to the Treasury.
- Further study is needed to fully understand the costs to local governments associated with the presence of public lands.
- Allow more flexibility for local governments to spend the non-school portion of Federal payments.
- Title III should be continued under long-term legislation, and categories expanded to allow for expenditure of funds for non-reimbursed services provided to public lands by local governments.
- Long-term payment legislation should contain provisions for resource advisory committees.
- The Forest Service and the BLM should initiate regulations to clarify administrative questions to provide consistency for Titles II and III.
- Broaden membership categories to allow for participation by relevant local interests.
- Consider expanding the role of resource advisory committees beyond current duties and relax the current requirements for restoration projects.
- The administration and Congress should consider designating additional funds for use by resource advisory committees, especially in those national forests and counties where available dollars for Title II projects are limited.
- Monitoring of P.L. 106-393 needs to be undertaken.
- Revise the Forest Service Appeal Regulations to reward collaborative efforts.
- Congress should continue to address statutes, regulations, and policies that affect forest health.

Chapter VI: Observations

Some comments and information supplied to the Committee may not have been directly related to the issues being evaluated, or there were no recommendations developed in the report. However, some of the information is important and should not be ignored. Chapter VI contains a discussion of these observations.

- Many communities have not recovered from the loss of historic timber management programs.
- Loss of revenue sources has resulted in the reduction of medical services in some communities.
- The cost of social services, law enforcement, and correctional facilities has increased due to social problems caused by loss of jobs from closure of timber manufacturing industries.
- A loss of higher-wage jobs has resulted in a loss of population in some counties, along with student enrollment, teachers, and “social capital.”
- Value-added wood products and community forestry industries are emerging. Also:
 - Federal statutes and agency policies, such as contracting, may not be flexible enough to facilitate development of these industries;
 - Local Federal managers may not fully understand the important role they should play in supporting these efforts;
 - The success of community forestry industries is frequently dependent on the leadership of a few individuals in a community; and
 - Other communities would benefit from leadership training and access to information and venture capital.
- Many local governments have created economic development authorities and programs that are aiding in diversification of economies.

- An increase in second home construction adjacent to public lands may increase the financial burdens of local governments to provide transportation and fire protection services to these areas.
- Public lands provide multiple benefits to residents of rural communities and to urban populations.
- Payment in Lieu of Taxes (PILT) has not been fully funded as authorized, and creates confusion among some counties, because of its relationship to other payment statutes.
 - In 2002, PILT payments were in excess of \$200 million, but when expressed in constant dollars, reflect only 80 percent of the value of the original \$100 million paid in fiscal year 1977.
 - Decreases in revenue sharing payments in the 1990s resulted in reduced PILT payments to counties that have a high dependency on this payment statute.
 - Passage of the Secure Rural Schools and Community Self Determination Act relieved pressure on PILT appropriations.
 - When considered together, payments from the Secure Rural Schools and Community Self Determination Act and PILT are less than the tax per acre for the aggregate of all counties.
- Implementation of Federal environmental laws and regulations is not efficient and can create adverse impacts on communities.
- Advisory committees that have financial resources to manage, and have a decision-making role, may experience a sense of accomplishment that improves working relationships.
- Forest Service units would benefit from the creation of advisory committees similar to those established under the Secure Rural Schools and Community Self Determination Act of 2000.
- Experience gained from participation in an advisory committee may help build capacity of citizens to work together in their communities to develop solutions for improving their economies.
- Agency field managers differ in the way they view their responsibilities in working with local communities to improve social and economic conditions.
- Relationships between the local governments and the Federal agencies have improved as a result of the Secure Rural Schools and Community Self Determination Act.
- There is a link between sustainable forests and sustainable communities.
- The long-term sustainability of public forests is a concern to many people. Increased mortality to trees from insects and diseases, wildfires, and other factors were affecting the health of forests, local economies, and the quality of life in communities.

Appendix A

Historical Studies on Payments to States and Local Governments

Federal Real Estate Board 1943

The Federal Real Estate Board was created by executive order to study and make recommendations regarding the effects of Federal land acquisition on communities. Much of the land the government was purchasing at that time was heavily cut over and provided little in terms of receipts. The general view was that government ownership of this land would improve the value because of forest and range restoration activities. This in turn would generate more receipts in the long term that would benefit counties.

The following represents key findings and recommendations from the Board.

- A distinction was made between public domain lands that had never been in private ownership, and acquired lands that had previously been privately owned.
- The board concluded that loss of taxes should not be a consideration for counties adjacent to public domain lands—"the whole structure of local government has been built up around these lands without the benefit of such taxes."
- The restriction on the use of the money—roads and schools—may not be the best use of funds in all counties
- The board recommended that a partial tax equivalency payment be made for a period of years when lands move from private ownership to public ownership.
- The board adopted principles that have been studied by just about every board or commission since then. The principles advocate that the payment by the Federal government should consider the actual tax loss, the benefit to the local community from Federal ownership, and the effects of Federal ownership on the requirements for services provided by State and local governments.
- The board supported the practice of using receipts to offset the difference in lost tax revenue and costs imposed on local governments with benefits derived by local communities for the presence of public lands.
- The board also criticized the fluctuation in payments made from year to year. This is an indication that receipts from timber harvesting fluctuated significantly during this time.

Hoover Commission 1949

The Hoover Commission was created to study the organization of the Executive Branch. In the course of its work, it contracted with the Council of State Governments to conduct a study on tax immunity. The council encountered similar problems that future commissions would wrestle with. When an estimate is made about how public lands might have been developed if they were in private ownership, the possibilities can only be conjecture at best. An argument can be made that they could generate greater economic value, but an argument of equal merit can be made that adjacent lands would actually lose value. Regardless of these uncertainties, the Council of State Governments made the following conclusions.

- The presence of public land increases the value of adjacent private lands.
- If Federal lands were privatized, the costs to local communities to provide and extend services to those lands might offset any gain.
- There is a question whether the presence of public lands have a negative impact on local taxes since the public domain lands have never been available for taxation.

BUREAU of Budget (Now OMB) 1951

The Bureau of Budget began their study in 1949, after a request was made for it to assess effects on local governments which have had property removed from its tax base. The recommendations developed by the bureau only dealt with acquired lands, and did not address public domain lands. The recommendations established classifications for properties according to their use. The recommendations were never adopted.

Commission on Intergovernmental Relations (Kestnbaum Commission) 1955

The Kestnbaum Commission made an assessment of the impact of denied tax base on local communities, and

concluded that impacts were severe where the Federal property constituted a large portion of the total property. The commission considered all Federal ownerships, and considered two broad categories of lands; those where revenue payments are shared, and those that receive no payments. The following conclusions and recommendations were made by the commission.

- Federally owned lands have created a severe impact on local communities where they comprise a large percentage of the land base.
- A tax equivalency approach to reimbursement is not realistic due to a lack of uniformity in property values, and the diverse nature of the lands.
- Supported a revenue sharing approach on the national forests.
- Recommended that payments be calculated on a five-year moving average.
- When timber is traded, the value of that timber should be shared. Present day application of this approach would be the Pilot Program of Goods for Services.
- Restrictions on the use of funds for roads and schools should be abolished.
- Acquired lands should receive an in-lieu payment for 10 years.

Public Land Law Review Commission 1970

The Public Land Law Review Commission was a 19-member bipartisan commission that looked at many issues related to public lands. While they did not develop a separate recommendation for national forest land they did address Federal ownership. They made recommendations covering 10 areas. There are eight that are related to the work of the Forest Counties Payments Committee.

- State and local governments should receive payments for the tax immunity of Federal lands, and the costs should be born by all citizens of the United States.
- Payments should be reduced by a discount rate of 10 percent to 40 percent for benefits derived from the public lands. The commission could not establish methods for measuring benefits.

- Payments should be made to the State. The appropriate role for the Federal government is to deal with the State rather than the local level of government.
- Payment formulas should not distinguish public domain lands from Federally purchased lands.
- Federal payments should not be earmarked for schools and roads.
- Receipts bear no relationship to fiscal burdens associated with Federal ownership.
- Valuations for tax equivalency payments should be made every 5 to 10 years, with annual adjustments
- Federal ownership creates greater burdens on some communities for a number of reasons. This needs to be recognized and provided for.

Advisory Committee on Intergovernmental Relations 1978

The Adequacy of Federal Compensation to Local Governments for Tax Exempt Federal Lands

The Advisory Committee began the study in 1975, and completed their report in 1978. The purpose was to examine the fairness of payments made to States and counties for the presence of Federal lands. The study focused on the impacts to local government finances and made recommendations to compensate for any adverse fiscal effects. The commission made the following conclusions and recommendations.

- The presence of public land does not create an additional tax burden, except in certain counties.
- The presence of public lands does not add to the operating expenditures above what is normally spent to meet the needs of local residents.
- Special problems do exist in certain counties.
- Revenue sharing payments plus PILT payments may not completely protect against unusual cases of fiscal distress caused by Federal land ownership.
- Criteria should be developed and additional compensation should be made to counties that meet these criteria.

- Local governments may experience severe fiscal disruption when the Federal government purchases lands, or makes changes in land management policies which sharply reduce receipts.
- Adjustment payments should be made for several years to allow State and local governments to adjust to the revenue loss.
- In 1908, roads and schools were the principle local government function. In effect, the restriction for use of the payments was no restriction at all.
- The Congress should remove the restrictions on the use of funds for roads and schools.
- Local governments are affected by the stability of payments from one year to the next.
- Payments should be determined based on an average of several years.

Some important distinctions need to be made about this report. The commission acknowledged that its conclusions were based on local governments as a whole, or in the aggregate. As a result, the report does not adequately measure the effects to individual counties.

Several of the members of the commission disagreed with some of the methods used to compare costs incurred by local governments, and the determination that costs imposed on public lands counties is no different than those imposed on other rural counties.

Comptroller General Report 1979

Alternatives for achieving Greater Equities in Federal Land Payment Programs

The comptroller general conducted an assessment of various land payment programs which compensate States and counties for lost tax revenue on Federal land. The study looked at eight western States, which receive about 80 percent of the payments. The following conclusions and recommendations were made in the report that was submitted to Congress.

- Most programs pay States and local governments a percentage of receipts rather than equivalent taxes, and have little, if any, relationship to taxes that would be collected if those lands were privately owned.

- Many States and local governments are overpaid when compared to tax equivalency, and others receive little or no payment.
- Some counties received more in land payments than they would have in taxes for the same land, and received an added bonus through minimum payments under PILT.
- For six of the eight States reviewed, States and local governments received an average of \$1 more an acre from the Federal government than they would have received on a tax-equivalent basis.
- Federal land receipts are likely to increase over time.
- Congress should change the law to require payments made on a tax-equivalency basis.
- Payments should not be earmarked for particular purposes.
- If Congress retains payments made on receipts, payments should be made to counties.
- Delete the minimum payment method under PILT. It increases the disparity of payments among counties when all payments are considered.
- It is not feasible to implement a payment system based on calculating costs and benefits to States and counties. The process of calculating costs and benefits is costly, time consuming, and probably inaccurate.

An Analysis of PILT-Related Payments and Likely Property Tax Liability of Federal Resource Management Lands

Schuster, Beckley, Busher, Gebert, Niccolucci 1999

This is the most recent study involving a comparison of certain Federal payments with the tax value of Federal resource management lands. In addition to payments made under PILT, it compared PILT, plus revenue-sharing payments. It also made an assessment of costs and benefits that local governments incur, or receive from the presence of these Federal resource lands. While this Study's primary focus is on PILT, it is appropriate to include it as a source of relevant information, because it addressed costs and benefits to communities for the presence of Federal lands, and made comparisons between PILT, revenue sharing payments, and the likely property taxes Federal lands would

generate if they could be taxed. However, the Forest Counties Payments Committee believes, as presented in the report, that it is not appropriate to assume that revenue-sharing payments made under the 1908 Twenty-five Percent Payments Act were intended to compensate local governments for a denied tax base.

The Study made the following findings using 1997 payment data.

- Individually, payments to many counties are equivalent to the taxes those Federal resource lands would generate. However, many are not equivalent to the extent that when all counties are considered, payments are not equivalent. In fact, the study found that potential taxes that could be generated, exceeded PILT plus revenue-sharing payments by \$.94 per acre.
- Considering PILT payments alone, about 51 percent of all counties are tax equivalent.
- If PILT were fully funded and revenue-sharing payments were held constant, then about 62 percent of the counties are tax equivalent.
- In order to generate a national tax equivalency, PILT would have to be increased by a factor of almost three

times. Still, 18 percent of the counties would not be tax equivalent.

- Costs and benefits to local governments were evaluated through a questionnaire, and not on a detailed examination of fiscal records or accounts.
- Consistent with previous studies, there was limited data collected to indicate the specifics of costs imposed. However, the study concluded that Federal lands and programs mostly increased costs for search and rescue, law enforcement, road construction and maintenance, and fire protection and control. Local officials commenting through the questionnaire indicated some of those costs were small, and attributed the recreation programs as responsible for the greatest increase in costs.
- Direct fiscal benefits to counties from Federal lands is low. However, this should not be interpreted the same as benefits to communities from economic activity generated by certain national forest programs, nor indirect fiscal benefits to local governments. Widespread cost savings to local governments from Federal lands are difficult to document because direct fiscal benefits were perceived to be low.

Appendix B

Historical Payments (Millions of Dollars)

Year	Forest Service 25% Payments to States and Puerto Rico	Forest Service P.L. 106-393	BLM Payments to O&C & Coos Bay Counties	BLM P.L. 106-393 To O&C & Coos Bay Counties
2001	15.5	370.9		109.6
2000	192.4		62.4	
1999	205.4		65.2	
1998	227.8		68.0	
1997	239.1		70.8	
1996	260.8		73.6	
1995	277.7		76.4	
1994	316.2		79.2	
1993	301.5		79.3	
1992	329.2		91.2	
1991	327.2		97.2	
1990	372.6		104.1	
1989	371.5		110.9	
1988	293.3		109.7	
1987	270.0		69.0	
1986	382.7		72.3	
1985	225.0		61.6	
1984	199.8		66.5	
1983	132.6		47.8	
1982	230.4		39.9	
1981	233.6		97.8	
1980	280.3		98.1	
1979	277.0		97.4	
1978	238.8		88.1	
1977*	224.1		107.2	
Trans Qtr	48.9		29.6	
1976	109.5		60.3	
1975	89.8		49.3	
1974	117.5		57.8	
1973	113.7		47.2	
1972	84.7		37.7	
1971	56.6		31.1	

- Source: Forest Service and BLM
- Numbers are in millions of dollars and may vary slightly due to rounding.
- The increase from 1976 to 1977 reflects changes made to the formula for calculating payments to States as result of National Forest Management Act.
- 2001 was the first year of payments made under P.L. 106-393

Appendix C

Federal Payments to States for Certain Geographic Areas from 1908 25% Payment Act (Millions of Dollars)

Geographic Area	1990	1999	% Decline
N. California counties covered by legislated payment levels	19.8	13.1	34 %
N. California counties not covered by legislated payment levels	24.1	6.8	72 %
State of Idaho	14.5	7.5	48 %
State of Montana	11.1	6.2	45 %
Eastern Oregon counties not covered by legislated payment levels	33.7	4.2	87 %
Western Oregon counties covered by legislated payment levels	115.9	76.3	34 %
Eastern Washington counties not covered by legislated payment levels	1.8	.974	46 %
Western Washington counties covered by legislated payment levels	35.0	24.7	29 %

Source: Forest Service ARS-10

Note: Legislated payment levels for certain counties in Oregon, Washington, and California are based on the Omnibus Budget Reconciliation Act of 1993. Payments to States for fiscal year 1995 were based on 82 percent of the 5-year average payments for fiscal years 1986 to 1990 for those national forests affected by decisions on the Northern Spotted Owl. Provisions of the 1993 act were repealed with passage of P.L. 106-393.

Note: Numbers are not adjusted for inflation and may vary slightly due to rounding.

Appendix D

Trend of National Forest and O&C Timber Sales
Billion Board Feet

YEAR	National Forests Timber Volume Sold	O&C Lands Timber Volume Sold
2002	1.6	
2001	1.5	.05
2000	1.7	.07
1999	2.2	.06
1998	2.9	.2
1997	3.6	.2
1996	3.3	.2
1995	2.9	.1
1994	3.1	.01
1993	4.5	.05
1992	4.5	.05
1991	5.8	.42
1990	9.2	1.1
1989	8.4	.7
1988	10.9	1.0
1987	11.3	1.1
1986	10.9	1.6
1985	10.8	1.0
1984	10.6	1.1
1983	11.1	1.1
1982	10.0	1.1
1981	11.4	1.1
1980	11.3	1.1
1979	11.3	1.1
1978	10.9	1.1
1977	9.9	1.2
1976	11.8	1.1
1975	10.8	1.1
1974	10.2	1.2
1973	10.3	1.2
1972	10.3	1.2
1971	10.6	1.2
1970	13.4	1.7
1969	19.5	1.1
1968	11.7	1.3
1967	11.6	1.3
1966	11.3	1.2
1965	11.5	1.2
1964	11.7	1.6
1963	12.2	1.6
1962	10.3	
1961	8.8	
1960	12.2	
1959	9.3	
1958	13.3	
1957	6.5	
1956	6.8	
1955	10.1	
1954	6.4	
1953	4.7	
1952	4.7	
1951	4.9	
1950	3.4	

Source: Forest Service and BLM

Note: Numbers are in billion board feet, and may vary slightly due to rounding.

On average, it takes about 12,000 board feet of lumber to build a house in the United States.

Appendix E

Payments to States and Counties Fiscal 2001 P.L. 106-393

Forest Service County Elections by State	TITLE I	TITLE II	TITLE III	TOTAL TITLE I,II,III	% Allocated Title II & III	% of Title II and Title III Allocated To Title II	% of Title II and Title III Allocated to Title III
ALABAMA	1,755,528.98	0.00	276,852.88	2,032,381.86	14	0	100
ALASKA	7,794,999.52	367,733.67	1,000,864.74	9,163,597.93	15	27	73
ARIZONA	6,206,346.80	319,079.78	793,903.46	7,319,330.04	15	29	71
ARKANSAS	4,611,130.39	234,458.85	522,601.61	5,368,190.85	14	31	69
CALIFORNIA	55,122,779.58	4,042,659.21	6,041,471.74	65,206,910.53	15	40	60
COLORADO	2,715,868.01	0.00	324,549.89	3,040,417.90	11	0	100
FLORIDA	2,022,327.82	0.00	357,411.69	2,379,739.51	15	0	100
GEORGIA	1,136,530.27	0.00	84,438.60	1,220,968.87	7	0	100
IDAHO	19,450,288.59	2,631,538.51	751,698.73	22,833,525.83	15	78	22
ILLINOIS	261,840.24	0.00	23,217.96	285,058.20	8	0	100
INDIANA	121,965.20	0.00	0.00	121,965.20	0	0	0
KENTUCKY	356,332.88	0.00	27,594.12	383,927.00	7	0	100
LOUISIANA	3,108,319.57	0.00	535,441.39	3,643,760.96	15	0	100
MAINE	38,797.87	0.00	0.00	38,797.87	0	0	0
MICHIGAN	481,286.42	0.00	98,352.16	579,638.58	17	0	100
MINNESOTA	727,242.83	0.00	128,336.97	855,579.80	15	0	100
MISSISSIPPI	6,440,613.42	62,893.62	970,913.34	7,474,420.38	14	6	94
MISSOURI	2,047,905.09	0.00	285,844.27	2,333,749.36	12	0	100
MONTANA	11,391,154.37	54,154.97	1,972,989.53	13,418,298.87	15	3	97
NEBRASKA	28,364.00	0.00	0.00	28,364.00	0	0	0
NEVADA	302,461.51	0.00	26,864.75	329,326.26	8	0	100
NEW HAMPSHIRE	0.00	0.00	0.00	0.00	0	0	0
NEW MEXICO	1,652,522.01	103,690.67	128,473.69	1,884,686.37	12	45	55
NEW YORK	4,457.20	0.00	0.00	4,457.20	0	0	0
NORTH CAROLINA	933,317.41	0.00	22,853.28	956,170.69	2	0	100
NORTH DAKOTA	0.00	0.00	0.00	0.00	0	0	0
OHIO	40,418.70	0.00	0.00	40,418.70	0	0	0
OKLAHOMA	1,107,138.09	0.00	195,377.31	1,302,515.40	15	0	100
OREGON	128,341,365.14	13,696,607.49	12,734,042.01	154,772,014.64	17	52	48
PENNSYLVANIA	1,198,409.39	0.00	211,484.01	1,409,893.40	15	0	100
SOUTH CAROLINA	2,588,138.06	0.00	491,548.10	3,079,686.16	16	0	100
SOUTH DAKOTA	3,278,812.54	0.00	390,374.73	3,669,187.27	11	0	100
TENNESSEE	487,627.81	0.00	37,106.19	524,734.00	7	0	100
TEXAS	3,958,839.42	183,196.99	487,677.42	4,629,713.83	14	27	73
UTAH	1,253,359.45	0.00	144,479.09	1,397,838.54	10	0	100
VERMONT	224,531.00	0.00	0.00	224,531.00	0	0	0

Forest Service County Elections by State	TITLE I	TITLE II	TITLE III	TOTAL TITLE I,II,III	% Allocated Title II & III	% of Title II and Title III Allocated To Title II	% of Title II and Title III Allocated to Title III
VIRGINIA	602,517.19	0.00	16,121.89	618,639.08	3	0	100
WASHINGTON	36,233,196.63	3,168,715.07	4,969,412.70	44,371,324.40	18	39	61
WEST VIRGINIA	1,559,255.17	0.00	267,690.30	1,826,945.47	15	0	100
WISCONSIN	50,346.10	0.00	0.00	50,346.10	0	0	0
WYOMING	1,887,284.77	66,627.03	215,832.72	2,169,744.52	13	24	76
PUERTO RICO	0.00	0.00	0.00	0.00	0	0	0
State Totals	\$311,523,619.44	\$24,931,355.86	\$34,535,821.27	\$370,990,796.57	16	42	58

**Payments to States and Counties Fiscal 2001
P.L. 106-393**

BLM O&C and Coos Bay Counties	TITLE I	TITLE II	TITLE III	TOTAL TITLE I, II, III	% Allocated Title II & III	% of Title II and Title III Allocated To Title II	% of Title II and Title III Allocated to Title III
Benton	\$2,597,062.51	\$274,983.09	\$183,322.06	\$3,055,367.66	15	60	40
Clackamas	\$5,129,429.52	\$0.00	\$905,193.45	\$6,034,622.97	15	0	100
Columbia	\$1,903,896.36	\$110,873.96	\$225,107.75	\$2,239,878.07	15	33	67
Coos	\$5,452,907.06	\$452,270.53	\$510,007.19	\$6,415,184.78	15	47	53
Coos (CBWR)	\$682,664.52	\$56,621.00	\$63,849.21	\$803,134.73	15	47	53
Curry	\$3,373,408.61	\$29,765.37	\$565,542.03	\$3,968,716.01	15	5	95
Douglas	\$23,151,749.47	\$3,064,202.14	\$1,021,400.71	\$27,237,352.32	15	75	25
Douglas (CBWR)	\$123,410.01	\$16,333.68	\$5,444.56	\$145,188.25	15	75	25
Jackson	\$14,482,551.46	\$1,277,872.19	\$1,277,872.19	\$17,038,295.84	15	50	50
Josephine	\$11,164,596.15	\$610,769.08	\$1,359,453.77	\$13,134,819.00	15	31	69
Klamath	\$2,162,678.40	\$190,824.56	\$190,824.56	\$2,544,327.52	15	50	50
Lane	\$14,112,862.86	\$1,245,252.60	\$1,245,252.60	\$16,603,368.06	15	50	50
Lincoln	\$332,719.74	\$29,357.63	\$29,357.63	\$391,435.00	15	50	50
Linn	\$2,439,944.86	\$215,289.25	\$215,289.25	\$2,870,523.36	15	50	50
Marion	\$1,349,363.44	\$23,812.30	\$214,310.66	\$1,587,486.40	15	10	90
Multnomah	\$948,142.56	\$0.00	\$237,035.64	\$1,185,178.20	20	0	100
Polk	\$1,996,318.52	\$35,229.15	\$317,062.35	\$2,348,610.02	15	10	90
Tillamook	\$517,564.05	\$61,194.34	\$30,140.50	\$608,898.89	15	67	33
Washington	\$582,259.57	\$25,687.92	\$77,063.77	\$685,011.26	15	25	75
Yamhill	\$665,439.51	\$0.00	\$117,430.50	\$782,870.01	15	0	100
County Totals	\$93,168,969.18	\$7,720,338.79	\$8,790,960.38	\$109,680,268.35	15	47	53
National Forest & O&C Totals	404,692,589	32,651,695	43,326,782	480,671,065	16	43	57

Appendix F

Future Outlook for Receipt Collections from the National Forests

When Secure Rural Schools and Community Self Determination Act was passed, historical receipts from 1886 to 1999 were used to calculate the "Full Payment Amount" described in the act. Projections about future of receipt collections, and their contribution to payments made from P.L. 106-393, can never be certain. However, the following table indicates the trend of receipt collections after passage of the act. The data also provides useful trend information to illustrate the effects of not passing long-term payment legislation and all counties having to revert to the 1908 payments act. Counties deciding whether to remain under the Twenty-five Percent Act, or switch to the full payment amount during this interim period should be aware of trends in receipt collections from all programs that collect receipts.

Estimated 25 Percent Payment Based on Actual Receipts Collected

	P.L. 106-393 Full Payment Amount	2000 25% Payment Estimate	2001 25% Payment Estimate	2000 Receipts Collected	2001 Receipts Collected	% Decline 2000-2001
Western Regions	270,454,000	32,642,110	20,756,184	130,568,440	83,024,736	36%
Rocky Mountain Regions	39,380,000	29,157,940	20,756,184	116,631,760	83,024,736	28%
Northeast and Southeast	54,211,000	34,202,937	24,877,211	136,811,751	99,508,844	27%

Source: Forest Service ARS-04

Note: 2000 and 2001 estimates are without the owl guarantees to illustrate what payments would be in the future without them.

Owl guarantees would have expired had P.L. 106-393 not rescinded the 1993 legislation that created them.

Note: Full Payment Amount column includes funds from Titles I, II, & III

Appendix G

Language to Prevent States from Substituting Federal Funds

The following language, or similar language, should be included in new legislation to prevent the substitution of Federal funds by States.

“Funds paid to a State under 16 U.S.C. 500 and this act must be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) that are available to counties with national forests, and in no case may supplant otherwise available Federal, State, or local funds.”

Appendix H

Date: August 4, 2002

The Honorable James V. Hansen
Chairman, Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515

Dear Congressman Hansen:

The Forest Counties Payments Committee has conducted nine listening sessions in many areas of the Country to gather information for developing recommendations to Congress in accordance with P.L. 106-291. One of the issues the Committee consistently heard from the public was frustration about the Forest Service project appeal regulation (36 CFR 215).

Many people with diverse interests and values are working together in communities to find common ground on issues related to the management of forests and rangelands. Through their collaborative efforts, they develop projects that restore water quality, reduce hazardous fuels, and improve wildlife habitat. Unfortunately, their efforts, and the efforts of the Forest Service, are easily undone by an administrative process that provides for objections by individuals not actively engaged in finding solutions.

The devastating wildfires this year will create a critical need for restoration projects, as well as salvage operations. The current appeal process used by the Forest Service has the potential to create a serious bottleneck when a bias for action is needed. When these types of projects are delayed, there is a loss of economic value to local communities. The Committee believes that a different approach is needed to ensure proper management of the national forests and grasslands, to promote more meaningful collaboration by citizens, and to ensure adequate due process.

The Forest Counties Payments Committee has the responsibility to make recommendations to Congress regarding evaluations it makes of costs and benefits to counties from the presence of public lands, to look at those factors affecting payments, and to consider sustainable forestry as defined in the legislation. We believe that the Forest Service appeal process for projects has a direct effect on these areas.

The Committee recommends an interim and a long-term solution to the problem. In the short-term, Congress should withdraw the statutory requirement for project-level appeal regulations set forth in appropriation law. No other agency in the Executive Branch has this requirement. The Forest Service should be instructed to evaluate the need for retaining the current appeal regulation at 36 CFR 215, and take steps within a specified time to make changes they deem necessary. Congress would exercise its oversight responsibilities to monitor progress and provide feedback.

The Forest Service should also be given authority to suspend the current 215 Appeal Regulation for restoration and salvage operations of wildfires that occur in calendar year 2002. This would provide the necessary relief to quickly treat these areas and engage in salvage operations where appropriate. It would also give the Agency time to complete its evaluation of the current appeal process and make needed changes.

Sincerely,

/s/Mark Evans

MARK EVANS
Chair
Forest Counties Payments Committee

Editor's Note: This letter was addressed to the Chairs of the six Committees of Jurisdiction

Appendix I

Establishment of the Advisory Committee on Forest Counties Payments

Sec. 320 P.L. 106-291

(a) Definitions.—In this section:

- (1) Advisory committee.—The term “Advisory Committee” means the Forest Counties Payments Committee established by this section.
- (2) Committees of jurisdiction.—The term “committees of jurisdiction” means the Committee on Agriculture, the Committee on Resources, and the Committee on Appropriations of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry, the Committee on Energy and Natural Resources, and the Committee on Appropriations of the Senate.
- (3) Eligible county.—The term “eligible county” means a county that, for one or more of the fiscal years 1986 through 1999, received—
 - (A) a payment under title II of the Act of August 28, 1937 (chapter 876; 50 Stat. 875; 43 U.S.C. 1181f), or the Act of May 24, 1939 (chapter 144; 53 Stat. 753; 43 U.S.C. 1181f-1 et seq.); or
 - (B) a portion of an eligible State's payment, as described in paragraph (4).
- (4) Eligible State.—The term “eligible State” means a State that, for one or more of the fiscal years 1986 through [[Page 114 STAT. 991]] 1999, received a payment under the sixth paragraph under the heading of “FOREST SERVICE” in the Act of May 23, 1908 (35 Stat. 260; 16 U.S.C. 500), or section 13 of the Act of March 1, 1911 (36 Stat. 963; 16 U.S.C. 500).
- (5) Federal lands.—The term “Federal lands” means the following:
 - (A) Lands within the National Forest System, as defined in section 11(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1609(a)), exclusive of the National Grasslands and land utilization projects designated as National Grasslands administered pursuant to the Act of July 22, 1937 (7 U.S.C. 1010-1012).
 - (B) Such portions of the Oregon and California Railroad grant lands revested in the United States by the Act of June 9, 1916 (chapter 137; 39 Stat. 218), and the Coos Bay Wagon Road grant lands reconveyed to the United States by the Act of February 26, 1919 (chapter 47; 40 Stat. 1179), as are or may hereafter come

under the jurisdiction of the Secretary of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, that shall be managed, except as provided in the former section 3 of the Act of August 28, 1937 (50 Stat. 875;

43 U.S.C. 1181c), for permanent forest production.

- (6) Sustainable forestry.—The term “sustainable forestry” means the practice of meeting the forest resource needs and values of the present without compromising the similar capability of future generations.

(b) Establishment of Advisory Committee.—

- (1) Establishment required.— <<NOTE: Forest Counties Payments Committee.>> There is hereby established an advisory committee, to be known as the Forest Counties Payments Committee, to develop recommendations, consistent with sustainable forestry, regarding methods to ensure that States and counties in which Federal lands are situated receive adequate Federal payments to be used for the benefit of public education and other public purposes.
- (2) Members.—The Advisory Committee shall be composed of the following members:
 - (A) The Chief of the Forest Service, or a designee of the Chief who has significant expertise in sustainable forestry.
 - (B) The Director of the Bureau of Land Management, or a designee of the Director who has significant expertise in sustainable forestry.
 - (C) The Director of the Office of Management and Budget, or the Director's designee.
 - (D) Two members who are elected members of the governing branches of eligible counties; one such member to be appointed by the President pro tempore of the Senate (in consultation with the chairmen and ranking members of the committees of jurisdiction of the Senate) and one such member to be appointed by the Speaker of the House of Representatives (in consultation with the chairmen and ranking members of the committees of jurisdiction of the House of Representatives) within 60 days of the date of the enactment of this Act. [[Page 114 STAT. 992]]
 - (E) Two members who are elected members of school boards for, superintendents from, or teachers employed by, school districts in eligible counties; one such member to be appointed by the President pro tempore of the Senate (in consultation with the chairmen and ranking

members of the committees of jurisdiction of the Senate) and one such member to be appointed by the Speaker of the House of Representatives (in consultation with the chairmen and ranking members of the committees of jurisdiction of the House of Representatives) within 60 days of the date of the enactment of this Act.

- (3) Geographic representation.—In making appointments under subparagraphs (D) and (E) of paragraph (2), the President pro tempore of the Senate and the Speaker of the House of Representatives shall seek to ensure that the Advisory Committee members are selected from geographically diverse locations.
- (4) Organization of advisory committee.—
 - (A) Chairperson.—The Chairperson of the Advisory Committee shall be selected from among the members appointed pursuant to subparagraphs (D) and (E) of paragraph (2).
 - (B) Vacancies.—Any vacancy in the membership of the Advisory Committee shall be filled in the same manner as required by paragraph (2). A vacancy shall not impair the authority of the remaining members to perform the functions of the Advisory Committee under this section.
 - (C) Compensation.—The members of the Advisory Committee who are not officers or employees of the United States, while attending meetings or other events held by the Advisory Committee or at which the members serve as representatives of the Advisory Committee or while otherwise serving at the request of the Chairperson of the Advisory Committee, shall each be entitled to receive compensation at a rate not in excess of the maximum rate of pay for grade GS-15, as provided in the General Schedule, including traveltime, and while away from their homes or regular places of business, shall each be reimbursed for travel expenses, including per diem in lieu of subsistence as authorized by section 5703 of title 5, United States Code, for persons in Government service employed intermittently.
- (5) Staff and rules.—
 - (A) Executive director.—The Advisory Committee shall have an Executive Director, who shall be appointed by the Advisory Committee and serve at the pleasure of the Advisory Committee. The Executive Director shall report to the Advisory Committee and assume such duties as the Advisory Committee may assign. The

Executive Director shall be paid at a rate not in excess of the maximum rate of pay for grade GS-15, as provided in the General Schedule.

- (B) Other staff.—In addition to authority to appoint personnel subject to the provisions of title 5, United States Code, governing appointments to the competitive service, and to pay such personnel in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such [[Page 114 STAT. 993]] title relating to classification and General Schedule pay rates, the Advisory Committee shall have authority to enter into contracts with private or public organizations which may furnish the Advisory Committee with such administrative and technical personnel as may be necessary to carry out the functions of the Advisory Committee under this section. To the extent practicable, such administrative and technical personnel, and other necessary support services, shall be provided for the Advisory Committee by the Chief of the Forest Service and the Director of the Bureau of Land Management.
 - (C) Committee rules.—The Advisory Committee may establish such procedural and administrative rules as are necessary for the performance of its functions under this section.
 - (6) Federal agency cooperation.—The heads of the departments, agencies, and instrumentalities of the executive branch of the Federal Government shall cooperate with the Advisory Committee in the performance of its functions under this section and should furnish, as practicable, to the Advisory Committee information which the Advisory Committee deems necessary to carry out such functions.
- (c) Functions of Advisory Committee.—
- (1) Development of recommendations.—
 - (A) In general.—The Advisory Committee shall develop recommendations for policy or legislative initiatives (or both) regarding alternatives for, or substitutes to, the payments required to be made to eligible States and eligible counties under the provisions of law referred to in paragraphs (3) and (4) of subsection (a) in order to provide a long-term method to generate annual payments to eligible States and eligible counties.
 - (B) Reporting requirements.—

<<NOTE: Deadline.>> Not later than 18

months after the date of the enactment of this Act, the Advisory Committee shall submit to the committees of jurisdiction a final report containing the recommendations developed under this subsection. The Advisory Committee shall submit semiannual progress reports on its activities and expenditures to the committees of jurisdiction until the final report has been submitted.

- (2) Guidance for committee.—In developing the recommendations required by paragraph (1), the Advisory Committee shall—
 - (A) evaluate the method by which payments are made to eligible States and eligible counties under the provisions of law referred to in paragraphs (3) and (4) of subsection (a), and related laws, and the use of such payments;
 - (B) consider the impact on eligible States and eligible counties of revenues derived from the historic multiple use of the Federal lands;
 - (C) evaluate the economic, environmental, and social benefits which accrue to counties containing Federal lands, including recreation, natural resources industries, and the value of environmental services that result from Federal lands; and
 - (D) evaluate the expenditures by counties on activities on Federal lands which are Federal responsibilities.

[[Page 114 STAT. 994]]

- (3) Monitoring and related reporting activities.—The Advisory Committee shall monitor the payments made to eligible States and eligible counties under the provisions of law referred to in paragraphs (3) and (4) of subsection (a), and related laws, and submit to the committees of jurisdiction an annual report describing the amounts and sources of such payments and containing such comments as the Advisory Committee may have regarding such payments.

- (4) Testimony.—The Advisory Committee shall make itself available for testimony or comments on the reports required to be submitted by the Advisory Committee and on any legislation or regulations to implement any recommendations made in such reports in any Congressional hearings or any rulemaking or other administrative decision process.

- (d) Federal Advisory Committee Act Requirements.—The provisions of the Federal Advisory Committee Act (5 U.S.C. App.) shall apply to the Advisory Committee.

- (e) Termination of Advisory Committee.—The Advisory Committee shall terminate three years after the date of the enactment of this Act.

- (f) Funding Source.—At the request of the Executive Director of the Advisory Committee, the Secretary of Agriculture shall provide funds from any account available to the Secretary, not to exceed \$200,000 in fiscal year 2001, for the work of the Advisory Committee necessary to meet the requirements of this section.

Appendix J

Definitions

The following definitions to words and terms utilized in this Report are provided to assist the reader, and to avoid any misunderstanding about the intent, or the meaning of a particular word being used.

County: For the purposes of this report - local governments of jurisdiction as defined in State constitutions. They may include counties, parishes, townships, boroughs, etc.

Full Payment Amount: A provision of P.L. 106-393. A payment amount determined by averaging the three highest years of payments from 1986 to 1999, for national forests, O&C lands, and Coos Bay Wagon Road grant lands.

RAC's: Resource Advisory Committees as defined in P.L. 106-393.

P.L.106-393: The Secure Rural Schools and Community Self Determination Act. Signed into law in 2000, it established a six-year period of stable payments to States and counties, required monies to be set aside for public lands projects, or county projects when counties elect to receive payments under the Act, and their payments exceed \$100,000. Public lands projects require the formation of resource advisory committees.

Title I: A provision of P.L. 106-393. In the case of national forests; payments made to States for use by counties in funding education and transportation needs. In the case of O&C and Coos Bay Wagon Road Lands; payments made to counties to be used for public safety, law enforcement, education, and other public purposes.

Title II: A provision of P.L. 106-393. A portion, not exceeding 20% in combination with any Title III elections, of a county's Full Payment Amount to be used for projects on the national forests and O&C Lands. Designation of funds to this Title requires establishment of a resource advisory committee.

Title III: A provision of P.L. 106-393. A portion, not exceeding 20% in combination with any Title II elections, of a county's Full Payment Amount to be used for projects designated by the county in accordance with specific guidelines specified in the Act.

Appendix K

BIBLIOGRAPHY

Idaho Department of Commerce, Division of Economic Development, *Profile of Rural Idaho, A Look at Economic and Social Trends Affecting Rural Idaho*, IDC 99-33120-4M.

Bonnicksen, Thomas M., *America's Ancient Forests: From the Ice Age to the Age of Discovery*, John Wiley & Sons, Inc., 2000.

U.S. Department of the Interior, "An Analysis of PILT-Related Payments and Likely Property Tax Liability of Federal Resource Management Lands," IA No. 14422P850-A8-0005, USDA Forest Service Rocky Mountain Research Station, January 11, 1999.

Public Land Law Review Commission, *A Catalog of Possible Alternatives to or Modifications of Existing Federal Programs for Revenue Sharing and Payments in Lieu of Taxes on the Public Land*, EBS Management Consultants, Inc. July 1968.

Kenney, Douglas S., Cater, Gabriel D., Jerstein, Joshua M., *Values of the Federal Public Lands*, Natural Resources Law Center, University of Colorado School of Law, Spring 1998.

U.S. General Accounting Office, *Report to the Honorable Vic Fazio, House of Representatives, Land Management Agencies, Revenue Sharing Payments to States and Counties*, GAO/RCED-98-261, September, 1998.

USDA Forest Service, *Water & the Forest Service*, FS-660, January, 2000.

U.S. General Accounting Office, Comptroller General, *Report to the Congress of the United States, Alternatives for Achieving Greater Equities in Federal Land Payment Programs*, PAD-79-64, September 25, 1979.

Huebner, Anne E., Hickman, Clifford A., Kaiser, H. Fred, *A Tax Equivalency Study on National Forest System Lands in the United States*, FS-396, USDA Forest Service, December 1985.

Fedkiw, John, *Managing Multiple Uses on National Forests 1905-1995, A 90-year Learning Experience and It Isn't Finished Yet*, USDA Forest Service.

College of Forestry, Oregon State University, "Community Stability in Forest-Based Economies, Proceedings of a Conference in Portland, Oregon, November 16-18, 1987," edited by Dennis C. Le Master, John H. Beauter.

Williams, Gerald W., "General History of the O&C Lands," USDA Forest Service, Pacific Northwest Region.

Advisory Commission on Intergovernmental Relations, *A Commission Report: The Adequacy of Federal Compensation to Local Governments for Tax Exempt Federal Lands*, A-68, July 1978.

Advisory Commission on Intergovernmental Relations, *A Commission Report: Payments in Lieu of Taxes on Federal Real Property*, A-90, September 1981.

Williams, Gerald W., "USDA Forest Service and Revenue Sharing With States 1905-Present," USDA Forest Service Office of Communication, November 19, 2001.

Gorte, Ross W., "RS20178: Forest Service Receipt-Sharing Payments: Proposals for Change," National Council for Science and the Environment, Resources, Science, and Industry Division, National Library for the Environment, Congressional Research Service Issue Brief, April 26, 2000.

Gorte, Ross W., "Forest Service Revenue-Sharing Payments: Distribution System," National Council for Science and the Environment, Resources, Science, and Industry Division, Congressional Research Service, Library of Congress, November 19, 1999.

Gorte, Ross W., "Forest Service Revenue-Sharing Payments: Legislative Issues," Resources, Science and Industry Division, Congressional Research Service, Library of Congress, March 24, 2000.

Gorte, Ross W., "County Schools and Services Funding Revitalization Act of 1999," Resources, Science, and Industry Division, Congressional Research Service, Library of Congress, August 5, 1999.

Gorte, Ross W., "Forest Service Receipt-Sharing Payments: Proposals for Change," CRS Report for Congress, Order Code RS20178, Resources, Science, and Industry Division, Congressional Research Service, Library of Congress, April 26, 2000.

U.S. General Accounting Office, "By the Comptroller General, Report to the Congress of the United States: Alternatives for Achieving Greater Equities in Federal Land Payment Programs," PAD-79-64, September 25, 1979.

Gorte, Ross W., "Forest Service Receipt-Sharing Payments: Legislative History," Resources, Science, and Industry Division, Congressional Research Service, Library of Congress, May 26, 1999.

Schuster, Ervin G., Gebert, Krista M., "Property Tax Equivalency on Federal Resource Management Lands," *Journal of Forestry*, Vol. 99, No. 5, May 2001.

Carroll, Matthew S., *Community and the Northwestern Logger - Continuities and Changes in the Era of the Spotted Owl*, Rural Studies Series, Rural Sociological Society, Westview Press, Inc., 1995.

Schuster, Ervin G., Beckley, Paul R., Bushur, Jennifer M., Gebert, Krista M., Niccolucci, Michael J., "An Analysis of PILT-Related Payments and Likely Property Tax Liability of Federal Resource Management Lands," USDA Forest Service, Rocky Mountain Research Station, General Technical Report RMRS-GTR-36WWW, September 1999.

Schuster, Ervin G., "Revenue Sharing and Resource Management in Western States," *Western Journal of Applied Forestry*, Vol. 11, No. 1, USDA Forest Service, Intermountain Research Station, January 1996 .

Kenney, Douglas S., "Arguing About Consensus: Examining the Case Against Western Watershed Initiatives and Other Collaborative Groups Active in Natural Resources Management," Natural Resources Law Center, University of Colorado School of Law, 2000.

The Society of American Foresters, *Forest of Discord: Options for Governing our National Forests and Federal Public Lands*, ISBN 0-939970-78-3, 1999.

Floyd, Donald W., *Forest Sustainability, The History, the Challenge, the Promise*, The Forest History Society, 2002 .

The Forest History Society, "Origins of the National Forests: A Centennial Symposium", 1992.

Appropriations Hearing Before the Committee on Agriculture and Forestry of the United States Senate on HR 24815, "Making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1908", House AG-59-E, 1907.

Bush, George W., President of the United States, "Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities," White House Web site, August 22, 2002.

Brussman, Robert S., "The Organic Act: A Historical Perspective," National Forest Products Association, Washington, DC, 1973.

Committee on Public Lands, "Granting Ten Percent Gross Receipts From Forest Reserves to Certain Counties," A report to accompany HR 19575, p.1, June 20, 1906.

U.S. Department of the Interior Circular 30 LD 23-24, 1900.

USDA "Report of the Forester" 10-11, 1913.

Gorte, Ross W. "Forest Service Receipt Sharing Payments: Legislative, A Memorandum for Members of Congress," Congressional Research Service, Library of Congress, May 26, 1999.

Keating v Federal Energy Regulatory Commission, 114 F. 3d 1265-1269, 1997.

Organic Administration Act of 1897, 30 Stat. 34, 1897.

Pinchot, Gifford, *The Use of the National Forests*, U.S.D.A., 1907.

Public Land Law Revision Commission, *One Third of the Nations Land*, Government Printing Office, 1970.

Roth, Filbert, "The Future of Our Public Forest Lands, Forestry and Irrigation," Washington, DC, 1902.

Steen, Harold K. "The Beginning of the National Forest System," FS-488, USDA, 1991.

The National Fire Plan, Miscellaneous Publication MP-1584, USDA, March 2002.

USA v New Mexico, 438 US at 708, 98 S. Ct. at 3012-3021 fn 16.

59th Congressional Session 2, Chapter 2907, p. 1270, 34 Stat. 1270, 1907.

38 Stat. 441, 1914.

72 Stat. 1571 (September 2, 1958); See House Report No. 2638, 1958, USCCAN. 4728.

Yockim, Ron, "History of Forest Receipts" (unpublished), Association of O&C Counties, 2002.

Yockim, Ron, "A Brief Legal History of the O&C Lands" (unpublished), Association of O&C Counties, 2002.

USDA Forest Service, *The "Purposes" of the National Forests - - A Historical Re-Interpretation of Policy Development*, Department of Political Science, Department of Forest and Wood Sciences, College of Forestry and Natural Resources, Colorado State University, January 1979.

Report to the Forest Counties Payments Committee by USDA Forest Service, "An Inquiry into selected Aspects of Revenue Sharing on Federal Lands," Research Unit 4802—Economic Aspects of Forest Management on Public Lands, Rocky Mountain Research Station, Missoula, Montana, 2002.

Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000

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January 21, 2015

Congressional Research Service

7-5700

www.crs.gov

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Summary

Many counties are compensated for the tax-exempt status of federal lands. Counties with national forest lands and with certain Bureau of Land Management (BLM) lands have historically received a percentage of agency revenues, primarily from timber sales. However, timber sales have declined substantially—by more than 90% in some areas—which had led to substantially reduced payments to the counties. Thus, Congress enacted the Secure Rural Schools and Community Self-Determination Act of 2000 (SRS; P.L. 106-393) as a temporary, optional program of payments based on historic rather than current revenues.

Authorization for SRS payments originally expired at the end of FY2006, but the program was extended through FY2013 by several reauthorizations, starting with a one-year reauthorization for FY2007 (P.L. 110-28). In 2008, the Emergency Economic Stabilization Act (P.L. 110-343) enacted a four-year extension to SRS authorization through FY2011, with declining payments, a modified formula, and transition payments for certain areas. In 2012, Congress enacted a one-year extension through FY2012, and amended the program to slow the decline in payment levels and to tighten requirements that counties select a payment option promptly (P.L. 112-141). In 2013, Congress again enacted a one-year extension through FY2013 (P.L. 113-40). SRS payments are disbursed after the fiscal year ends, so the FY2013 SRS payment—the last authorized payment—was made in FY2014.

Congressional debates over reauthorization have considered the basis and level of compensation (historical, tax equivalency, etc.); the source of funds (receipts, a new tax or revenue source, etc.); the authorized and required uses of the payments; interaction with other compensation programs (notably Payments in Lieu of Taxes); and the duration of any changes (temporary or permanent). In addition, legislation with mandatory spending, such as SRS reauthorization, raises policy questions about congressional control of spending. Current budget rules to restrain deficit spending typically impose a procedural barrier to such legislation, generally requiring offsets by additional receipts or reductions in other spending.

SRS expired at the end of FY2013. County payments are set to return to a revenue-based system for FY2014. On January 15, 2015, the Forest Service announced that the revenue-sharing payment to be disbursed in February 2015 will be \$50.4 million, which is significantly lower than the previous years' SRS payments. The 114th Congress may consider extending SRS (with or without modifications), implementing other legislative proposals to address the county payments, or taking no action.

Contents

Background.....	1
Payment History: Declining Revenue-Sharing Payments Leads to Enactment of SRS	2
SRS and Other Federal Compensation Programs	5
Revenue-Sharing Program Concerns and Responses	6
Declining Timber Receipts	6
Annually Fluctuating Payments.....	6
Linkage.....	7
Legislative History of the Secure Rural Schools and Community Self-Determination Act of 2000, as Amended	7
Reauthorization Efforts in the 110 th Congress	8
Four-Year Extension through FY2011 Enacted in the 110 th Congress	9
One-Year Extension Through FY2012 Enacted in the 112 th Congress.....	11
Legislative Activity in the 113 th Congress.....	11
One-Year Extension Through FY2013 Enacted in the 113 th Congress	12
FY2014 Reauthorization Efforts	12
Legislative Issues.....	12
Offsets for New Mandatory Spending.....	13
Geographic Distribution of SRS and PILT Payments.....	13
Lands Covered.....	15
Basis for Compensation.....	16
Source of Funds.....	16
Authorized and Required Uses of the Payments	17
Duration of the Programs	18

Figures

Figure 1. Forest Service Cut Volume and Cut Value (2013 dollars).....	3
Figure 2. FS Total Payments and Estimated Payments.....	5
Figure 3. PILT and Forest Service Payments, FY2013.....	14
Figure 4. Source and Distribution of FS Payments.....	17

Tables

Table 1. SRS Payments, FY2000-FY2013	4
Table 2. SRS Legislative History.....	8
Table 3. FY2013 SRS and PILT Payments, by State	14
Table A-1. FY2006 and FY2009 FS and O&C Payments Under SRS, by State	19

Appendixes

Appendix A. SRS Payments in FY2006 and FY2009	19
Appendix B. Historical Proposals to Change the Revenue-Sharing System	21
Appendix C. FY2013 Sequestration Issues	23

Contacts

Author Contact Information.....	25
Acknowledgments	25

Federally owned lands cannot be taxed by state or local governments, but may create demand for services from state or local entities, such as fire protection, police cooperation, or longer roads to skirt the property. Under federal law, local governments are compensated through various programs due to the presence of federal lands. Counties with national forest lands and with certain Bureau of Land Management (BLM) lands have historically received a percentage of agency revenues, primarily from timber sales. However, timber sales have declined substantially since the historic high cut values in 1989—by more than 90% in some areas—which had led to substantially reduced payments to the counties. Congress enacted the Secure Rural Schools and Community Self-Determination Act of 2000 (SRS)¹ to provide a temporary, optional system to supplant the revenue-sharing programs for the national forests, managed by the Forest Service (FS) in the Department of Agriculture, and for certain public lands administered by the BLM in the Department of the Interior.

The law authorizing these payments (SRS) originally expired at the end of FY2006, but was extended an additional seven years through several reauthorizations. The 109th Congress considered the program, but did not enact reauthorizing legislation. The 110th Congress extended the payments for one year through FY2007, and then enacted legislation to reauthorize the program for four years with declining payments, and to modify the formula for allocating the payments. The 112th Congress extended the program for one more year through FY2012, and amended the program to slow the decline in payments. The 113th Congress again enacted a one-year extension, reauthorizing the program through FY2013, but did not reauthorize the program for FY2014. SRS payments are disbursed after the fiscal year ends, so the FY2013 payment was made in FY2014.

Without additional congressional action, payments for FY2014 (to be made in FY2015) will revert to a percentage of agency revenues, primarily from timber sales and recreation fees. This report explains the changes enacted for the program by the amendments in 2008 and 2012 and the effect of the FY2013 sequester order on the FY2012 payments. It then describes the issues that Congress has debated and may continue to debate in the 114th Congress.

Background

In 1908, the FS began paying 25% of its gross receipts to states for use on roads and schools in the counties where national forests are located; receipts come from sales, leases, rentals, or other fees for using national forest lands or resources (e.g., timber sales, recreation fees, and communication site leases).² This mandatory spending program was enacted to compensate local governments for the tax-exempt status of the national forests, but the selected compensation rate (10% of gross receipts in 1906 and 1907; 25% of gross receipts since) was not discussed in the 1906-1908 debates. This revenue- or receipt-sharing program is called FS Payments to States (also referred to as the 1908 payment, or the 25% payment), because each state must spend the funds on road and school programs, although states have no discretion in assigning the funds to the county: the FS determines the amount to be allocated to each county based on the national forest acreage in each county. The states cannot retain any of the funds; they must be passed

¹ P.L. 106-393, 16 U.S.C. §§7101-7153.

² Act of May 23, 1908, 16 U.S.C. §500. For more on these and other county-compensation programs with mandatory spending for federal lands, see CRS Report RL30335, *Federal Land Management Agencies' Mandatory Spending Authorities*.

through to local governmental entities for use at the county level (but not necessarily to county governments themselves) for authorized road and school programs. State law sets forth how the payments are to be allocated between road and school projects, and the state laws differ widely, generally ranging from 30% to 100% for school programs, with a few states providing substantial local discretion on the split.

Congress has also enacted numerous programs to share receipts from BLM lands for various types of resource use and from various classes of land. One program—the Oregon and California (O&C) payments—accounts for the vast majority (more than 95%) of BLM receipt-sharing.³ The O&C payments are made to the counties in western Oregon containing the revested Oregon and California grant lands that were returned to federal ownership for failure of the states to fulfill the terms of the grant. The O&C counties receive 50% of the receipts from these lands. These mandatory payments go directly to the counties for any local governmental purposes. Concerns about, and proposals to alter, FS revenue-sharing payments also typically include the O&C payments, because both are substantial payments derived largely from timber receipts.

Payment History: Declining Revenue-Sharing Payments Leads to Enactment of SRS

FS revenue—and consequently, revenue-sharing payments—peaked in the late 1980s. The FY1989 FS 25% payments totaled \$362 million, while O&C payments totaled \$110 million. FS and O&C receipts have declined substantially since FY1989, largely because of declines in federal timber sales (see **Figure 1**), but also due to a variety of factors. The decline began in the Pacific Northwest, owing to a combination of forest management policies and practice, efforts to protect northern spotted owl habitat, increased planning and procedural requirements, changing public preferences, economic and industry factors, and other values. Provisions in the Omnibus Budget Reconciliation Act of 1993⁴ directed FS payments for 17 national forests in Washington, Oregon, and California and BLM payments to the O&C counties at a declining percentage of the average payments for FY1986-FY1990.⁵ Declining federal timber sales in other regions led to the nationwide SRS program replacing these “safety net” or “owl” payments in 2000.

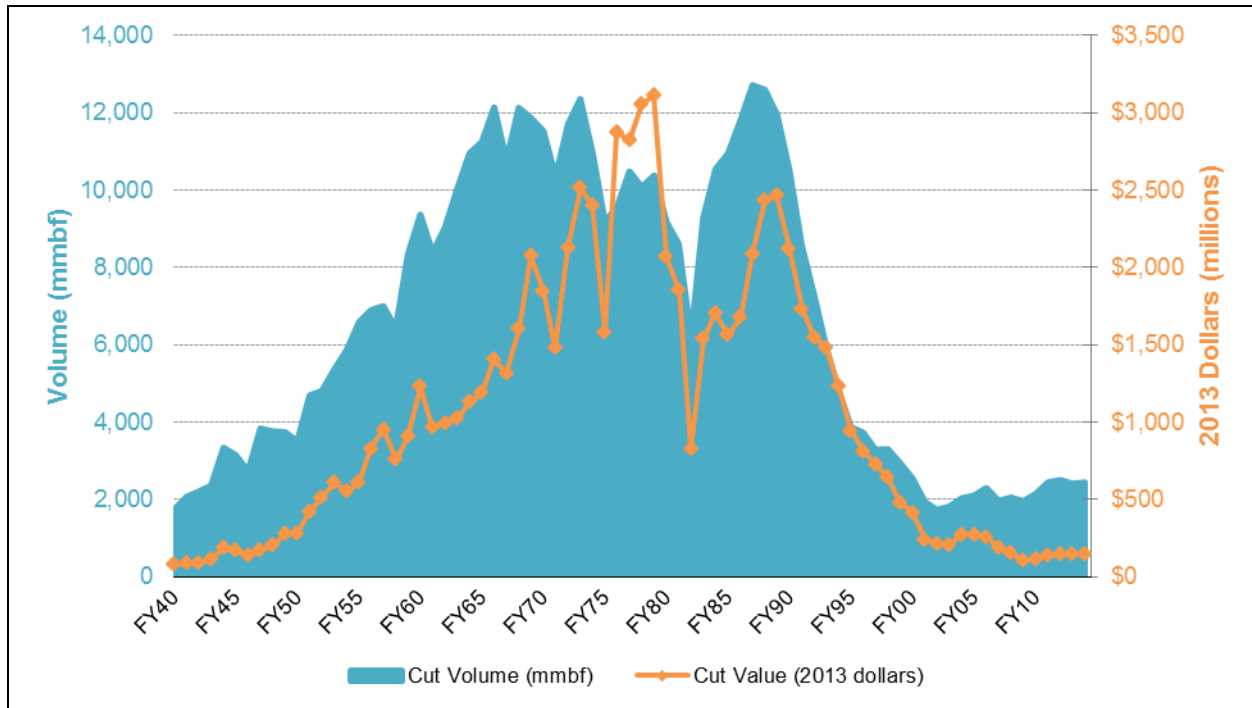
Similar to the owl payments for the Pacific Northwest, the SRS program was an optional payment that counties could elect to receive instead of receiving the 25% receipt-sharing payment. As originally enacted, the SRS payment was calculated as an average of the three highest payments between FY1986 and FY1999. With the extension in FY2007, the SRS payment calculation was modified to also consider county population and per capita income, and established a declining payment level.

³ For more information, see CRS Report R42951, *The Oregon and California Railroad Lands (O&C Lands): Issues for Congress*.

⁴ P.L. 103-66 §13982-3.

⁵ The payment amount began at 85% of the average FY1986-FY1990 payment, and declined by 3 percentage points annually.

Figure 1. Forest Service Cut Volume and Cut Value (2013 dollars)



Sources: FY1977-FY2014 data: U.S. Forest Service, *Forest Cut and Sold Reports*, <http://www.fs.fed.us/forestmanagement/products/sold-harvest/cut-sold.shtml>, accessed December 17, 2014. FY1940-FY1976 data: U.S. Forest Service legislative affairs office.

Note: mmbf= million board feet.

Payments under SRS are substantial (see **Table 1**), and significantly greater than the receipt-sharing payments currently would be. The FS payment rose from \$194 million in FY2000 (all figures in nominal dollars) to a \$346 million SRS payment in FY2001.⁶ For the initial six years SRS was authorized, the average FS SRS payment was \$360 million annually, more than \$130 million above the average annual FS payment for the six years prior to the enactment of SRS (FY1995-FY2000). Over the life of the program, the FS SRS payment averaged \$356 million, and the BLM SRS payment averaged \$85.3 million.⁷ **Figure 2** shows a comparison of the FS actual payments to estimates of what the payments would have been had SRS not been enacted. For example, FS receipts (for revenue-sharing purposes) in FY2012 totaled \$230 million.⁸ If revenue-sharing had been used rather than SRS payments, then the payments would have been around \$58 million.⁹ However, the payments under SRS actually totaled \$274 million. Similarly, BLM timber receipts from western Oregon (which includes some non-O&C lands) totaled \$28 million in FY2012.¹⁰ If 50% payments had been used, then approximately \$14 million would

⁶ Unless otherwise specified, “SRS payment” means the payment made to counties under SRS Title I and Title III payments, but does not include SRS Title II payments, which remain with the agency. Data from annual Forest Service report, *All Service Receipts: Title I, II, and III Region Summary (ASR-18-3)*, available from <http://www.fs.usda.gov/main/pts/home>.

⁷ BLM data from annual *Official Payments Made to Counties reports*, available from <http://www.blm.gov/or/rac/ctypaypayments.php>.

⁸ Data provided by the Forest Service Legislative Affairs office, February 21, 2013.

⁹ Estimated 25% payments data available from <http://www.fs.usda.gov/main/pts/securepayments/projectedpayments>.

¹⁰ U.S. Dept. of the Interior, Bureau of Land Management, *Public Land Statistics, 2012*, Table 3-12, (continued...)

have been transferred to the counties, compared to SRS payments of \$34 million. If SRS had not been reauthorized for FY2013, FS estimated that the revenue-sharing payment would have been approximately \$54 million and BLM estimated the O&C payment would have been \$12 million. The FS SRS payment for FY2013 was \$259 million, and the BLM SRS payment was \$36 million.¹¹ With the expiration of SRS, FY2014 payments will again be based on a percentage of agency receipts (25% for national forest lands; 50% for O&C lands. The FS announced that the FY2014 FS revenue-sharing payment will be \$50.4 million.¹²

Table I. SRS Payments, FY2000-FY2013

(dollars in millions)

	FS Payment	BLM Payment	Total SRS Payment
FY2001	\$346.2	\$102.0	\$448.2
FY2002	\$343.5	\$102.3	\$445.7
FY2003	\$356.2	\$103.3	\$459.5
FY2004	\$360.8	\$104.5	\$465.4
FY2005	\$371.3	\$107.1	\$478.4
FY2006	\$376.7	\$108.9	\$485.6
FY2007	\$381.6	\$111.9	\$493.5
FY2008	\$422.5	\$96.7	\$519.2
FY2009	\$466.1	\$87.2	\$553.3
FY2010	\$373.8	\$78.0	\$451.9
FY2011	\$291.2	\$36.3	\$327.5
FY2012	\$274.0	\$34.3	\$308.3
FY2013	\$259.0	\$36.3	\$295.3

Source: FS FY2001-FY2005, FY2007 data: FS legislative affairs office. FS FY2006, FY2008-FY2013 data: annual Forest Service report, *All Service Receipts: Title I, II, and III Region Summary (ASR-18-3)*, available from <http://www.fs.usda.gov/main/pts/home>. BLM data from annual *Official Payments Made to Counties reports*, available from <http://www.blm.gov/or/rac/ctypaypayments.php>.

Notes: The data presented include SRS Title I and Title III payments, but do not include SRS Title II payments, FS revenue-sharing payments, or other miscellaneous county payments authorized through various FS payment programs not discussed in this report, such as payments from land utilization projects.

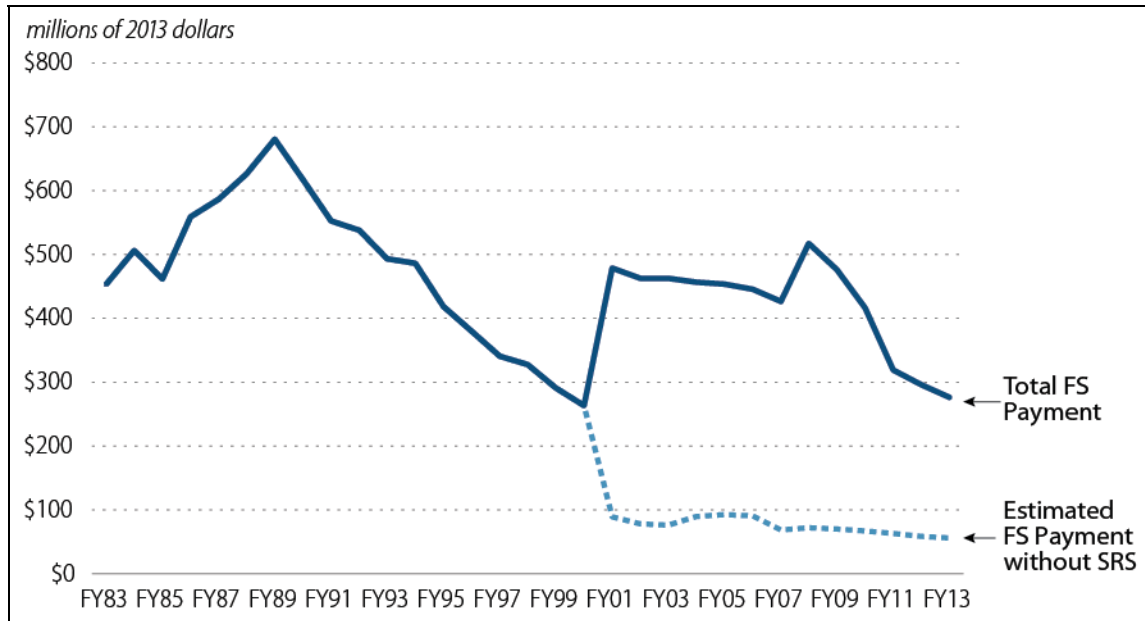
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http://www.blm.gov/public_land_statistics/pls12/pls2012-web.pdf.

¹¹ SRS payments reported here only include the Title I and Title III payments made to the counties, and do not include Title III payments retained by the agency or the payments to the counties that opted to receive revenue-sharing payments.

¹² Forest Service, *Forest Service announces payments to States to support local schools and roads*, January 15, 2015, <http://www.fs.fed.us/news/releases/forest-service-announces-payments-states-support-local-schools-and-roads>.

Figure 2. FS Total Payments and Estimated Payments



Source: CRS. FS total payments are from the annual Forest Service report, *All Service Receipts: Final Payment Summary Report PNF (ASR-10-01)*, available from <http://www.fs.usda.gov/main/pts/home>. The estimated FS payments if SRS had not been enacted for FY2001-FY2007 are from an unpublished spreadsheet received from Rick Alexander, Secure Rural Schools Act National Program Manager, U.S. Forest Service, on November 30, 2011. The estimated payments for FY2008-FY2013 are from an FS spreadsheet available at <http://www.fs.usda.gov/main/pts/home>.

Notes: The data presented include payments under the 25% Payments to States and SRS Title I and Title III programs, but do not include SRS Title II payments and miscellaneous county payments authorized through various other FS payment programs not discussed in this report, such as payments from land utilization projects.

SRS and Other Federal Compensation Programs

In addition to the FS and BLM receipt-sharing programs, Congress has enacted other programs to compensate for the presence of federal land. The most widely applicable program, administered by the Department of the Interior, is the Payments in Lieu of Taxes (PILT) Program.¹³ PILT payments to counties are calculated in dollars per acre and are based on eligible federal lands, as specified in statute. The eligible lands include national forests and O&C lands in each county (but total amounts are restricted in counties with very low populations). PILT payments are reduced (to a minimum payment per acre) by other payment programs—including FS Payments to States but not including BLM’s O&C payments—so increases in FS payments may decrease a county’s payments under PILT (and vice versa). This helps to explain why FY2012 PILT payments to Colorado were double the PILT payments to Oregon, even though there is more federal land in Oregon (32.6 million acres) than in Colorado (23.8 million acres).

Before 2008, annual appropriations were necessary to fund PILT. When the appropriations were less than the authorized total payments, each county received its calculated pro rata share of the appropriation. However, the 2008 and 2012 SRS amendments also made PILT payments

¹³ Payments in Lieu of Taxes Act of 1976 (P.L. 94-565 as amended, 31 U.S.C. §§6901-6907). For more information, see CRS Report RL31392, *PILT (Payments in Lieu of Taxes): Somewhat Simplified*.

mandatory spending for FY2008-FY2012. P.L. 112-141 extended mandatory spending to FY2013 and P.L. 113-79 extended payments to FY2014. Thus, for those fiscal years, each county received 100% of its authorized PILT payment.

For FY2015 and FY2016, P.L. 113-291 (Section 3096 of the National Defense Authorization Act (NDAA), FY2015) appropriated \$70 million in mandatory spending for PILT. Of this amount, \$33 million will be made available in FY2015; the remaining \$37 million will be made available after the start of FY2016 on October 1, 2015. In addition, P.L. 113-235 (Consolidated and Further Continuing Appropriations Act, 2015) provided \$372 million in discretionary spending. Together, the two provisions provide \$405 million for the payment expected in June 2015. This amount would have been sufficient for 92.7% of full funding in FY2014; with PILT's required correction for inflation, it would be a somewhat lower fraction of full funding for FY2015.¹⁴ It is unclear whether the additional \$37 million made available after October 1, 2015, by the NDAA will be issued to counties as a supplemental check in October, or whether it would form part of the FY2016 payment that will be issued in 2016.

Revenue-Sharing Program Concerns and Responses

Congress, the affected counties, and other observers have raised three principal concerns about FS and O&C revenue-sharing programs.¹⁵ These are the decline in FS and O&C receipts due to the decline in timber sales, the annual uncertainty about payment amounts, and the linkage between timber revenue and county payments.

Declining Timber Receipts

A primary concern about the revenue-sharing programs is how counties are responding to declining revenue. National forest receipts (subject to sharing) declined from their peak of \$1.44 billion in FY1989 to \$230 million in FY2012—a drop of 84%. In some areas, the decline was even greater; for example, payments to the eastern Oregon counties containing the Ochoco National Forest fell from \$10 million in FY1991 to \$309,000 in FY1998—a decline of 97% in seven years. The impact of these declining revenues to individual counties is varied, ranging from minimal to substantial. Some counties in Oregon, for example, have begun exploring alternative options to generating revenue to replace the loss of timber receipts and declining SRS payments.¹⁶

Annually Fluctuating Payments

Another concern has been annual fluctuations in the payments based on revenue generated. Even in areas with modest declines or increases in recent decades, payments varied widely from year to

¹⁴ FY2014 full funding was \$436.9 million, and if (a) inflation is the major factor raising each year's annual total, and (b) inflation is about 2%, then the FY2015 full funding level would be about \$446 million, or about \$41 million more than the two bills provide. Based on these assumptions, the two bills would provide about 91% of full funding for the payment expected in June 2015.

¹⁵ Forest Counties Payments Committee, *Recommendations for Making Payments to States and Counties: Report to Congress* (Washington: GPO, 2003). The committee was established in §320 of the FY2001 Interior and Related Agencies Appropriations Act, P.L. 106-291.

¹⁶ See <http://www.seattlepi.com/news/science/article/Curry-County-Ore-rejecting-public-safety-tax-4955794.php>.

year. From FY1985 to FY2000, the payments from each national forest fluctuated an average of nearly 30% annually—that is, on average, a county’s payment in any year was likely to be nearly 30% higher or lower than its payment the preceding year. Such wide annual fluctuations imposed serious budgeting uncertainties on the counties.

Linkage

A third, longer-term concern is referred to as linkage. Some observers have noted that, because the counties receive a portion of receipts, they are rewarded for advocating receipt-generating activities (principally timber sales) and for opposing management that might reduce or constrain such activities (e.g., designating wilderness areas or protecting commercial, tribal, or sport fish harvests). County governments have thus often been allied with the timber industry, and opposed to efforts of environmental and other interest groups to reduce timber harvests, in debates over FS management and budget decisions. This source of funds was deemed appropriate when the FS program was created (albeit, prior to creation of federal income taxes). Some interests support retaining the linkage between county compensation and agency receipts; local support for receipt-generating activities is seen as appropriate by these constituencies, because such activities usually also provide local employment and income, especially in rural areas where unemployment is often high. Others assert that ending the linkage is important so that local government officials can be independent in supporting whatever management decisions benefit their locality, rather than having financial incentives to support particular decisions.

Legislative History of the Secure Rural Schools and Community Self-Determination Act of 2000, as Amended

In 2000, Congress enacted the Secure Rural Schools and Community Self-Determination Act (SRS)¹⁷ after extensive debates and several different bill versions. (See **Appendix B** for an overview of historic proposals to change the revenue-sharing system prior to the enactment of SRS.)

The act established an optional alternative payment system for FY2001-FY2006. At each county’s discretion, the states with FS land and counties with O&C land received either the regular receipt-sharing payments or 100% of the average of the three highest payments between FY1986 and FY1999. Title I of the act directed that counties receiving less than \$100,000 under the alternative system could distribute the entire payment to roads and schools in the same manner as the 25% payments. However, counties receiving over \$100,000 under the alternative system were required to spend 15%-20% of the payment on (1) federal land projects proposed by local resource advisory committees and approved by the appropriate Secretary (Secretary of Interior or Secretary of Agriculture) if the projects met specified criteria, including compliance with all applicable laws and regulations and with resource management and other plans (identified in Title II of the act) or (2) certain county programs¹⁸ (specified in Title III of the act).

¹⁷ P.L. 106-393, 16 U.S.C. §§7101-7153.

¹⁸ The authorized uses for Title III funds included search, rescue, and emergency services; community service work (continued...)

Funds needed to achieve the full payment were mandatory spending, and came first from agency receipts (excluding deposits to special accounts and trust funds) and then from “any funds in the Treasury not otherwise appropriated.”

SRS was originally enacted as a temporary program, expiring after payments were made for FY2006. However, SRS has been reauthorized four times, extending the payments an additional seven years (see **Table 2**). The following sections describe each reauthorization process and any program modifications.

Table 2. SRS Legislative History

Statute	Duration	Authorized Payment Level	Major Changes
P.L. 106-393	FY2001-FY2006	Determined by formula; average annual payment was \$500 million nationally	Established program
P.L. 110-28	FY2007	\$525 million	None
P.L. 110-343	FY2008-FY2011	\$500 million FY2008; FY2009-FY2011, 90% of previous year funding ^a	Established a declining full funding amount; modified payment calculation formula; phased out transition payments; modified payment allocations; 25% payment based on rolling 7-year average
P.L. 112-141	FY2012	95% of FY2011 level (\$346 million)	Modified the declining full funding amount
P.L. 113-40	FY2013	95% of FY2012 level (\$329 million)	None

Notes: The payments were authorized as mandatory spending, with a portion of the payment derived from agency revenue and the balance from the General Treasury.

- a. The transition payments for specific states authorized in P.L. 110-343 for FY2008-FY2010 resulted in the total payment amount exceeding the “full funding” amount defined in the act.

Reauthorization Efforts in the 110th Congress

SRS expired at the end of FY2006, with final payments made in FY2007. Legislation to extend the program was considered in the 110th Congress; various bills would have extended the program for one or seven years. The Emergency Supplemental Appropriations Act for FY2007¹⁹ extended SRS for one year, but the bill was vetoed by President George W. Bush. However, Congress passed a new version of the Emergency Supplemental Appropriations for FY2007,²⁰ which included a one-year extension of SRS payments. P.L. 110-28 authorized payments of \$100 million from receipts and of \$425 million from appropriations, to “be made, to the maximum extent practicable, in the same amounts, for the same purposes, and in the same manner as were

(...continued)

camp; easement purchases; forest-related educational opportunities; fire prevention and county planning; and community forestry projects.

¹⁹ 110th Congress, H.R. 1591, the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007.

²⁰ 110th Congress, H.R. 2206.

made to States and counties in 2006 under that Act.²¹ Thus, preliminary FY2007 payments were made at the end of September 2007, with final payments made at the end of December 2007.

Four-Year Extension through FY2011 Enacted in the 110th Congress

In October 2008, Congress passed the Emergency Economic Stabilization Act,²² which extended SRS payments for four years and made several changes to the program, including providing “full funding” that declined over four years; altering the basis for calculating payments; providing transition payments for certain states; and modifying the use of SRS funds for Title II and Title III activities. These are discussed in more detail below. In addition, Section 601(b) modified the original FS 25% payment program (under which counties can get compensation in lieu of SRS payments and for payments after SRS expires).

The act also provided five years of mandatory spending for the PILT program, FY2008-FY2012. This meant that eligible counties received the full calculated PILT payment for those five years—a significant increase in PILT payments, since appropriations averaged less than two-thirds of the calculated payments over the past decade. PILT was further extended in subsequent bills through the FY2015 payment (and a supplemental payment for FY2016).

Full Funding

The act defined *full funding* for SRS in Section 3(11). For FY2008, full funding was defined as \$500 million; for FY2009-FY2011, full funding was 90% of the previous year’s funding. However, total payments exceeded the full funding amount in the first two years; payments under SRS totaled \$572.9 million in FY2008 and \$612.8 million in FY2009. This occurred because the *calculated payments* (discussed below) are based on full funding, as defined in the bill, but the act also authorized *transition payments* (discussed below) in lieu of the calculated payments in eight states. Since the transition payments exceeded the calculated payments for those states, the total payments were higher than the full funding amount.

Calculated Payments

SRS payments to each state (for FS lands) or county (for O&C lands) differed significantly from the payments made under the original SRS; **Table A-1** shows the dollars and share of total SRS payments in each state in FY2006 and FY2009. Payments under Section 102 were based on historic revenue-sharing payments (like SRS), but modified based on each county’s share of federal land and relative income level. The payment calculations required multiple steps:

- **Step 1.** Determine the three highest revenue-sharing payments between FY1986 and FY1999 for each eligible county, and calculate the average of the three.²³
- **Step 2.** Calculate the proportion of these payments in each county (divide each county’s three-highest average [**Step 1**] by the total of three-highest average in all eligible counties, with separate calculations for FS lands and O&C lands).

²¹ P.L. 110-28 Title V, Chapter 4, Section 5401.

²² P.L. 110-343, Section 601(a).

²³ Eligible counties are those that choose to receive payments under this program; counties that choose to continue to receive payments under the original revenue-sharing programs are excluded from these calculations.

- **Step 3.** Calculate the proportion of FS and O&C lands in each eligible county (divide each county's FS and O&C acreage by the total FS and O&C acreage in all eligible counties, with separate calculations for FS lands and O&C lands).
- **Step 4.** Average these two proportions (add the payment proportion [Step 2] and the acreage proportion [Step 3] and divide by 2, with separate calculations for FS lands and O&C lands). This is the *base share* for counties with FS lands and the *50% base share* for counties with O&C lands.
- **Step 5.** Calculate each county's *income adjustment* by dividing the per capita personal income in each county by the median per capita personal income in all eligible counties.
- **Step 6.** Adjust each county's base share [Step 4] by its relative income (divide each county's base share or 50% base share by its income adjustment [Step 5]).
- **Step 7.** Calculate each county's *adjusted share* or *50% adjusted share* as the county's proportion of its base share adjusted by its relative income [Step 6] from the total adjusted shares in all eligible counties (divide each county's result from Step 6 by the total for all eligible counties [FS and O&C combined]).

In essence, the new formula differed from the original SRS by basing half the payments on historic revenues and half on proportion of FS and O&C land, with an adjustment based on relative county income. This was done because of the concentration of payments under the original SRS to Oregon, Washington, and California (more than 75% of payments in FY2006; see **Table A-1**). Several counties opted out of the amended SRS system, while others opted in, because of the altered allocation. For example, in FY2006 100% of the payments to Pennsylvania were under SRS, but in FY2009 only 54% of the payments to Pennsylvania were under SRS. Conversely, in FY2006 none of the payments to New Hampshire were under SRS, but in FY2009, 44% of the payments to New Hampshire were under SRS.

In addition, the act set a full payment amount allocated among all counties that chose to participate in the program (eligible counties). Thus, the fewer counties that participated (i.e., the more that opted for the original, revenue-sharing payment programs), the more each participating county received.

Transition Payments

In lieu of the calculated payments under Section 102, counties in eight states—California, Louisiana, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, and Washington—received transition payments for three fiscal years, FY2008-FY2010. These counties were included in the calculations, but received payments of a fixed percentage of the FY2006 payments under SRS, instead of their calculated payments. The schedule in the act specified FY2008 payments equaling 90% of FY2006 payments, FY2009 payments at 81% of FY2006 payments, and FY2010 payments at 73% of FY2006 payments. Because the transition payments were higher than the calculated payments (using the multi-step formula, above), total payments have been greater than the “full funding” defined in the act.

Title II and Title III Activities

As with the original SRS, the amended version allowed counties with less than \$100,000 in annual payments to use 100% of the payments for roads and schools (or any governmental purpose for O&C counties). However, it modified the requirement that counties with “modest distributions” (annual payments over \$100,000 but less than \$350,000) use 15%-20% of the funds for Title II projects (reinvestment in federal lands). Instead, these counties could use the required 15%-20% either for Title II projects or for Title III projects (county projects). Counties with payments of more than \$350,000 were limited to a maximum of 7% of the payments for Title III programs. The amendment also modified the authorized uses of Title III funds, deleting some authorized uses (e.g., community work centers) while expanding authorized uses related to community wildfire protection.²⁴

Income Averaging

The extension also altered the FS revenue-sharing (25% payment) program. It changed the payment from 25% of current-year gross receipts to 25% of average gross receipts over the past seven years—essentially a seven-year rolling average of receipts. This reduced the annual fluctuation in payments, providing more stability in the annual payments. Thus payments increase more slowly than in the past when and where national forest receipts are rising, but decline more slowly when and where receipts are falling. This change immediately affected counties with FS land that chose not to participate in the SRS payment program, and will affect all counties with FS land in FY2015 (unless SRS is reauthorized or some other alternative is enacted).

One-Year Extension Through FY2012 Enacted in the 112th Congress

SRS was set to expire at the end of FY2011, with final payments made at the end of December 2011 (FY2012). Legislation to extend the program for five years was considered in the 112th Congress.²⁵ However, the Moving Ahead for Progress in the 21st Century Act (MAP-21),²⁶ contained a one-year extension for SRS. MAP-21 authorized a FY2012 SRS payment set at 95% of the FY2011 level (approximately \$346 million) and included requirements for the counties to select their payment option in a timely manner.

Legislative Activity in the 113th Congress

The 113th Congress considered several options for extending, modifying, or reforming SRS (and other county payment programs, such as PILT). Several bills were introduced and both the Senate and House held legislative hearings.²⁷ The 113th Congress also conducted oversight on the SRS

²⁴ A 2012 GAO report found inconsistencies among agency (FS and BLM) oversight and county use of SRS Title III funds. U.S. Government Accountability Office, *Payments to Counties: More Clarity Could Help Ensure County Expenditures Are Consistent with Key Parts of the Secure Rural Schools Act*, GAO-12-755, July 16, 2012, <http://www.gao.gov/products/GAO-12-775>.

²⁵ The County Payments Reauthorization Act of 2011 (S. 1692 and H.R. 3599) would have extended SRS through 2016 and included provisions to slow the decline of the full funding levels to 95% of the preceding fiscal year. Neither the Senate nor the House version was reported out of committee.

²⁶ P.L. 112-141, §100101.

²⁷ For example, U.S. Congress, Senate Energy and Natural Resources Committee, *Keeping the Commitment to Rural* (continued...)

program, particularly regarding the decision to sequester the FY2012 SRS payment (see **Appendix C**).²⁸

The President's FY2015 budget request for the Forest Service and the BLM proposed a five-year reauthorization of SRS, with mandatory funding, starting at \$279 million for FY2014 and declining to \$101 million by FY2018.²⁹ The President's proposal also would have decreased the Title I and Title III allocation while increasing the Title II allocation.

One-Year Extension Through FY2013 Enacted in the 113th Congress

SRS was again set to expire at the end of FY2012, with final payments made in February 2013 (FY2013). In the first session of the 113th Congress, Congress enacted the Helium Stewardship Act of 2013,³⁰ which included a one-year extension of SRS through FY2013 at 95% of the FY2012 SRS payment (approximately \$329 million). The payments were disbursed in early 2014.

FY2014 Reauthorization Efforts

SRS expired after the FY2013 payments were made in early 2014. Although the 113th Congress considered options for reauthorizing or modifying SRS for FY2014, the program was not reauthorized prior to adjournment.

The House passed the Restoring Healthy Forests for Healthy Communities Act,³¹ which would have directed the FS and BLM to distribute a payment to eligible counties in February 2015, essentially a FY2014 SRS payment. The payment amount would have been equal to the FY2010 payment for the counties receiving FS payments. For the O&C counties, the payment amount would have been \$27 million less than the FY2010 payment. After that payment had been made, county payments would have returned to a revenue-sharing system. The bill would have established Forest Resource Revenue Areas within at least half of the National Forest System, and created a fiduciary responsibility to generate revenue by removing forest products for the beneficiary counties. The bill also would have changed the calculation for the FS revenue-sharing payment. It would have changed the payment from 25% of average gross receipts over the past seven years back to the original calculation of 25% of current-year gross receipts. The Senate did not take up the measure.

Legislative Issues

Congress may consider extending SRS, with or without modifications, implementing other legislative proposals to address the county payments, or taking no action (thus continuing the

(...continued)

Communities, 113th Cong., 1 sess., March 19, 2013, pp. <http://www.energy.senate.gov/public/index.cfm/2013/3/full-committee-hearing-funding-programs-for-rural-communities>.

²⁸ House Natural Resources Committee, press release, November 5, 2013, <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=360388>.

²⁹ U.S. Forest Service, *FY2015 Budget Justification*, pp. 11-1, <http://www.fs.fed.us/aboutus/budget/>.

³⁰ P.L. 113-40.

³¹ 113th Congress, H.R. 1526, §501 et seq.

revenue-based system that took effect upon the program's expiration). Seven issues commonly have been raised about compensating counties for the tax-exempt status of federal lands: the geographic distribution of the payments; the lands covered; the basis for compensation; the source of funds; the authorized and required uses of the payments; and the duration of the new system. In addition, any new mandatory spending in excess of the baseline that would result in an increase in the deficit may be subject to budget rules such as congressional pay-as-you-go (PAYGO) rules, which generally require budgetary offsets.³² Although SRS has previously been authorized as mandatory spending, Congress may consider funding the program through the regular annual appropriations process.

Offsets for New Mandatory Spending

The original SRS authorization—and all subsequent reauthorizations—have been for mandatory spending. One policy issue concerns legislation with mandatory spending that would increase federal expenditures, and whether such spending should be offset so as not to increase the deficit. Congress has enacted a set of budget rules requiring that most legislation that creates new or extends existing mandatory spending (in excess of the baseline) be balanced—offset—by increases in receipts or decreases in other spending. Congress may choose to waive or set aside these rules in particular instances, but the increased deficit spending remains a consideration.

Legislation to reauthorize SRS (with or without other modifications), or to enact a different alternative, would require an offset—increased revenues or decreased spending from other mandatory spending accounts—or a waiver to the budget rules. In 2000, Congress provided such a waiver by including a specific type of provision, called a reserve fund, in the budget resolution.

In 2006, to fund a six-year reauthorization of SRS, the Bush Administration proposed selling some federal lands. To fund the O&C payments, the BLM would have accelerated its land sales under Section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA; 43 U.S.C. §1713). For the FS payments, estimated at \$800 million, the FS would have sold approximately 300,000 acres of national forest land. This would have required legislation, as the FS currently has only very narrow authority to sell any lands. The Administration offered draft legislation to authorize these land sales, but no bill to authorize that level of national forest land sales was introduced in the 109th Congress. Instead, Congress again included a reserve fund for SRS payments in the budget resolution. In 2007, the Bush Administration again proposed selling national forest lands to fund a phase-out of SRS payments, with half of the land sale revenues to be used for other programs (including land acquisition and conservation education). Again, no legislation to authorize national forest land sales was introduced.

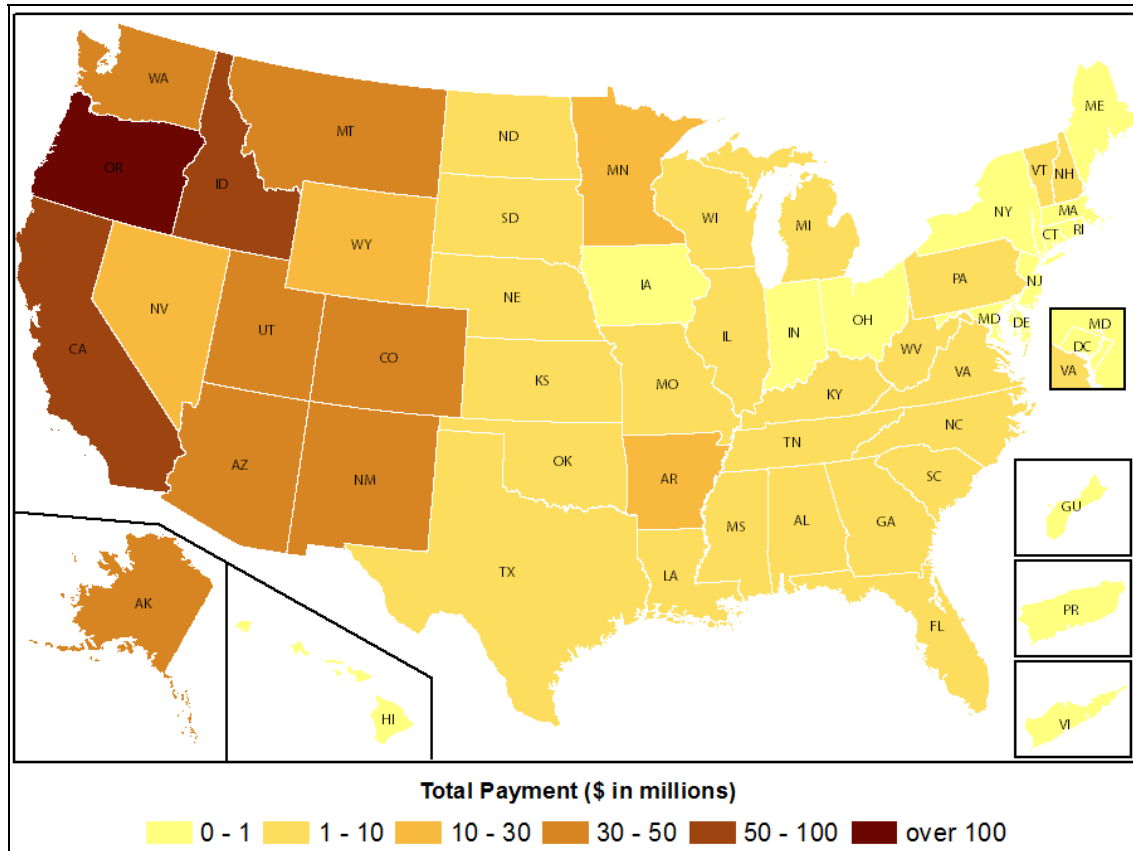
Geographic Distribution of SRS and PILT Payments

An issue for Congress is the geographic allocation of the SRS and PILT payments (see **Figure 3**). **Table 3** shows the payments for FY2013. The only BLM SRS payment is made to Oregon for the O&C lands, and Oregon receives the largest FS SRS payment. With a total SRS payment of approximately \$97 million, Oregon received nearly one-third of the total SRS payments made in FY2013. The next-largest SRS payments are in California and Idaho, which both received just

³² For an overview of federal budget procedures, see CRS Report 98-721, *Introduction to the Federal Budget Process*. For background on PAYGO rules, see CRS Report RL34300, *Pay-As-You-Go Procedures for Budget Enforcement*.

under 10% of the total payment that year. PILT payments are more evenly distributed, with no state receiving more than 10% of the total payments.

Figure 3. PILT and Forest Service Payments, FY2013



Source: Prepared by CRS from data reported in **Table 3**. See sources listed for that table.

Notes: The Forest Service Payment includes the revenue-sharing payment, FS SRS Title I and Title III payments, and BLM Title I and Title III payments.

The preponderance of payments going to western states is mostly due to the large percentage of federal lands located in those states.

Table 3. FY2013 SRS and PILT Payments, by State

(in thousands of dollars)

	SRS	PILT		SRS	PILT
Alabama	\$1,707.0	\$901.1	Nebraska	\$193.1	\$1,120.6
Alaska	\$12,173.6	\$26,458.5	Nevada	\$3,496.7	\$23,331.9
Arizona	\$13,025.7	\$32,203.9	New Hampshire	\$197.4	\$1,767.3
Arkansas	\$6,135.6	\$5,840.9	New Jersey	\$0.0	\$97.3
California	\$28,784.2	\$41,445.2	New Mexico	\$9,512.7	\$34,693.0
Colorado	\$9,566.0	\$31,986.3	New York	\$17.8	\$144.5
Connecticut	\$0.0	\$28.9	North Carolina	\$1,766.3	\$3,997.2

	SRS	PILT		SRS	PILT
Delaware	\$0.0	\$17.8	North Dakota	\$0.4	\$1,374.4
Florida	\$2,300.8	\$4,968.3	Ohio	\$241.0	\$554.8
Georgia	\$1,454.2	\$2,286.1	Oklahoma	\$914.9	\$2,794.6
Hawaii	\$0.0	\$326.9	Oregon	\$97,058.2	\$15,578.8
Idaho	\$25,203.8	\$26,326.2	Pennsylvania	\$993.6	\$685.6
Illinois	\$31.4	\$1,120.0	Rhode Island	\$0.0	\$0.0
Indiana	\$252.2	\$489.6	South Carolina	\$1,678.2	\$470.4
Iowa	\$0.0	\$453.9	South Dakota	\$1,650.1	\$5,669.8
Kansas	\$0.0	\$1,104.6	Tennessee	\$1,113.8	\$1,877.0
Kentucky	\$1,665.1	\$1,949.7	Texas	\$2,255.9	\$4,804.0
Louisiana	\$1,633.1	\$634.3	Utah	\$9,899.6	\$35,391.1
Maine	\$67.2	\$299.8	Vermont	\$317.1	\$944.4
Maryland	\$0.0	\$99.6	Virginia	\$1,461.9	\$3,263.8
Massachusetts	\$0.0	\$111.2	Washington	\$18,989.2	\$17,222.8
Michigan	\$2,855.7	\$4,187.9	West Virginia	\$1,735.4	\$2,892.6
Minnesota	\$2,204.5	\$1,975.0	Wisconsin	\$1,701.0	\$1,305.0
Mississippi	\$5,334.3	\$1,580.4	Wyoming	\$3,782.4	\$25,340.6
Missouri	\$3,259.3	\$3,079.1	Other ^a	\$141.2	\$62.5
Montana	\$18,607.4	\$26,497.1	Total	\$295,298.3	\$401,756.1

Sources: SRS: U.S. Dept. of Agriculture, Forest Service, "All Service Receipts (ASR), Final Payment Summary Report PNF (ASR-10-01)," http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb3795399.pdf, and U.S. Dept. of the Interior, Bureau of Land Management, *FY2013 Secure Rural Schools Act Payments*, <http://www.blm.gov/or/rac/ctypaypayments.pdf>. **PILT:** U.S. Dept. of the Interior, *Payments in Lieu of Taxes (PILT) Payments by State*, http://www.doi.gov/pilt/state-payments.cfm?fiscal_yr=2013.

Notes: The SRS payment only includes the SRS Title I and Title III payments, and does not include amounts paid in Title II. The Oregon payment includes \$36.3 million paid to the O&C counties under SRS Title I and Title III.

a. "Other" includes the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

Lands Covered

SRS includes payments only for national forests and for the O&C lands. These compensation programs provide substantial funding for the specified lands, while other federal lands that are exempt from state and local taxation receive little or nothing. The easiest comparison is with the counties that contain national grasslands, which receive 25% of net receipts and were excluded from SRS. Both forests and grasslands are part of the National Forest System, although the laws authorizing their establishment differ. However, it is unclear why national forest counties are compensated with 25% of gross receipts and were protected from declines in receipts under SRS, while national grassland counties are compensated with 25% of net receipts and did not receive the option of receiving SRS payments.

More significantly, many other tax-exempt federal lands provide little compensation to local governments. The BLM has numerous compensation programs, but generally the payments are

quite small. (The O&C payments account for about 95% of BLM compensation payments, but O&C lands are only about 1% of BLM lands.) The National Park Service has two small compensation programs related to public schooling of park employees' children at two parks. PILT provides some compensation for most federal lands, but many lands—inactive military bases, Indian trust lands, and certain wildlife refuge lands, for example—are excluded, and the national forests and O&C lands get PILT payments in addition to other compensation. In 1992, the Office of Technology Assessment recommended “fair and consistent compensation for the tax exempt status of national forest lands and activities.”³³ Congress could consider several options related to extending a compensation program to all tax-exempt federal lands, although determining a fair and consistent compensation level would likely generate significant debate

Basis for Compensation

The legislative histories of the agriculture appropriations acts establishing the FS payments to states (the last of which, enacted on May 23, 1908, made the payments permanent) indicate that the intent was to substitute receipt-sharing for local property taxation, but no rationale was discussed for the level chosen (10% in 1906 and 1907; 25% in 1908 and since). Similarly, the rationale was not clearly explained or discussed for the Reagan tax-equivalency proposal, for the owl payments (a declining percent of the historical average), or for the legislation debated and enacted by the 106th Congress (generally the average of the three highest payments during a specified historical period). The proposals' intents were generally to reduce (Reagan Administration) or increase (more recently) the payments.

The geographic basis has been raised as a potential problem for FS payments. FS revenue-sharing payments (25% payments) are made to the states, but are calculated for each county with land in each national forest.³⁴ Depending on the formula used—the average of selected historical payments from each national forest or to each county or each state—the calculations could result in different levels of payments in states with multiple national forests.³⁵ (This is not an issue for O&C lands, because the O&C payments are made directly to the counties.)

Source of Funds

As noted above, the FS revenue-sharing payments (25% payments) are permanently appropriated from agency receipts, and were established prior to federal income taxes and substantial federal oil and gas royalties. Most of the proposals for change also would establish mandatory payments; lacking a specified funding source, funds would come from the General Treasury. SRS directed payments first from receipts, then from the General Treasury. **Figure 4** shows the breakdown of FS SRS funding between receipts and the General Treasury. Critics are concerned that retaining the linkage between agency receipts (e.g., from timber sales) and county payments (albeit less directly than for the 25% payments) still encourages counties to support timber sales over other FS uses. Another concern is the reliance on General Treasury funds, given the current fiscal

³³ U.S. Congress, Office of Technology Assessment, *Forest Service Planning: Accommodating Uses, Producing Outputs, and Sustaining Ecosystems*, OTA-F-505 (Washington: GPO, February 1992), p. 8.

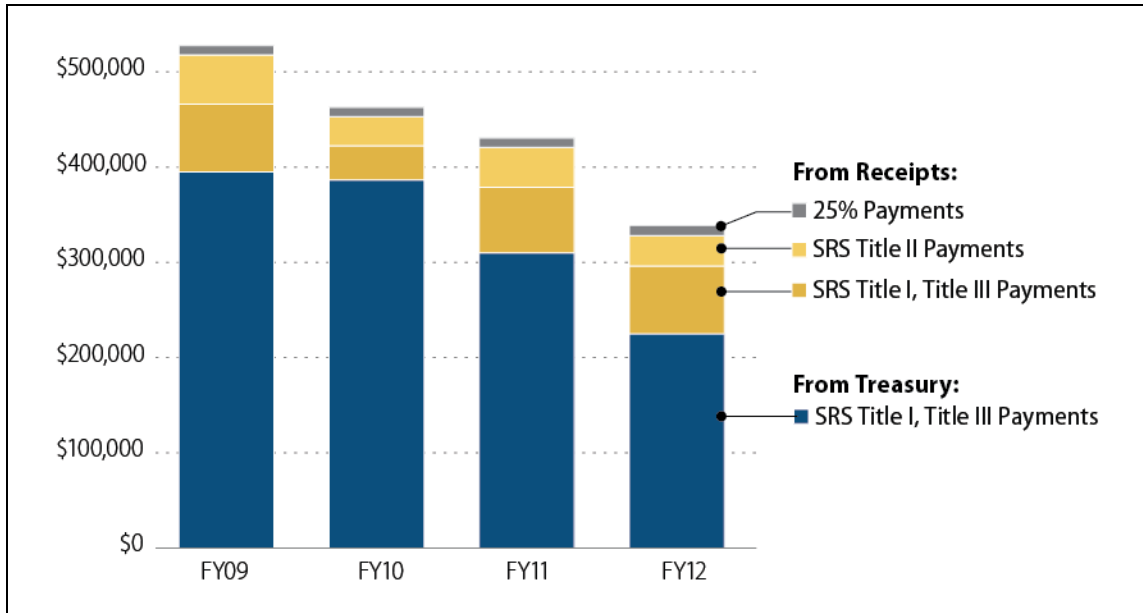
³⁴ There was no discussion in the legislative history of why the payments were made to the states, and not directly to the counties.

³⁵ The complexity of this situation is shown using Arizona as an example in out-of-print CRS Report RL30480, *Forest Service Revenue-Sharing Payments: Legislative Issues* (available from the author).

climate and some Members' desire to reduce government spending. On the other hand, recipients of these funds argue that it is fair compensation for the presence of these lands in their jurisdiction.

Figure 4. Source and Distribution of FS Payments

(dollars in thousands)



Source: CRS. Data from Forest Service, *FY2010-FY2013 Budget Justifications*, available from <http://www.fs.fed.us/aboutus/budget/>.

Notes: FS SRS Title I and Title III payments are passed through the state to the counties to use for specified purposes. SRS Title II payments are retained by the Forest Service for use on approved National Forest projects in the same county.

Authorized and Required Uses of the Payments

SRS modified how the counties could use the payments by requiring (for counties with at least \$100,000 in annual payments) that 15%-20% of the payments be used for other specified purposes: certain local governmental costs (in Title III); federal land projects recommended by local advisory committees and approved by the Secretary (under Title II); or federal land projects as determined by the Secretary (under §402). Use of the funds for federal land projects has been touted as “reinvesting” agency receipts in federal land management, but opponents argue that this “re-links” county benefits with agency receipt-generating activities and reduces funding for local schools and roads. The Forest Counties Payments Committee recommended granting local governments more flexibility in their use of the payments.³⁶ The committee also recommended that the federal government prohibit the states from adjusting their education funding allocations

³⁶ Forest Counties Payments Committee, *Recommendations for Making Payments to States and Counties: Report to Congress* (Washington: GPO, 2003). The committee was established in §320 of the FY2001 Interior and Related Agencies Appropriations Act, P.L. 106-291.

because of the FS payments.³⁷ In practice, such a prohibition could be difficult to enforce. The O&C payments are available for any local governmental purpose.

Duration of the Programs

Other policy questions that arise from the SRS payments include (1) how often should Congress review the payment systems (these or any other county compensation programs) to assess whether they still function as intended; and (2) what options are available (e.g., a sunset provision) to induce future Congresses to undertake such a review? The FS revenue-sharing payments and the O&C payments are permanently authorized.³⁸

SRS was originally enacted as a six-year program that expired on September 30, 2006, but was extended an additional seven years through four separate reauthorizations. As noted earlier, SRS expired on September 30, 2013, with the final payment made in FY2014. The last two reauthorizations have been for one year. The annual uncertainty about the continuation and level of the program concerns those interested in providing a consistent and predictable payment for local governments.

³⁷ Some states include FS payments allocated for education in their calculations allocating state education funds to the counties.

³⁸ The FS 25% payments were established in 1908 (after having been enacted as a one-year program in 1906 and again in 1907). The O&C payments were established in 1937. The owl payments were to be a 10-year program, enacted in 1993.

Appendix A. SRS Payments in FY2006 and FY2009

As described in the text, under “Four-Year Extension through FY2011 Enacted in the 110th Congress,” the SRS payment formula was modified to include federal acreage and relative income in each county, as well as transition payments in some states. The result was a change in the payments and the allocation of total payments in the modified formula. These changes are shown in **Table 2**. Note, however, that the change in the payment formula led some counties that had chosen 25% payments for FY2006 to opt for SRS payments for FY2009, and vice versa. Some of the increase in SRS payments in FY2009 is due to more counties opting for SRS payments in some states, such as Michigan, New Hampshire, Ohio, Puerto Rico, and Wisconsin. In at least one state—Pennsylvania—a portion of the decline is due to some counties opting for 25% payments in FY2009.

Table A-1. FY2006 and FY2009 FS and O&C Payments Under SRS, by State

(in thousands of dollars and percent of total SRS funding for all of U.S.)

FY2006			FY2009			FY2006		FY2009	
	Dollars	Percent	Dollars	Percent		Dollars	Percent	Dollars	Percent
AL	2,133.8	0.44%	2,236.2	0.44%	NY	16.9	<0.01%	29.5	0.01%
AK	9,377.2	1.92%	18,760.5	3.68%	NC	1,020.9	0.21%	2,326.6	0.46%
AZ	7,289.8	1.50%	16,688.2	3.27%	ND	0.0	0.00%	0.8	<0.01%
AR	6,568.0	1.35%	8,309.6	1.63%	OH	68.8	0.01%	339.7	0.07%
CA	65,279.3	13.44%	50,125.6	9.83%	OK	1,238.9	0.26%	1,192.4	0.23%
CO	6,338.7	1.31%	14,641.3	2.87%	OR-FS	149,153.3	30.72%	121,316.4	23.80%
FL	2,504.5	0.52%	2,862.3	0.56%	OR-O&C	108,852.0	22.42%	87,175.0	17.10%
GA	1,304.6	0.27%	1,864.1	0.37%	OR-Total	258,005.3	53.13%	208,491.4	40.91%
ID	21,173.5	4.36%	34,900.0	6.85%	PA	6,491.6	1.34%	2,505.6	0.49%
IL	304.2	0.06%	107.6	0.02%	PR	0.0	0.00%	184.7	0.04%
IN	130.2	0.03%	337.4	0.07%	SC	3,288.2	0.68%	2,498.4	0.49%
KY	682.1	0.14%	2,596.9	0.51%	SD	3,823.4	0.79%	2,931.1	0.58%
LA	3,726.1	0.77%	2,620.1	0.51%	TN	560.3	0.12%	1,428.4	0.28%
ME	41.4	0.01%	99.3	0.02%	TX	4,688.8	0.97%	3,655.9	0.72%
MI	789.8	0.16%	3,397.1	0.67%	UT	1,872.5	0.39%	14,177.0	2.78%
MN	1,468.8	0.36%	3,330.1	0.65%	VT	392.3	0.08%	400.7	0.08%
MS	8,287.2	1.71%	7,705.7	1.51%	VA	925.2	0.19%	2,093.7	0.41%
MO	2,767.2	0.57%	4,681.7	0.92%	WA	42,293.9	8.71%	33,990.9	6.67%
MT	12,934.8	2.66%	24,523.6	4.81%	WV	2,006.3	0.41%	2,356.8	0.46%
NE	55.6	0.01%	584.4	0.11%	WI	577.6	0.12%	2,730.1	0.54%
NV	408.8	0.08%	5,174.2	1.02%	WY	2,387.4	0.49%	4,357.6	0.85%

	FY2006		FY2009			FY2006		FY2009	
NH	0.0	0.00%	275.2	0.05%					
NM	2,383.6	0.49%	18,185.9	3.57%	Total	485,567.7		509,667.8	

Sources: **FS:** U.S. Dept. of Agriculture, Forest Service, "All Service Receipts (ASR), Final Payment Summary Report PNF (ASR-10-01)," unpublished reports. **O&C:** U.S. Dept. of the Interior, Bureau of Land Management, *FY2011 Budget Justification*, p. X-6, http://www.doi.gov/budget/2011/data/greenbook/FY2011_BLM_Greenbook.pdf.

Note: Counties could choose to receive the regular 25% FS payments or 50% O&C payments, rather than the SRS payments, and in many cases opted for the 25% in FY2006 or FY2009, and sometimes in both fiscal years. Thus, a change in the SRS payments in the table might not reflect the total change in FS payments to that state.

Appendix B. Historical Proposals to Change the Revenue-Sharing System

Concerns about the FS and BLM programs have led to various proposals over the years to alter the compensation system. Most have focused on some form of *tax equivalency*—compensating the states and counties at roughly the same level as if the lands were privately owned and managed. Many acknowledge the validity of this approach for fairly and consistently compensating state and county governments. However, most also note the difficulty in developing a tax equivalency compensation system, because counties and states use a wide variety of mechanisms to tax individuals and corporations—property taxes, sales taxes, income taxes, excise taxes, severance taxes, and more. Thus, developing a single federal compensation system for the tax-exempt status of federal lands may be very difficult if not impossible.

In his 1984 budget request, President Reagan proposed replacing the receipt-sharing programs with a tax equivalency system, with a guaranteed minimum payment. The counties argued that the proposal was clearly intended to reduce payments, noting that the budget request projected savings of \$40.5 million (12%) under the proposal. The change was not enacted. The FY1986 FS budget request included a proposal to change the payments to 25% of *net* receipts (after deducting administrative costs). Legislation to effect this change was not offered.

In 1993, President Clinton proposed a 10-year payment program to offset the decline in FS and O&C timber sales, and thus payments, resulting from efforts to protect various resources and values including northern spotted owls in the Pacific Northwest. Congress enacted this program in Section 13982 of the 1993 Omnibus Budget Reconciliation Act (P.L. 103-66). These “owl” payments began in 1994 at 85% of the FY1986-FY1990 average payments, declining by 3 percentage points annually, to 58% in 2003, but with payments after FY1999 at the higher of either this formula or the standard payment.

In his FY1999 budget request, President Clinton announced that he would propose legislation “to stabilize the payments” by extending the owl payments formula to all national forests. The proposal would have directed annual payments from “any funds in the Treasury not otherwise appropriated,” at the higher of (1) the FY1997 payment, or (2) 76% of the FY1986-FY1990 average payment. This approach would have increased payments in areas with large payment declines while decreasing payments in other areas, as well as eliminating annual fluctuations in payments and de-linking the payments from receipts. The Administration’s proposed legislation was not introduced in Congress. The FY2000 and FY2001 FS budget requests contained similar programs, but no legislative proposals were offered.

The National Association of Counties (NACo) proposed an alternative in 1999.³⁹ The NACo proposal would have provided the counties with the higher of (1) the standard payment, or (2) a replacement payment determined by the three highest consecutive annual payments for each county between FY1986 and FY1995, indexed for inflation. NACo also proposed “a long-term solution ... to allow for the appropriate, sustainable, and environmentally sensitive removal of timber from the National Forests” by establishing local advisory councils. The NACo approach

³⁹ National Association of Counties, *NACo Resolution in Support of a Forest Counties “Safety Net,”* Washington, DC, April 21, 1999.

would have maintained or increased the payments and might have reduced the annual fluctuations, but would likely have retained the linkage between receipts and payments in at least some areas.

Appendix C. FY2013 Sequestration Issues

Section 302 of the Budget Control Act (BCA)⁴⁰ required the President to sequester, or cancel, budgetary resources for FY2013, in the event that Congress did not enact a specified deficit reduction by January 15, 2012.⁴¹ Congress did not enact such deficit reduction by that date, and on March 1, 2013, the Office of Management and Budget (OMB) determined the amount of the total sequestration for FY2013 to be approximately \$85 billion.⁴²

Under the BCA, half of the total reduction for FY2013 was allocated to defense spending, and the other half to non-defense spending.⁴³ Within each half, the reductions were further allocated between discretionary appropriations and direct spending.⁴⁴ Discretionary appropriations are defined in the BCA as budgetary resources provided in annual appropriations acts.⁴⁵ In contrast, direct spending was defined to include budget authority provided by laws other than appropriations acts.⁴⁶ The BCA further required OMB to calculate a uniform percentage reduction to be applied to each program, project, or activity within the direct spending category.⁴⁷ For the direct spending category, OMB determined this percentage to be 5.1% for FY2013.

Section 102(d)(3)(e) of SRS directed that payments for a fiscal year were to be made to the state as soon as practicable after the end of that fiscal year, meaning that the FY2012 payment was made in FY2013.⁴⁸ Because the authority to make these payments is not provided in an annual appropriations act, such payments are not discretionary spending for purposes of the BCA. These payments were classified as non-defense, *direct* spending for purposes of sequestration.⁴⁹ The BCA exempts a number of programs from sequestration; however, the payments under SRS were not identified in the legislation as exempt.⁵⁰ Consequently, these payments were subject to sequestration as non-defense, direct spending. However, BLM and FS managed the sequestration of the FY2013 payments in different ways.

BLM Sequestration of SRS Funds

BLM issues SRS payments only for the O&C lands in Oregon. In February 2013, BLM distributed \$36 million to the 18 O&C counties in Oregon for FY2012 SRS payments. However, DOI had held back 10% of the scheduled payments across all three titles in anticipation of the

⁴⁰ P.L. 112-25, as amended by P.L. 112-240.

⁴¹ 2 U.S.C. §901A. The sequester was originally supposed to be ordered on January 2, 2013, but was delayed by the American Taxpayer Relief Act of 2012, P.L. 112-240, until March 1, 2013. For more information on sequestration issues, see CRS Report R42972, *Sequestration as a Budget Enforcement Process: Frequently Asked Questions*.

⁴² This amount was identified based on a formula set forth in §302 of the BCA.

⁴³ 2 U.S.C. §901A(4).

⁴⁴ 2 U.S.C. §901A(6).

⁴⁵ 2 U.S.C. §900(7).

⁴⁶ 2 U.S.C. §900(8). Budget authority is further defined as “the authority provided by Federal law to incur financial obligations.” 2 U.S.C. §622.

⁴⁷ Although not relevant here, additional restrictions are placed on the degree by which Medicare payments in the direct spending category may be reduced. 2 U.S.C. §901a(8).

⁴⁸ 16 U.S.C. §7112(e).

⁴⁹ 2 U.S.C. §900(8).

⁵⁰ 2 U.S.C. §905.

possibility of sequestration. The reduction to DOI's SRS program required by sequestration was 5.1% of the total payment, or \$2.0 million.⁵¹ Since the sequestered amount was less than the amount withheld, DOI-BLM owed an additional SRS payment for the difference. In May 2013, BLM distributed the remaining 4.9% of the payment, resulting in a total of \$38 million for the SRS payment to the O&C counties for FY2012.⁵²

Forest Service Sequestration of SRS Funds

The Forest Service distributed the full FY2012 SRS payments in January and February 2013, without withholding any amount in preparation for the potential sequester order. On March 19, 2013, the Forest Service announced it would seek to recover from the states the 5.1% of the payments that were subject to sequestration.⁵³ In letters sent to each affected governor, the Forest Service outlined two repayment options and asked for the states to respond by April 19, 2013, with how they planned to repay. Invoices for repayment were not included. In addition to repaying the 5.1%, the FS offered the states the option of having the full sequestered amount taken out of Title II funds (for those states with enough Title II money). Three states—Alaska, Washington, and Wyoming—publicly indicated their intention not to repay the SRS funds.⁵⁴ In an April 16, 2013, hearing before the Senate Committee on Energy and Natural Resources, the FS indicated that invoices for the repayment would be sent in late April 2013.

On August 5, 2013, the Forest Service sent additional letters which included invoices for the repayment to the governors of the 18 states with insufficient Title II money to cover the sequestered amount.⁵⁵ The invoices outlined three options for the affected states to take within 30 days: pay the debt in full; agree to a payment plan; or petition for administrative review of the debt. The invoices also included a Notice of Indebtedness to the U.S. Forest Service and Intent to Collect by Administrative Offset, which describes the basis of the indebtedness and the Forest Service's intent to offset future payments—without assessing penalties—from future Forest Service and Department of Agriculture state payments. As of May 21, 2014, two states had remitted an SRS sequester-related payment—New Hampshire paid \$27,884.17 and Maine paid \$3,648—and no collection efforts have been initiated by the Forest Service or Treasury Department in the remaining 16 states.⁵⁶ On August 20, 2013, the Forest Service sent additional letters to the governors of the 22 states that had sufficient Title II money to cover the sequestered amount.⁵⁷ The letters informed the governors that the Title II allocations were reduced by the sequestered amount.

⁵¹ Testimony of DOI Deputy Assistant Secretary Pamela K. Haze, in U.S. Congress, Senate Committee on Energy and Natural Resources, *Keeping the Commitment to Rural Communities*, hearing, 113th Cong., 1st sess., March 19, 2013.

⁵² Personal communication with BLM Legislative Affairs office, June 19, 2013.

⁵³ Testimony of Forest Service Chief Thomas Tidwell, in U.S. Congress, Senate Committee on Energy and Natural Resources, *Keeping the Commitment to Rural Communities*, hearing, 113th Cong., 1st sess., March 19, 2013. SRS payments are made from the Forest Service to the states, which then distribute the payment to the eligible counties.

⁵⁴ Phil Taylor, "Hastings probes Forest Service's withholding of timber payments," *E&E News*, May 21, 2013.

⁵⁵ The following states did not have sufficient Title II funds to cover the sequester and received invoices: AL, AR, GA, IL, IN, ME, MN, MO, NC, ND, NE, NH, NY, OH, PA, PR, TN, VT, and VA. WA received a letter and invoice to collect money from a special act payment, but the letter also indicated the total SRS Title II reduction.

⁵⁶ WA paid \$317.15 to reimburse for the sequester-related overpayment of a special act payment. Personal communication with Katherine Armstrong, Legislative Affairs Specialist, Forest Service, November 13, 2013.

⁵⁷ The following states had the sequester withheld entirely from their Title II funds: AK, AZ, CA, CO, FL, ID, KY, LA, MI, MS, MT, NM, NV, OK, OR, SC, SD, TX, UT, WI, WV, and WY.

To date, the last congressional action on the issue was a House Committee on Natural Resources oversight hearing on January 14, 2014.

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The Secure Rural Schools Act of 2000: Does It Make Rural Schools Secure?

By Krista M. Gebert, David E. Calkin, and Ervin G. Schuster

INTRODUCTION

State budget crises, along with voter-passed initiatives limiting property tax levies,¹ have severely reduced school financing in many states in recent years. Rural schools may be particularly vulnerable in that they are typically less able to generate revenue because funding often is tied to enrollment, rural districts tend to have lower property value assessments, and citizens may be unwilling to pay for school facility improvements.² Such funding limitations make every source of school revenue essential for rural school districts.

A potentially important source of new revenue for rural school districts is the Secure Rural Schools Act (SRSA, technically the Secure Rural Schools and Community Self-Determination Act of 2000, Public Law 106-393). The SRSA was signed into law in 2000 to supplement the U.S. Department of Agriculture (USDA) Forest Service's revenue-sharing program, the 25% Fund (Public Law 60-136). The 25% Fund has provided revenue sharing between the USDA Forest Service and primarily rural counties for nearly a century, but the magnitude of these payments has declined dramatically in recent years because of land management policies.

The passage of the SRSA has the potential to have a substantial effect on rural school funding in some areas. But will it? The amount of money actually reaching school districts in the counties with federal lands varies widely and depends on how money is allocated between schools and roads (which is dictated by state law) and how the

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1. See D. O'Toole and B. Stipak, "Oregon School Districts Respond to Increased Tax Limitations," *Journal of Education Finance* 26 (Fall 2000): 173-186; C. P. Kearney, "Reducing Local School Property Taxes: Recent Experiences in Michigan," *Journal of Education Finance* 21 (Summer 1995): 165-185.

2. S. Dewees, "Improving Rural School Facilities for Teaching and Learning," ERIC Clearinghouse on Rural Education and Small Schools, Charleston, WV, 1999. Available from http://www.ericfacility.net/databases/ERIC_Digests/ed438153.html (accessed May 2003).

federal payments are treated in state school finance systems. In this article we examine the background and provisions of the SRSA along with the legal and administrative context in which SRSA will function. The ability of SRSA to achieve its stated purpose may well be limited by this context.

BACKGROUND

With the reservation of the public domain for forest reserves and other purposes, starting in the late 1800s local governments became concerned about lost property tax revenues because these federal lands were not subject to property taxation. Subsequently, legislation was passed to provide local governments with payments in lieu of taxes (e.g., 25% Fund payments, Taylor Grazing Act payments, and Refuge Revenue Sharing Act payments).³ These revenue-sharing programs often earmark payments for roads and schools because local property taxes are regularly used to finance these types of expenditures. However, how much money actually reaches the schools depends not only on the provisions of the federal legislation but also on state rules and regulations regarding the distribution of these funds.

The 25% Fund

The National Forests Revenue Act of 1908 (the 25% Fund) designated that 25% of all money received from each national forest be paid to counties in which the forests are situated. According to the legislation, the funds may be "expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated."⁴

Problems in recent years have arisen from the amount and volatility of these payments. Because revenue-sharing payments are geared to the value of products sold, which fluctuates with product prices and quantity, federal revenue-sharing payments have been an undependable source of revenue for local governments.

The amount of 25% Fund payments has steadily declined since the early 1990s with changes in Forest Service land management policies and practices (Figure 1). The decline in timber-oriented receipts is pervasive nationwide. The Pacific Northwest was so hard hit that the U.S. Congress created safety net payments, which provided guaranteed payments to 72 counties in Oregon, Washington, and northern California as a result of the abrupt decline in federal timber harvest in areas designated as northern spotted owl habitat.⁵ These payments were to be phased out in fiscal year 2000, and that would have meant a huge drop in 25% Fund payments.

3. See E. G. Schuster, "Revenue Sharing and Resource Management in the Western States," *Western Journal of Applied Forestry* 11(1) (1996): 20–24, for information on these and other federal land revenue-sharing programs.

4. *National Forests Revenue Act of 1908* (Twenty-Five Percent Fund), 35 Stat. 260; 16 U.S.C. 500.

5. K. M. Gebert, D. E. Calkin, and E. G. Schuster, "The Secure Rural Schools Act, Federal Land Payments, and Property Tax Equivalency," *Western Journal of Applied Forestry* (in press).

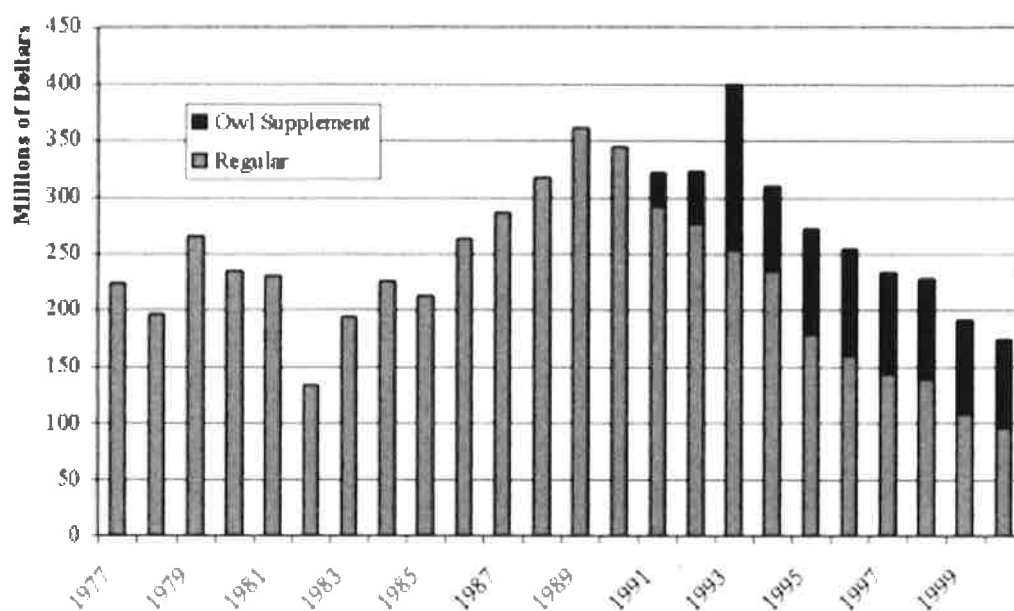


Figure 1. 25% Fund Payments, FYs 1997–2000

The SRSA was passed as a direct result of this steady erosion of federal revenue-sharing payments and the ending of the owl guarantees. The act's stated purpose is

To restore stability and predictability to the annual payments made to States and counties containing National Forest System lands and public domain lands managed by the Bureau of Land Management for use by the counties for the benefit of public schools, roads, and other purposes.⁶

The SRSA allows counties to choose between two options: continue to receive payments under the original 25% Fund or receive payments via the SRSA, which allots money based on a county's pro-rata share of each state's average high-three payment years from the old system.⁷ More than 76% of the counties chose the SRSA, which had the effect of almost doubling the amount of revenue-sharing payments allocated to schools compared with what would have been allocated without enactment of the SRSA (Table 1). This amounts to an estimated \$69 million of additional funding potentially available for schools in those counties.

School Financing

Revenue-sharing payments through the SRSA can improve funding for rural schools. However, the amount of money actually reaching school districts in the counties with federal lands varies widely. The rules concerning school funding equalization have a large effect on how federal land payments may be used to finance education and on

6. *Secure Rural Schools and Community Self-Determination Act of 2000*, 114 Stat. 1607; 16 U.S.C. 500.

7. Gebert et al., "The Secure Rural Schools Act," 10.

Table 1. Simulated Fiscal Year 2002 Revenue-Sharing Payments Allocated to Schools With and Without Secure Rural Schools Act (SRSA)

	With SRSA	Without SRSA
Secure Rural Schools counties	\$136,217,625	\$67,425,438
25% Fund counties	\$10,551,838	\$10,551,838
Total	\$146,769,463	\$77,977,276

Note: Relationships based on 10-year historical averages (1991–2000).

Source: Computed by author from unpublished data on file at the Rocky Mountain Research Station.

overall school funding equity. Additionally, even when funding equalization exists, school facility funding often is tied to the ability of local school districts to raise funds through property taxes or other local revenue sources.⁸ The recent state budget crises experienced nationwide may cause a further shift of financial burden from states back to local taxpayers. These issues may reduce funding equity gains achieved in the 1990s.

Consider Oregon and Washington, two states where funding equalization exists and two of the three states receiving the highest SRSA payments (California being the other). The state of Oregon has had a severe budget shortfall in school funding, resulting from depressed economic conditions and the inability to raise taxes because of a voter initiative (Measure 5).⁹ The city of Portland and Multnomah County issued a temporary business license fee increase to raise an estimated \$15 million that will go directly to school funding. However, the concentration of business in Portland limits use of this type of option in other areas in Oregon. On the other hand, SRSA and 25% Fund payments, which are generated primarily in rural areas, are shared by all school districts in the state because of equalization. Regarding the state of Washington, Plecki examined school finance reform and concluded, "While overall inter-district equity measures have been favorable, there is evidence that suggests that the stability of these improvements in inter-district equity might be threatened. Since 1991, a trend toward increasing dependence on local levy dollars is evident."¹⁰

Federal revenue-sharing payments, such as the 25% Fund and the SRSA, are made predominantly to rural counties in Interior West and Pacific West states, where school funding issues are particularly troublesome (Figure 2). It is often argued that small rural schools have higher per-student costs because of higher transportation costs and economies of scale. Bowles and Bosworth¹¹ developed a number of econometric models for a dataset on school district funding in Wyoming. The authors

8. M. F. Hughes, "Financing Facilities in Rural School Districts," paper presented at the Invitational Conference on Rural School Facilities, Kansas City, MO, May 1–2, 1998, Education Resources Information Center (ERIC), ED429427.

9. B. Herbert, "Teaching Kids a Lesson," *New York Times*, May 1, 2003, A35.

10. M. L. Plecki, "Washington's School Finance Reform: Moderate Success and the Need for Improvement," *Journal of Education Finance* 25 (Spring 2000): 565–582, quote on p. 567.

11. T. J. Bowles and R. Bosworth, "Scale Economies in Public Education: Evidence from School Level Data," *Journal of Education Finance* 28 (Fall 2002): 285–300.

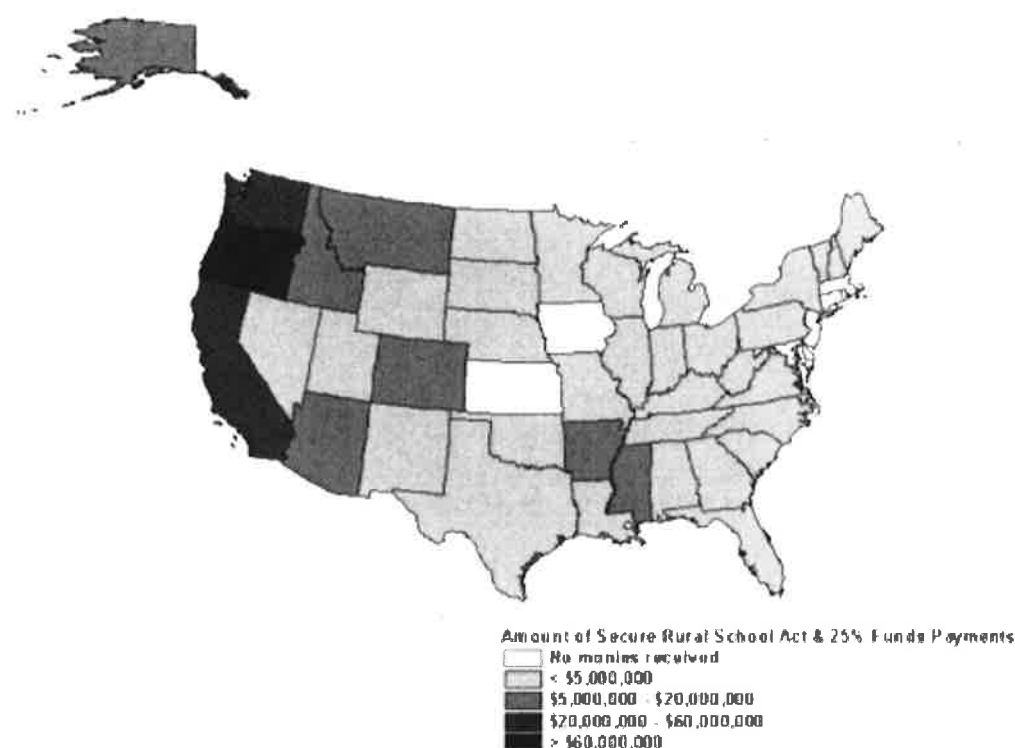


Figure 2. Secure Rural Schools Act and 25% Fund Payments by State, FY2002

found that economies of scale do exist, specifically that a 10% increase in school size decreases cost per student by 2% for similar academic outcomes. Hughes¹² also showed a strong relationship between school facility funding and school district size for Arkansas in 1993–94.

Generating needed money for education can be difficult for rural areas, particularly those adjacent to public land. Because federal land is not subject to taxation, these federal land counties have a smaller tax base than urban or even agricultural areas, which is the exact problem revenue-sharing programs such as the 25% Fund and SRSA are meant to address. Rural counties also do not have the ability to raise large sums of money by other means, such as business taxes. Finally, rural areas tend to have less diverse economies (generally relying heavily on agriculture or natural resource industries such as timber or mining), leading to more fluctuations in local revenues than more economically diverse urban areas experience.¹³

We could find no research focusing on federal revenue-sharing payments and school finance. Recent work linking federal revenue-sharing payments and county

12. Hughes, "Financing Facilities," 13.

13. Forest County Payments Committee, *Recommendations for Making Payments to States and Counties*. Report prepared by the Forest County Payments Committee, an advisory committee to Congress, 108th Congress, 1st session, 2003.

financing, by the authors, analyzes the tax equivalency of these payments, that is, how close payments are to tax revenues counties would receive if they could tax federal lands. In fact, most of the work in this area in the last decade has been done by our research organization, and we developed and maintain a database of revenue-sharing payments.¹⁴

The only publication we found that addresses the distribution of these payments was a 1998 report by the General Accounting Office (GAO), which looked at the distribution of this money from the states (the initial recipients of these funds) to the counties.¹⁵ Looking only at Oregon, Washington, and California (the recipients of the largest amount of funds), the GAO found that state laws generally govern the distribution of these funds; federal revenue-sharing laws in general do not explicitly require the funds to be distributed to local governments. However, results showed that Oregon distributes 100% of these funds to the counties, Washington 98%, and California 66%. It did not address the issue of distribution to school districts, either by the state or county, or how school equalization affected the distribution of these funds.

Given the continued concern with financing rural schools and the lack of research in this area, we investigated the distribution of 25% Fund and SRSA payments to the school district level to see how they have affected school financing, with particular emphasis on 2000. Specifically, we wanted to know whether legislation such as the SRSA is indeed making rural schools financially more secure.

METHODS

To assess the role of the SRSA in school financing, we started by contacting the National School Board Association and the National Association of Counties regarding their knowledge of existing informal or unpublished studies in this area. We then reviewed the reference text *Public School Finance Programs of the United States and Canada: 1998–1999*¹⁶ and contacted the Department of Education in each state to determine the role of revenue-sharing payments in their school finance system. We also contacted the treasurer of each state to verify or ascertain how Forest Service revenue-sharing payments are split between roads and schools; this information supplemented the Congressional Research Service memorandum *Forest Service*

14. See Gebert et al., "The Secure Rural Schools Act"; E. G. Schuster and K. M. Gebert, "Property Tax Equivalency on Federal Resource Management Lands," *Journal of Forestry* 99(5) (2001): 30–35; E. G. Schuster, P. R. Beckley, J. M. Bushur, K. M. Gebert, and M. J. Niccolucci, *An Analysis of PILT-Related Payments and Likely Property Tax Liability of Federal Resource Management Lands*, General Technical Report RMRS-GTR-36WWW (Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, 1999); Schuster, "Revenue Sharing and Resource Management in Western States," 20–24.

15. U.S. General Accounting Office, *Land Management Agencies: Revenue Sharing Payments to States and Counties*, GAO/RCED-98-261 (Washington, DC: Author, 1998).

16. C. C. Sielke, J. Dayton, C. T. Holmes, and A. L. Jefferson (compilers), *Public School Finance Programs of the United States and Canada: 1998–1999* (Washington, DC: National Center for Education Statistics, 2001). Available from http://nces.ed.gov/edfin/state_finance/StateFinancing.asp (accessed November 2002).

*Revenue-Sharing Payments: Distribution System.*¹⁷ Finally, we conducted brief telephone interviews with school administrators in areas where revenue-sharing payments constituted at least 1% of the total general revenue of the county and were therefore likely to significantly contribute to the district's budget. This process provided anecdotal evidence of how school funding has been affected by the level and variability of revenue-sharing payments from federal lands and helped validate research findings related to the distribution of these payments.

RESULTS

The role of revenue-sharing payments in financing rural schools is often emphasized. The SRSA specifies that not less than 80% but not more than 85% of the payments distributed to counties containing National Forest lands "shall be expended in the same manner in which the 25-percent payments are required to be expended," that is, for public schools and roads (the remaining 15–20% is allocated to special projects on federal or county lands).¹⁸

This emphasis led us to investigate the role of these payments in school financing. Specifically, we wanted to know how much of this money is spent on education (versus being spent on roads) and how these payments affect school district budgets, especially in light of school equalization.

Schools Versus Roads

Figure 3 shows how the 41 states receiving 25% Fund or SRSA payments allocate this money to public schools and public roads. More than 40% of the states (18 states) allocate between 41% and 60% of the money to schools, with the split generally being 50% to schools and 50% to roads. The figure's map shows that states allocating between 41% and 60% of the payments to schools are concentrated in the southern half of the United States, and states allocating more than 60% of the payments to schools are found mostly in the Midwest and the East. In nine states (Florida, Georgia, Indiana, Nevada, New Mexico, New York, North Dakota, Ohio, and Tennessee), the allocation of money between schools and roads is a county decision. For these states, we did not obtain county-specific information regarding the split but rather relied on statewide averages.

Although the largest percentage of the states split revenue-sharing payments about equally between roads and schools, these 18 states do not receive the majority of the money. The largest amount of money from the 25% Fund and SRSA revenue-sharing programs (almost 50%) goes to 5 states that distribute between 21% and 40% of the funds to schools (Figure 3). The states that allocate more than 60% of the money

17. R. W. Gorte, *Forest Service Revenue-Sharing Payments: Distribution System*, memorandum (Washington, DC: Congressional Research Service; Resources, Sciences and Industry Division; U.S. Library of Congress; November 19, 1999).

18. See Gebert et al., "The Secure Rural Schools Act," for more details.

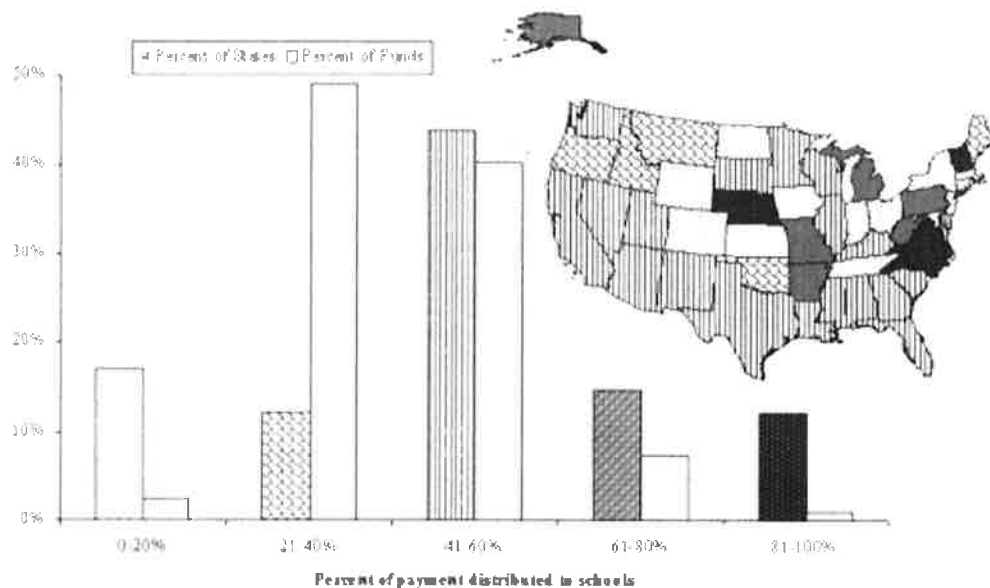


Figure 3. Distribution of States by Percentage of 25% Fund and Secure Rural Schools Act Funds Allocated to Schools, FY 2002

to schools (11 states) receive only 8% of the money. What does this really mean? Because the bulk of revenue-sharing payments are made to states that allocate less than 50% of this money to schools, the bottom line is that only about 40% of the revenue-sharing payments from the 25% Fund or SRSA are allocated to public schools, with the greater part being spent on public roads.

Do SRSA Payments Affect School Budgets?

Even with 60% of the \$326 million of 25% Fund or SRSA payments going to roads, the remaining \$129 million still seems substantial enough to affect school funding. However, the amount of money actually reaching school districts in counties with federal lands varies widely and depends on each state's school finance system.

Figure 4 compares the six general ways in which various states handle revenue-sharing payments allocated to schools. In three of the ways, revenue-sharing funds have no net effect on school district budgets:

- The revenue-sharing payments are not distributed to the school districts but rather are kept by the county and used for education-related purposes (e.g., transportation) or just deposited in the county general fund; the school districts see no net increase in funding.

- School equalization funding formulas subtract the revenue-sharing payments from the state aid school districts receive; again, the school districts see no net increase in funding.

- The revenue-sharing payments are used to decrease the school district's tax burden; the school's budget stays the same, but taxpayers pay less.

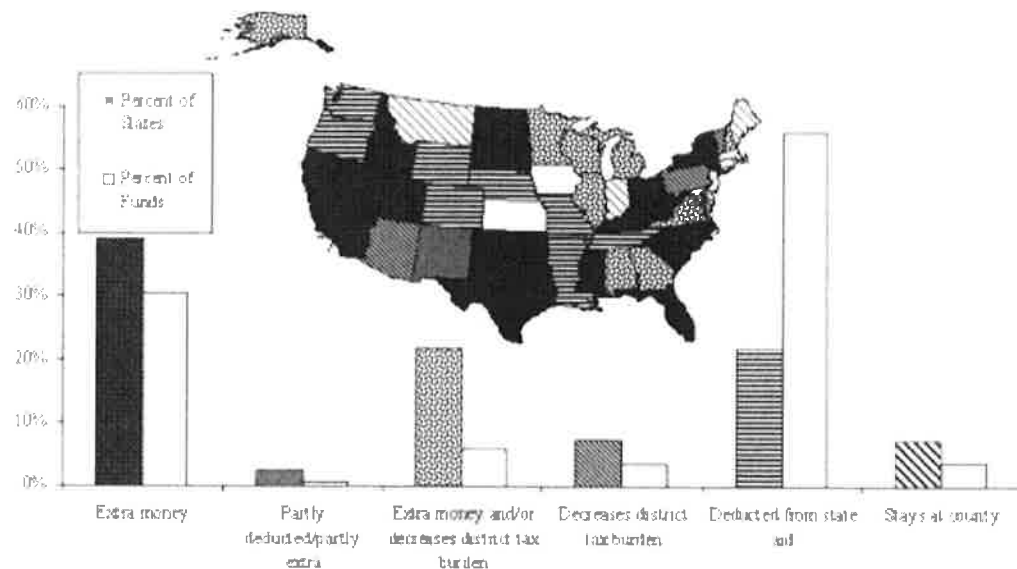


Figure 4. Distribution of States by Role of 25% Fund and Secure Rural Schools Act Funds in School Finance, FY 2002

In the other three ways, school districts receive at least some net benefit from revenue-sharing payments: These payments are considered extra money for the school districts, thereby generating a net budget increase; part of the money is offset or "equalized" out, but the remainder is extra money for the district; or the district can decide whether to use the payments to decrease the tax burden on district taxpayers or use it as extra money.

There is no discernible geographic pattern among the states regarding how these payments are handled in the school financing system (Figure 4). Except for states where school districts choose to use revenue-sharing payments to lower the district tax rate or use it as extra money (all in the eastern half of the United States), the various systems seem to be distributed throughout the country.

Although there may not be a noticeable geographic pattern, Figure 4 shows that a majority of the money (56%) goes to the nine states where revenue-sharing payments are subtracted from state aid. If we combine these nine states with states where revenue-sharing money is kept by the county (three states) and with the states where the funds are used to decrease the tax burden on district taxpayers (three states), then 63% of the revenue-sharing payments go to states in which payments have no net effect on the budgets of the school districts in the counties receiving these payments. On the other hand, the greatest numbers of states (16) treat revenue-sharing payments entirely as extra money for the school districts, and these 16 states receive approximately a third of the revenue-sharing payments.

To gain a better appreciation of how revenue-sharing issues affect school financing, we conducted several telephone interviews with school administrators from

counties that receive high levels of revenue-sharing payments. We contacted 23 school district superintendents, randomly selected from counties where federal revenue-sharing payments constituted at least 1% of the total general revenue of the county. Ten superintendents were from school districts where revenue-sharing payments offset state aid, and 13 were from school districts where at least a portion of the revenue-sharing payments counted as extra money for the district.

Consider first the 10 superintendents from seven states where revenue-sharing payments are deducted from state aid. Seven of the 10 offered an open-ended comment regarding the federal revenue-sharing program. All seven comments expressed dissatisfaction with the reduction of state aid based on the level of revenue-sharing payments and a desire to see these payments reach the school districts where the federal land is located. In fact, a number of school districts in the state of Washington, led by the Okanogan School District, have gone to the U.S. Supreme Court to appeal a Ninth Circuit Court decision upholding the state of Washington's right to count federal land revenue-sharing money against state-based aid. These interviews provided further evidence that the equalization of payments at the state level is an important financial issue for school districts that qualify for high levels of revenue-sharing payments.

The other 13 superintendents interviewed were from 10 states where the school districts were allowed to count at least a portion of the revenue-sharing payments as extra money for the district. Eleven of the 13 stated that the revenue-sharing payments substantially affected their school's budgeting process, and the remaining two stated that payments had a moderate effect. When asked about the volatility of the revenue-sharing payments over the last several years, seven of the 13 specifically mentioned declining payment levels before passage of the SRSA. Additionally, seven of 13 stated that there had been substantial budget shortfalls in past years because of lower-than-expected revenue-sharing payments and that programs, support staff, and teachers had been cut because of these shortfalls. Nine of the 11 respondents offering open-ended comments voiced support for the SRSA legislation and a desire to see the program renewed, often mentioning a desire for higher payment levels. The responses provided by this group confirmed that declining payment levels under the old 25% Fund were imposing financial constraints, and in general the SRSA has improved the financial outlook for these school districts.

A common theme among the superintendents interviewed, whether revenue-sharing payments reached the school district or not, was the severe funding crisis facing rural school districts. Numerous comments were made regarding the lack of local tax base, regional economic hardships, high per-student costs associated with rural school districts, and statewide budget crises.

DISCUSSION

Recent changes in federal revenue-sharing legislation provided encouragement that funding for public schools would improve in both amount and stability. Indeed, one

purpose of the Secure Rural Schools and Community Self-Determination Act of 2000 is to stabilize payments to counties for schools. Our work investigated relationships between revenue-sharing payments and school financing.

We found that about 40% of the money from these programs is used for educational funding (as opposed to roads or other specified uses). Also, because of equalization and other school financing rules, only about 37% of the money for education has a net effect on the budgets of the school districts in which the federal lands are located. Telephone interviews with school district superintendents from counties with large revenue-sharing payments confirmed the importance of this issue. Superintendents from districts whose budgets see a net increase from revenue-sharing payments voiced support for the SRSA and a desire to see the program continued and expanded. Superintendents from school districts in states where payments are counted against state aid expressed dissatisfaction with the state aid system and a desire to see legislative change to the act to require that payments not be used to offset state aid.

We provided this information on revenue-sharing payments and school financing to the Forest County Payments Committee, chartered by the U.S. Congress to investigate these matters. The committee recommended to Congress that statutory language be developed to ensure that these payments reach their intended target: the counties in which the federal lands are located. This language would prohibit states from offsetting state educational aid with these federal funds.¹⁹ Many of the states where payments are counted toward an equalization program, most notably the states of Washington and Oregon, receive some of the highest levels of federal payments in the country.

Two other recommendations of the committee would ensure a reliable source of revenue for the counties and school districts receiving these funds. First, the committee recommended that the payment levels established under the SRSA be retained (the SRSA is due to expire in fiscal year 2006). Second, the committee recommended that these payments not be subject to the annual appropriation process but should be fixed at levels established under the SRSA (allowing for inflation adjustments).

Overall, the SRSA of 2000 is viewed favorably by administrators in counties with historically high levels of federal land payments, so these changes would mean good news for rural school districts in the affected counties.

Regarding the question of whether the SRSA makes rural school secure, the answer is largely "no," although it is certainly a move in the right direction. For the school districts where these payments can be used to increase district budgets, the increased stability and higher level of payments under the SRSA are a definite boost for financially strapped schools. However, the majority of the money goes to states where the payments offset the state aid already received by the schools; therefore, these payments have no net effect on the school budgets, leaving rural schools in these areas no more secure than before the act was passed.

19. Forest County Payments Committee, *Recommendations for Making Payments*, 30.

September 1998

LAND MANAGEMENT AGENCIES

Revenue Sharing Payments to States and Counties





**United States
General Accounting Office
Washington, D.C. 20548**

**Resources, Community, and
Economic Development Division**

B-280751

September 17, 1998

The Honorable Vic Fazio
House of Representatives

Dear Mr. Fazio:

Federal land management agencies within the Department of the Interior and the Forest Service, within the U.S. Department of Agriculture, administer numerous revenue-sharing programs to compensate states and counties for the tax-exempt status of federal lands within their boundaries. The Congress has enacted several programs that add to a complex system for fully and fairly compensating states and counties for the federal presence. Concerned about the level of complexity of these programs as well as whether counties are receiving their “fair share,” you asked us to provide information on these federal compensation programs.

Specifically, we agreed to provide information on (1) the programs that the federal land management agencies use to compensate states and counties and identify the major differences among these programs; (2) the processes that California, Oregon, and Washington use to distribute the federal payments to the counties and the major differences among them; and (3) the amount of federal compensation that California, Oregon, and Washington received and distributed to their counties compared with the amounts that the federal agencies calculated as attributable to the receipts generated in the counties during fiscal years 1995 through 1997.

Results in Brief

Twenty-one of the 22 revenue-sharing programs administered by the land management agencies—the Forest Service, Bureau of Land Management, Minerals Management Service, and Fish and Wildlife Service—share the receipts derived from the use, extraction, or sale of natural resources from federal lands located within the boundaries of certain states, counties, or territories. The Bureau of Land Management also compensates counties by providing payments in lieu of taxes that would have been received by these jurisdictions if the federal lands were privately owned. Nationwide, these payments total about \$1 billion annually. Many of the programs and payments are crosscutting. That is, more than one agency is involved with the collection and distribution of receipts, and in other cases, payments under certain programs are offsets—deductions—from other programs. Moreover, these programs contain a multitude of differences, such as the formulas for the distributions; the recipients of the payments; and the

timing, number, or specified uses of the payments. As a result, the picture of all of the revenue-sharing programs together is a complex one.

California, Oregon, and Washington have implemented laws, systems, and processes for distributing federal revenue-sharing funds to their counties. However, federal compensation laws generally provide the states with wide latitude in retaining or distributing the land management agencies' revenue-sharing payments to the states. While the states' distribution systems and processes are similar, numerous differences exist among California, Oregon, and Washington states' laws, such as those specifying paying or not paying interest on the funds distributed. In some instances, the differences in the states' distribution methodologies and requirements affected the amount of revenue-sharing funds that the counties received and affected the purposes for which the counties could use the distributed funds.

During fiscal years 1995 through 1997, the three states received about \$660 million in total federal compensation from the land management agencies. Oregon distributed 100 percent of the federal payments to its counties and paid interest on these funds. California counties, on the other hand, received the lowest percentage of payments; the state distributed only about 66 percent of the federal funds identified as having been generated by designated counties. Washington distributed about 98 percent of the federal funds to its counties. In addition to these state distributions, however, counties in these three states received about \$280 million during fiscal years 1995 through 1997 directly from the federal agencies. The federal distribution systems identify the receipts generated in specific counties, while the states distribute payments to the counties on the basis of state laws. Therefore, while the federal distribution identifies the attributable county, few federal laws require that the funds be distributed to those counties generating the receipts. State laws control the actual amounts distributed to the counties.

Background

Nationwide, the Forest Service, within the Department of Agriculture, and the Department of the Interior's Bureau of Land Management (BLM), Minerals Management Service (MMS), Fish and Wildlife Service (FWS), Bureau of Reclamation, and National Park Service collectively manage about 625 million acres for the benefit of the American people. These lands are either public domain or acquired lands and include national

forests and grasslands, wildlife refuges, grazing lands, and national parks.¹ From these federal lands, receipts are generated by the sale or use of natural resources, such as timber, minerals, recreation, or grazing permits.

Since the early 1900s, the Congress has enacted more than 20 laws directing that a state or county be compensated for a federal presence in the state. The compensation may be based on federal acreage or a county's population, but in most instances, the payments relate to a percentage—from 4 to 90 percent—of the receipts generated on federal lands. Federal law governs the basis, methodology, and timing of the compensation payments to the states but frequently allows state law to govern the payments' ultimate use and possible distribution to the counties within the state.

With the exception of the Bureau of Reclamation and the National Park Service, the federal land management agencies that we reviewed administer the various compensation programs enacted by the Congress.² While the lands administered by the Bureau of Reclamation and the National Park Service are used in one compensation program, the receipts generated from these lands are deposited in the General Fund of the U.S. Treasury if not otherwise authorized for use. Each of the remaining land management agencies has established a system of collecting and distributing the receipts generated to implement the numerous federal laws enacted to compensate the states and counties.

The compensation to the states and counties by these land management agencies totals in the hundreds of millions of dollars annually. Most compensation is derived from agencies' receipts, while compensation for some other programs is appropriated by the Congress. Nationwide, these land management agencies distributed about \$3.2 billion during fiscal years 1995 through 1997. Every state—as well as most U.S. territories—receives some federal compensation for a federal presence within its boundaries. Among the states receiving the largest federal compensations are Wyoming, New Mexico, Oregon, and California. Appendix I provides a listing of states and the amount of compensation paid during fiscal year 1997.

¹Public domain lands are lands that have not left the ownership of the federal government, and acquired lands are lands in federal ownership that the government obtained by deed through purchase, gift, exchange, or condemnation proceedings.

²We have excluded the programs of Interior's Bureau of Indian Affairs because payments from them benefit special populations rather than the general public.

Land Management Agencies' Revenue-Sharing Programs

Twenty-one of the 22 revenue-sharing programs administered by the land management agencies share the receipts derived from the use, extraction, or sale of natural resources from federal lands located within the boundaries of certain states, counties, or territories. BLM also compensates counties to provide payments in lieu of taxes that would have been received by these jurisdictions if the federal lands were privately owned. Our review of the agencies' administration of these revenue-sharing programs showed that each of the agencies had systems and procedures in place to make payments to the states and counties.

Many of the programs and payments are crosscutting. That is, more than one agency is involved with the collection and distribution of receipts, and in other cases, payments under certain programs are offsets—deductions—from other programs. Moreover, these programs contain a multitude of differences, such as the formulas for the distribution of the payments; the recipients of the payments; and the timing, number, or specified uses of the payments. As a result, the picture of all of the revenue-sharing programs together is a complex one.

Nationwide, payments to the states, counties, and territories by these land management agencies total about \$1 billion annually. Table 1 portrays the payments to the states and counties by each of the federal agencies for fiscal years 1995 through 1997.

Table 1: Federal Payments to States or Counties, Fiscal Years 1995 Through 1997

Dollars in thousands

Fiscal year	Forest Service	BLM	MMS	FWS	Total
1995	\$278,597	\$182,547	\$552,249	\$15,014	\$1,028,407
1996	260,364	191,413	546,892	17,426	1,016,095
1997	240,367	188,692	684,908	17,333	1,131,300
Total	\$779,328	\$562,652	\$1,784,049	\$49,773	\$3,175,802

Sources: Forest Service, BLM, MMS, and FWS.

Land Management Agencies Have Systems in Place to Collect and Distribute Revenues

The land management agencies have automated systems and procedures in place to collect and distribute receipts generated under 21 separate programs. The Forest Service distributes receipts under six programs. Three of Interior's agencies distribute receipts under the remaining programs—11 by BLM, 3 by MMS, and 1 by FWS. In addition, BLM makes

payments in lieu of taxes to units of local government (usually counties) that have certain federal lands within their boundaries.

Overall, our review of the agencies' administration of these revenue-sharing programs showed that each of the agencies had systems and procedures in place to make payments to the states and counties and to the General Fund of the U.S. Treasury. All disbursement transactions are processed through the Treasury, whether they are transfers between agencies, payments to the revenue-sharing recipients, or special uses of appropriated funds in conjunction with natural resources revenues. The timing of the payments is either specified in the enabling legislation or is administratively prescribed by the agency. The payments are distributed in accordance with the agencies' procedures. For some payments, sanctions are imposed on the agency in the form of added interest if the payments are made to the revenue-sharing recipients after the due dates.

Appendix II provides a detailed presentation of each of the land management agencies' revenue-sharing programs administered by the Forest Service, BLM, MMS, and FWS. Appendix II includes the statutory authority, general description of the payment, and the methodology and process for calculating and distributing the payments.

Differences in Revenue-Sharing Programs

The revenue-sharing programs stem from a variety of complex statutes, some of which date back to the early 1900s. Each of the individual agencies has established administratively differing requirements for implementing these programs. According to officials at each of the agencies and our examination of the distribution processes, the differing requirements have resulted in a multitude of differences in the processes that the land management agencies use to distribute the payments under the revenue-sharing programs. The following is a listing of the more significant differences and examples of each of the differences of specific programs. Table II.1 of appendix II provides details on each payment and summarizes the major differences in the payments.

- Initial recipient of payment: Some payments, such as MMS' Mineral Leasing payments for its Acquired Land, Public Domain Land, and Off-Shore programs, are made to the states for their use. Other payments, such as BLM's Oregon & California (O&C) Grant Lands payments, are distributed directly to the counties in which the receipts were generated. Finally, some payments go to a county or city, depending on the location where the receipts were generated, as occurs in BLM's Nevada Land Sales

program.

- Specified use of the payment: Eight of the programs do not specify the use of the payments. Among those that do require specific uses, the most frequent was for roads and schools, as required by the Forest Service's 25-Percent payment and Arkansas' Smoky Quartz payments. The Forest Service's and BLM's National Grasslands payments, however, require the payments to be used for roads and/or schools—thus, benefits may be all for roads, all for schools, or some combination of the two.
- Basis of payment's distribution: Most of the distributions are computed on the basis of some given percentage that ranges from 4 to 90 percent of the gross receipts or net receipts after administrative expenses are deducted. For example, BLM's Mineral Leasing payment is as high as 90 percent of gross receipts and its Proceeds of Sale payment, as low as 4 percent of gross receipts. MMS' Mineral Leasing on Public Domain Lands payment is based on net receipts after a portion of MMS', BLM's, and the Forest Service's costs to operate their minerals programs are deducted from the gross receipts.³

Other distributions are based on the average payments made over a base period, tax bills submitted by the counties, or a multistep formula. For example, the Forest Service's and BLM's Spotted Owl payment is based on a different formula each year until 2003, when it expires. BLM's Coos Bay Wagon Road payment was based on tax bills submitted to the agency. FWS' Refuge Revenue Sharing payment is based on a multistep formula and is different, depending on whether the refuge is on acquired or public domain land. BLM's Payment in Lieu of Taxes (PILT) is the most complex and is discussed in detail in appendix III.

- Source of funds for payments: While most payments are derived from the sharing of receipts from federal programs, some come from appropriations, while others are derived from a combination of federal receipts and appropriations. The Forest Service's Spotted Owl payment and BLM's Spotted Owl and PILT payments are funded through annual appropriations. The PILT program is permanent, but the Spotted Owl payments are due to expire in 2003. FWS' Refuge Revenue Sharing payment is derived from receipts and appropriated funds.

³The Net Receipts Sharing Deduction, authorized in P.L. 103-66, sec. 10201, is an annual calculation of a portion of MMS', BLM's, and the Forest Service's costs to operate the Mineral Leasing program. One-twelfth of the annual deduction is subtracted from the monthly payments to the state and deposited in the General Fund of the U.S. Treasury.

- Period used to calculate and make payments: Most payments are made on a fiscal-year basis, while others are made on a calendar-year, monthly, or semiannual basis. For example, the Forest Service's and BLM's Grasslands payments are made on a calendar-year basis, while the three MMS Mineral Leasing payments and BLM's Mineral Leasing payment are made on a monthly basis. But the annual settlement to six states is made once a year by April 15. Finally, BLM's Red River Oklahoma and National Petroleum Reserve payments are made on a semiannual basis.
- Payments from many, but not all, programs offset the PILT payment: Under BLM's PILT payment, each county in the nation that has federal land within its borders receives a payment that is based on the federal acres within the county, the county's population, and the county's prior payment history. However, the PILT is "offset"—that is reduced—by most of the payments made to the counties by the other land management agencies. A few payments, however, are not offsets to PILT. For example, BLM's Spotted Owl payment is not an offset, while the Forest Service's Spotted Owl payment is an offset to be consistent with the original treatment of the payment for the programs that they replaced. In summary, all of the Forest Service's payments are offsets to PILT, MMS' payments for onshore minerals are offsets, about half of BLM's payments are offsets, and some of FWS' payments are offsets, depending on whether the refuge is on acquired or public domain land.

In addition, we noted two authorized federal land management revenue-sharing payments that are offsets to PILT but have not been used in recent years: The Act of June 20, 1910 (Enabling Act of Arizona and New Mexico, 36 Stat. 557) and section 3 of the Act of July 31, 1947 (Mineral Materials Act of 1947, 30 U.S.C. 603). According to a BLM official, these acts are offsets to PILT but have not been used by the Forest Service because no revenues have been generated pursuant to these statutes. BLM, however, collects some receipts under the Mineral Materials Act but includes them with the Proceeds of Sales payments, which are offsets to PILT (see table II. 12). In the case of the Enabling Act, the lands' officials and the persons responsible for calculating the payments for the Forest Service and BLM do not remember the act's usage in recent years.

Similarities and Differences Exist in Three States' Distribution Systems

Federal compensation laws generally provide the states with wide latitude in retaining or distributing the land management agencies' revenue-sharing payments to the states. California, Oregon, and Washington have implemented similar systems and processes for distributing federal revenue-sharing funds to their counties. In addition, the states have enacted laws to implement the federal statutes and have established methodologies and processes specifying how the distribution systems are to function. While the states' distribution systems are similar, numerous differences exist, concerning, for example, whether or not a state should include the interest that is earned on the federal funds in its distributions to the counties. In some instances, the differences in the distribution systems affected the amount of revenue-sharing funds that the states distributed to the counties during fiscal years 1995 through 1997 and limited the purposes for which the counties might have used the funds.

Distribution Systems' and Processes Are Similar

California, Oregon, and Washington enacted laws establishing how the federal revenue-sharing funds are to be distributed to the counties, to which counties the funds are to be distributed, how often the funds are to be distributed, and for what purposes the counties are to use the distributed funds. In addition, the states established distribution methodologies and processes providing specific direction, such as how the state treasurers are to manage the revenue-sharing funds received from the federal agencies, how the states are to verify the federal funds deposited in their accounts, how the states are to calculate the funds to be distributed to each county, and how the states are to notify the counties receiving the distributions.

Each of the three states identified the state's treasurer as the person responsible for receiving the federal revenue-sharing funds and for maintaining the funds until distribution. To carry out their fiscal responsibilities, each state treasurer established interest-bearing accounts for depositing the federal revenue-sharing funds. The federal agencies deposit the funds electronically to each state on the basis of information on the account, such as account numbers, that the state treasurers provided them with. After receiving an appropriate state document, such as a claims schedule, that describes the amount of funds to be distributed to the counties, the state treasurer makes the funds in the interest-bearing accounts available to the responsible state organization for distribution. The states maintain documentation of their distribution methodologies and processes.

Distribution Systems' Differences Affected Amounts Distributed

While the states' distribution systems are somewhat similar, numerous differences exist in the specific requirements of the state laws and the distribution methodologies and processes. The numerous differences in the state laws affected whether counties would receive funds at all, when the counties would receive the funds, and the amount of funds that these counties would be receiving. Appendix II provides a description of each state's specific distribution processes implemented in response to the various federal revenue-sharing laws.

The following examples illustrate some of the major differences in the three states' distribution systems:

- Payment of interest to counties: Oregon law requires that the state pay interest to its counties for the period of time when all federal revenue-sharing funds are held in the state accounts before distribution to the counties. During fiscal years 1995 through 1997, Oregon distributed to its counties a total of about \$569,723 in interest that had accrued during the time the state held federal revenue-sharing funds. Washington law, however, requires that the state pay its counties interest only on the Forest Service's 25-Percent revenue-sharing funds for the period of time that the state holds the funds before distributing them to the counties. Finally, California law does not require that the state pay its counties any interest for the period of time that the state holds the federal funds before distribution. Thus, while Oregon's counties received about \$569,723 more than the federal payments, California's counties received nothing additional.
- Deduction of processing fee: Oregon law provides for deducting a \$0.60 processing fee from each of the federal revenue-sharing distributions the state makes to its counties. In addition, although it has not been deducted, Oregon law provides for the assessment of a transaction fee for each distribution made to a county. California and Washington did not deduct a processing fee from any of the federal revenue-sharing distributions they made to their counties.
- Use of Forest Service's 25-Percent revenue-sharing funds: While federal law requires only that the funds be used to benefit roads and schools, the states established specific sharing requirements. California law requires that the counties receiving the Forest Service's 25-Percent revenue-sharing funds use 50 percent to improve public schools and 50 percent to improve roads. Oregon law requires that its counties use 25 percent of the funds to improve public schools and 75 percent to improve roads. Washington law

requires that its counties use 50 percent of the funds to improve public schools and the remaining 50 percent to improve either public schools or roads.

- Distribution of the Forest Service's 25-Percent revenue-sharing funds: California, Oregon, and Washington distributed the 25-Percent revenue-sharing funds to their counties twice each year—once in October and once in December. Washington made its distributions within 2 working days after the Forest Service deposited the funds in the state's interest-bearing account; California took about 10 working days; and Oregon took from 8 to 12 working days.

The states differ in their approaches to notifying the counties of expected payments. In late June or early July, the Forest Service notifies California, Oregon, and Washington of the estimated payments they will receive in October and December. Washington provides its counties with this information to assist them in their budget preparation processes and to help them make investment decisions. California does not distribute this information to the counties because the state does not believe it would benefit the counties. Oregon does not provide the counties with the information because the information is received after the counties have developed and adopted their fiscal-year budgets.

- Use of Taylor Grazing Act revenue-sharing funds: California law requires that BLM's Section 3 and Section 15 Taylor Grazing funds be distributed to the counties for them to use to improve rangeland and to control predators. Oregon law requires that the funds be expended only for range improvements in those counties that have grazing districts; otherwise, the funds are available for general government purposes in those counties that have leased lands but no grazing districts. Washington does not specify how the Taylor Grazing funds that they distribute to their counties have to be used.

In distributing these funds, California makes single annual distributions of the Taylor Grazing funds to its counties in early February. Oregon makes single annual distributions of the Taylor Grazing funds to its counties in late December. Washington includes the Taylor Grazing funds in the general distribution of funds it makes to its counties from the state's general fund. In calculating these distributions, California distributes Section 3 Taylor Grazing funds to the eight counties where grazing districts are located on the basis of the proportion that the area of a grazing district situated in a county bears to the total area of the grazing

district. Oregon distributes Section 3 Taylor Grazing funds to the counties where the funds were generated as reported by BLM. Washington does not receive Section 3 Taylor Grazing funds.

- Distribution of BLM's Proceeds of Sales revenue-sharing funds: California and Washington did not distribute these funds to their counties during fiscal years 1995 through 1997 but kept them for other state uses. Oregon law, on the other hand, requires that the Proceeds of Sales funds be distributed to all 36 counties on a pro rata basis that is based on the total number of square miles in each county compared with the total number of square miles in the state. As a result, some counties received funds even though no receipts were generated by the counties. For example, in fiscal year 1997, 16 counties received about \$62,937, or about 23 percent, of BLM's Proceeds of Sales funds even though none of the receipts were generated in those counties. In addition, the county that generated the largest receipt—\$167,885—received only \$4,572, or less than 3 percent of its receipts, from the state. Oregon law requires that the counties use the funds for the repair and/or construction of roads and bridges and therefore distributes the funds to all counties in the belief that roads and bridges benefit the entire state.

While neither California nor Washington distributed these funds to the counties, California used the money for state school expenditures, and Washington requires that the funds be deposited in the state's common school construction fund and be allocated by the superintendent of public instruction to individual school districts in each county. In fiscal year 1997, California deposited about \$51,244 of Proceeds of Sales funds into its general fund, and Washington deposited about \$23,381 into its common school construction fund.

- Distribution and use of BLM's and MMS' Mineral Leasing revenue-sharing funds: California requires that all but a small portion of the Mineral Leasing funds received from BLM and MMS either be deposited in specific state funds or be allocated to specific school districts. In fiscal year 1997, for example, only about 6 percent of the funds, or \$3 million of the \$53 million, received from MMS was distributed to those counties from which the funds were generated. Oregon distributed, on a quarterly basis, all Mineral Leasing funds received from BLM and MMS to the counties in which the funds were generated because the amount of the funds involved was insignificant. Washington does not distribute the Mineral Leasing funds received from MMS to its counties, and the state receives only about

\$10 in Mineral Leasing funds from BLM for one county, which is distributed to that county.

California law requires that a portion of MMS' geothermal Mineral Leasing funds be distributed to its counties to be used for any of 11 specific purposes, including undertaking geothermal research and development projects, collecting baseline geothermal data, and conducting environmental monitoring. Oregon law specifies that the BLM and MMS Mineral Leasing funds that it distributes to its counties be used to support public schools or the construction or maintenance of public roads. Washington law requires that the Mineral Leasing funds be deposited in the state's common school construction fund to be used exclusively for financing the construction of common school facilities in the state's 39 counties.

Counties Received Varying Amounts of Federal Distributions

During fiscal years 1995 through 1997, Oregon distributed 100 percent of the federal payments to its counties and paid interest on these funds. California counties, on the other hand, received the lowest percentage of payments; the state distributed only about 66 percent of the federal funds identified as having been generated by designated counties. Washington distributed about 98 percent of the federal funds to its counties. In addition to these state distributions, however, counties in these three states received about \$280 million during fiscal years 1995 through 1997 directly from the federal agencies.

While some counties question whether they receive their "fair share," state laws generally govern the uses of the federal funds and the extent, if any, of the distributions to the local communities. The federal distribution systems identify the receipts generated in specific counties, while the states' distributions to the counties rely on the individual state law. Therefore, while the federal distribution systems identify the attributable counties, few federal laws require that the funds be distributed to those counties generating the receipts. State laws control the actual amounts distributed to the counties.

Even in those instances where the federal agencies pay counties directly, the amounts that the counties receive may not equate to the results of the mathematical formulas that the federal agencies apply because the Congress limits the amount of appropriations available for these distribution programs. Such is the case with BLM's PILT and FWS' Refuge Revenue Sharing payments. Thus, while counties may believe that they are

“entitled” to a certain level of funds, limited appropriations and state laws influence the amount that they actually receive.

**Payments to California’s,
Oregon’s, and Washington’s
Counties**

For federal fiscal years 1995 through 1997, we compared the amounts that the states received and distributed to their counties with the federal distribution records. We also identified the amount of federal funds paid directly to the counties for the same period. Appendix IV provides a detailed presentation of the sources and amounts received by each of California’s, Oregon’s, and Washington’s counties for fiscal year 1997. Table 2 presents the results of our analysis.

Table 2: Total Federal Payments to the States of California, Oregon, and Washington and to Counties Directly, Fiscal Years 1995 Through 1997

Dollars in thousands

State/ fiscal year	Total federal payments to states				State and federal payments to counties				
	Forest Service	BLM	MMS	Total ^a	Federal payments attributable to counties ^b	State distributions ^c	Percentage distributed	Direct federal payments ^d	Total county payment ^{c,e}
California									
1995	\$43,045.7	\$229.5	\$50,773.3	\$94,048.5	\$68,693.5	\$46,312.2	67.4	\$10,671.7	\$56,983.9
1996	36,157.5	226.2	50,944.5	87,328.2	62,382.4	39,303.1	63.0	12,180.6	51,483.7
1997	33,962.9	166.6	52,883.3	87,012.9	54,419.3	37,447.4	68.8	12,313.0	49,760.4
Oregon									
1995	109,647.4	315.8	43.4	110,006.6	110,006.6	110,253.8	100.2	79,585.7	189,839.5
1996	95,239.0	583.9	62.8	95,885.7	95,885.6	96,048.5	100.2	77,811.6	173,860.1
1997	92,242.5	445.2	41.5	92,729.3	92,729.3	92,886.3	100.2	74,830.8	167,717.1
Washington									
1995	30,089.1	31.7	371.2	30,492.0	30,292.3	30,139.5	99.5	5,426.9	35,566.4
1996	29,429.0	26.3	468.6	29,923.9	29,923.9	29,475.5	98.5	2,928.2	32,403.7
1997	28,425.1	37.6	817.9	29,280.7	29,280.7	28,455.1	97.2	3,515.0	31,970.1

^aTotal may not equal due to rounding.^bMMS' payment to the state includes the amount of interest, off-shore payments, and/or the settlement for the off-shore payments that are not attributable to specific counties but are instead paid directly to the state. For example, California received about \$69 million in off-shore settlement payments during the period that MMS paid directly to the state.^cThe state of Oregon also pays interest on the BLM and MMS Mineral Leasing payments. During federal fiscal years 1995 through 1997, Oregon paid about \$2,400 more in interest to the counties on these payments, which is not reflected in the above table. Because of the differences in the state and federal fiscal years and the way interest was calculated, allocating the amount attributable to the individual counties for each of the 3 fiscal years could not be easily done.^d"Direct federal payments" includes those payments for the Forest Service's Grasslands payments; BLM's PILT, O&C, and Coos Bay payments; and FWS' Refuge Revenue Sharing payments.^e"Total county payment" reflects the amount of the state distributions plus the amounts that the federal agencies paid directly to the counties.

The payments made directly to the counties are less than the amounts derived by the mathematical formulas used by the federal agencies. Both BLM and FWS must use a proration factor in allocating the moneys paid directly to the counties because the annual appropriations do not equal the results of the mathematical formulas that the agencies use. In fiscal year

1997, BLM allocated about 53 percent, while FWS allocated about 66 percent of the moneys calculated as due to the counties. During fiscal years 1995 through 1997, the Congress appropriated \$104 million, \$133.5 million, and \$113.5 million for BLM's PILT payments, respectively, while FWS received \$12 million, \$10.8 million, and \$10.8 million, respectively.

Agency Comments

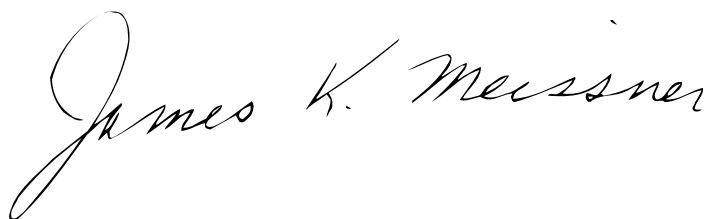
We provided the Department of the Interior, the Forest Service, and the states of California, Oregon, and Washington with a draft of this report for review and comment. The Assistant Secretary, Land and Minerals Management, Department of the Interior, and the Acting Director, Financial Management, Forest Service, agreed that the report accurately reflected the processes these agencies use to compensate states and counties. California, Oregon, and Washington officials also agreed that the report accurately reflected the processes they use to distribute the federal moneys to the counties. Both federal and state officials provided technical clarifications, which we have included as appropriate.

To respond to the assignment's objectives, we reviewed pertinent legislation, agency guidance, and agency financial records at both the federal and state levels. We spoke with federal representatives of the Forest Service, BLM, MMS, and FWS and with state representatives of California, Oregon, and Washington to determine their processes for calculating and distributing the federal payments. We conducted our work from January through August 1998 in accordance with generally accepted government auditing standards. Appendix V provides a detailed discussion of our scope and methodology.

We are sending copies of this report to the Secretaries of Agriculture and the Interior; the heads of the land management agencies; the Director, Office of Management and Budget; and appropriate congressional committees. We will also make copies available to others upon request.

If you or your staff have any questions about this report, please call me at (206) 287-4810. Major contributors to this report are included in appendix VI.

Sincerely yours,

A handwritten signature in black ink that reads "James K. Meissner". The signature is written in a cursive style with a large, looping initial "J".

James K. Meissner
Associate Director, Energy,
Resources, and Science Issues

Contents

Letter	1
Appendix I Department of the Interior’s and Forest Service’s Payments to States and U.S. Territories, Fiscal Year 1997	22
Appendix II Department of the Interior’s and Forest Service’s Payments to States and Counties	24
Appendix III Operational Overview of the Payment in Lieu of Taxes Program	53
Section 6902 Payments	53
Section 6904 Payments	56
Section 6905 Payments	56
Payments Based on Availability of Appropriations	56
Appendix IV Distribution of Federal Payments to California’s, Oregon’s, and Washington’s Counties for Fiscal Year 1997	58

Appendix V		68
Objectives, Scope,	Federal Programs	68
and Methodology	State Programs	69
	Reconciliation of Distributions	70
Appendix VI		72
Major Contributors to		
This Report		
Tables		
	Table 1: Federal Payments to States or Counties, Fiscal Years 1995 Through 1997	4
	Table 2: Total Federal Payments to the States of California, Oregon, and Washington and to Counties Directly, Fiscal Years 1995 Through 1997	14
	Table II.1: Summary Schedule of the Department of the Interior's and the Forest Service's Payments to States or Counties	24
	Table II.2: Forest Service's 25-Percent Payment	27
	Table II.3: Forest Service's Spotted Owl Payment	29
	Table II.4: Forest Service's Grasslands Payment	31
	Table II.5: Forest Service's Quinalt Special Payment	32
	Table II.6: Forest Service's Arkansas Smoky Quartz Payment	33
	Table II.7: Forest Service's Payments to Minnesota	34
	Table II.8: Bureau of Land Management's Payment in Lieu of Taxes	35
	Table II.9: Bureau of Land Management's Mineral Leasing Act Payment	36
	Table II.10: Bureau of Land Management's Section 15, Outside Grazing Payment	37
	Table II.11: Bureau of Land Management's Section 3 Inside Grazing Payment	38
	Table II.12: Bureau of Land Management's Proceeds of Sales Payment	39
	Table II.13: Bureau of Land Management's Oregon & California Grant Lands Payment	40
	Table II.14: Bureau of Land Management's Coos Bay Wagon Road Payment	41
	Table II.15: Bureau of Land Management's Spotted Owl Payment	42
	Table II.16: Bureau of Land Management's National Grasslands Payment	43

Table II.17: Bureau of Land Management's Nevada Land Sales Payment	44
Table II.18: Bureau of Land Management's National Petroleum Reserves Payment	45
Table II.19: Bureau of Land Management's South Half of Red River Payment	46
Table II.20: Minerals Management Service's Mineral Leasing Payments for Public Domain Lands	47
Table II.21: Minerals Management Service's Mineral Leasing Payments for Acquired Lands	49
Table II.22: Minerals Management Service's Offshore Mineral Leasing Payment	51
Table II.23: Fish and Wildlife Service's Refuge Revenue Sharing Payment	52
Table III.1: Maximum Payments (Ceiling) Based on Population and Minimum and Standard Rates Based on Acreage, Fiscal Years 1995-99	54
Table III.2: Example of a PILT Calculation for a Section 6902 Payment	55

Abbreviations

BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
FWS	Fish and Wildlife Service
GAO	General Accounting Office
MMS	Minerals Management Service
O&C	Oregon & California Grant Lands
OCSLA	Outer Continental Shelf Lands Act
OIG	Office of Inspector General
PILT	Payment in Lieu of Taxes

Department of the Interior's and Forest Service's Payments to States and U.S. Territories, Fiscal Year 1997

States ^a and U.S. territories ^b	Forest Service	Bureau of Land Management	Minerals Management Service	Fish and Wildlife Service	Total ^c
Alabama	\$964,419	\$210,117	\$14,037,447	\$194,159	\$15,406,142
Alaska	1,186,862	6,783,741	22,846,335	466,568	31,283,506
Arizona	2,214,865	9,752,226	47,732	103,128	12,117,951
Arkansas	5,954,224	1,659,709	999,992	804,604	9,418,529
California	33,963,060	11,311,230	52,886,705	1,168,244	99,329,239
Colorado	4,633,660	8,288,234	37,333,016	81,253	50,336,163
Connecticut	0	15,571	0	89,604	105,175
Delaware	0	10,640	0	88,824	99,464
District of Columbia	0	28,610	0	0	28,610
Florida	1,007,027	1,508,642	16,332	728,791	3,260,792
Georgia	698,906	749,307	109	687,668	2,135,991
Hawaii	0	9,864	0	170,618	180,482
Idaho	14,270,215	8,003,814	2,201,242	65,806	24,541,077
Illinois	17,396	324,520	67,934	294,712	704,562
Indiana	25,819	231,050	0	38,104	294,973
Iowa	0	126,646	0	169,214	295,860
Kansas	632,708	353,228	1,329,434	52,482	2,367,853
Kentucky	451,945	749,573	122,655	864	1,325,037
Louisiana	2,948,816	149,105	27,448,582	1,519,175	32,065,678
Maine	29,963	99,415	0	200,986	330,364
Maryland	2,597	47,887	0	384,698	435,182
Massachusetts	0	42,025	0	368,615	410,640
Michigan	2,889,101	1,223,595	712,062	128,712	4,953,470
Minnesota	2,921,890	765,213	13,242	764,710	4,465,055
Mississippi	4,919,049	464,247	1,675,691	861,592	7,920,579
Missouri	1,149,263	1,172,840	1,273,353	110,505	3,705,961
Montana	8,558,090	9,546,367	20,360,965	234,517	38,699,939
Nebraska	35,722	342,654	15,909	217,432	611,718
Nevada	387,649	7,891,283	5,706,321	162,860	14,148,113
New Hampshire	440,060	501,314	0	144,717	1,086,091
New Jersey	0	39,173	0	501,676	540,849
New Mexico	931,918	11,751,494	188,659,666	196,547	201,539,625
New York	6,390	51,105	0	270,777	328,272
North Carolina	653,564	1,249,937	115	615,440	2,519,055
North Dakota	3,537,978	590,611	3,894,112	437,644	8,460,345
Ohio	18,157	271,568	152,763	48,458	490,947

(continued)

Appendix I
Department of the Interior's and Forest
Service's Payments to States and U.S.
Territories, Fiscal Year 1997

States^a and U.S. territories^b	Forest Service	Bureau of Land Management	Minerals Management Service	Fish and Wildlife Service	Total^c
Oklahoma	1,901,985	863,304	2,137,305	88,554	4,991,148
Oregon	92,255,443	74,766,658	41,481	496,516	167,560,098
Pennsylvania	6,001,845	169,413	21,270	82,616	6,275,144
Rhode Island	0	4	0	110,576	110,580
South Carolina	1,292,387	219,745	0	444,520	1,956,652
South Dakota	3,888,736	1,420,489	565,528	260,778	6,135,531
Tennessee	440,145	621,178	26	188,381	1,249,730
Texas	2,379,496	1,294,193	26,038,308	880,699	30,592,696
Utah	1,598,865	9,492,700	34,290,505	44,745	45,426,815
Vermont	225,878	249,660	0	11,241	486,779
Virginia	789,580	958,704	85,139	759,882	2,593,305
Washington	28,425,142	2,850,186	817,894	702,469	32,795,691
West Virginia	1,623,549	862,312	326,127	65,467	2,877,454
Wisconsin	1,861,111	288,965	432	277,315	2,427,822
Wyoming	2,209,236	8,285,926	238,782,189	510,340	249,787,691
U.S. territories ^b	22,538	32,494	0	35,209	90,241
Total	\$240,367,247	\$188,692,486	\$684,907,919	\$17,333,012	\$1,131,300,664

^aThese figures include the federal payments made directly to the counties within the state.

^bThe U.S. territories include American Samoa, Guam, Northern Mariana, Puerto Rico, and the Virgin Islands. For ease of presentation, we added the Forest Service's prior-year adjustment of \$11 to the U.S. territories' total.

^cTotals for individual states may not be exact because of rounding.

Source: Forest Service, Bureau of Land Management, Minerals Management Service, and Fish and Wildlife Service.

Department of the Interior's and Forest Service's Payments to States and Counties

The following tables present detailed information about the various compensation programs administered by the Department of the Interior and the Forest Service. Table II.1 provides a summary matrix of the payments, while tables II.2 through II.23 provide the details of the programs, the agencies' methodology and process for calculating and distributing the payments, and, where applicable, the process used by California, Oregon, and Washington to distribute the federal payments to their respective counties.

Table II.1: Summary Schedule of the Department of the Interior's and the Forest Service's Payments to States or Counties

Payment's name	Calculation basis	Initial recipient	Basis of distribution to states or counties	Offset to PILT	Specified use	Table reference
Forest Service						
25-Percent payment	Fiscal year	State	25% of gross receipts.	Yes	Roads and schools	II.2
Spotted Owl payment	Fiscal year	State	Through fiscal year 1998, a declining percentage of fiscal years 1986-90 payments. For fiscal years 1999-2003 greater of Spotted Owl or 25% payment.	Yes	Roads and schools	II.3
Grasslands payment	Calendar year	County	25% of net receipts.	Yes	Schools and/or roads	II.4
Quinault Special payment	Fiscal year	State	45% of gross receipts.	Yes	Roads and schools	II.5
Arkansas Smoky Quartz payment	Fiscal year	State	50% of gross receipts from quartz sales.	Yes	Roads and schools	II.6
Payments to Minnesota	Fiscal year	State	3/4 of 1% of the appraised value of the land.	Yes	None	II.7
Bureau of Land Management						
Payment in Lieu of Taxes	Fiscal year	County	Population or federal acreage.	N/A	None	II.8
Mineral Leasing payment	Monthly	State	50% of gross receipts in states other than Alaska. 90% to Alaska.	Yes	Planning, construction, and maintenance of public facilities	II.9
Outside Grazing payment	Fiscal year	State	50% of gross grazing receipts.	Yes	None	II.10
Inside Grazing payment	Fiscal year	State	12.5% of gross grazing receipts.	Yes	None	II.11
Proceeds of Sales payment	Fiscal year	State	4% of gross receipts (5% of net) from the sales of land and materials.	No	Educational purposes or roads	II.12

(continued)

**Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties**

Payment's name	Calculation basis	Initial recipient	Basis of distribution to states or counties	Offset to PILT	Specified use	Table reference
O&C Grant Lands payment	Fiscal year	County	Prior to 1991, 50% of gross receipts. Until 2003, receive Spotted Owl payment.	No	None	II.13
Coos Bay Wagon Roads payment	Fiscal year	County	Prior to 1994, 75% of gross receipts deposited to pay property tax bills. From 1994 through 2003, receive Spotted Owl payment.	No	Schools, roads, bridges, highways	II.14
Spotted Owl payment	Fiscal year	County	Through fiscal year 1998, a declining percentage of fiscal years 1986-90 payments. For fiscal years 1999-2003 greater of Spotted Owl payment or the O&C/Coos Bay payment.	No	None for O&C payments. Schools, roads, bridges, and highways for Coos Bay Wagon Roads	II.15
Grasslands payment	Calendar year	County	25% of net receipts.	Yes	Schools and/or roads	II.16
Nevada Land Sales payment	Fiscal year	State/county/city	10% of value of the land sale to either Las Vegas or Clark County and 5% to the state of Nevada.	No	General education, acquisition, and development of recreational lands and facilities	II.17
National Petroleum Reserve payment	Semiannually	State	50% of gross receipts to the state of Alaska.	No	Planning, construction, and maintenance of public facilities	II.18
Red River, Oklahoma payment	Semiannually	State	37.5% of gross receipts.	No	Planning, construction, and maintenance of public facilities	II.19
Minerals Management Service						
Mineral Leasing—Public Domain Lands payment	Monthly	State	50% of net receipts to states other than Alaska. 90% to Alaska. For state-select lands, 90% of net receipts are paid to the state.	Yes	Planning, construction, and maintenance of public facilities	II.20

(continued)

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Payment's name	Calculation basis	Initial recipient	Basis of distribution to states or counties	Offset to PILT	Specified use	Table reference
Mineral Leasing— Acquired Lands payment	Monthly	State	25% of gross receipts on acquired national forest lands. For grasslands or refuges, money is sent to BLM, FWS, or Forest Service for distribution to counties.	Yes	The use is the same as that for other receipts from the lands on which the lease is situated	II.21
Off-shore Leasing Program payment	Monthly	State	27% of gross receipts from the 8(g) zone are paid to the states in addition to a \$65 million annual payment to six states from 1997 to 2001.	No	None	II.22
Fish and Wildlife Service						
Refuge Revenue Sharing payment	Fiscal year	County	For acquired lands, counties receive greater of (1) 25% of net receipts, (2) 0.75 of 1 percent of the appraised value of the land, or (3) \$0.75 per acre. However, payments may not be less than those made in fiscal year 1977. For public domain lands, 25% of net receipts.	No for acquired lands Yes for reserved public domain lands	None	II.23

Legend

BLM = Bureau of Land Management

FWS = Fish and Wildlife Service

MMS = Minerals Management Service

N/A = not applicable

O&C = Oregon and California Grant Lands

PILT = Payment in Lieu of Taxes (program)

Note: The payments by the Bureau of Indian Affairs are not included, since their payments are made to special populations instead of the general public.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.2: Forest Service's 25-Percent Payment

Agency: Forest Service

Name of payment: 25-Percent Payment to States/Forest Reserve Payment

Statutory authority: Act of May 23, 1908 (16 U.S.C. 500)

General description of payment:

Distribution to states of 25 percent of gross receipts generated on Forest Service lands during the fiscal year. Payments are to be used to benefit public schools and public roads of the county or counties in which the national forest is situated.

Agency's methodology and process for calculating and distributing payment:

National forests report receipts generated from forest lands to the regions, and the amounts are recorded on a national data system. The Forest Service's Financial Management personnel, using several financial reports, calculate the amounts of payments (25 percent of gross receipts) attributable to each county, and the Forest Service makes a total payment to the state for further distribution to the counties.

Payments to the states occur twice—an interim payment is made generally by October 15 on the basis of the estimated third-quarter operating results, a final payment, made in December, provides the balance of the fiscal-year receipts due to the counties. For both payments, the Forest Service sends letters to the states advising them of the amount of their payments and how much each county is to receive.

The Forest Service notifies the U.S. Treasury of the amounts to be paid, and the funds are electronically transmitted to the states.

California's process for allocating payment:

The Forest Service deposits the 25-Percent revenue-sharing funds into the state's Federal Trust Fund interest-bearing account in October and December of each year. After each of the two deposits, the state verifies the amount of each deposit with information received from the Forest Service, then distributes the funds to the counties in which the funds were derived as reported by the Forest Service to the state.

The state uses the same process to make the two distributions in October and December. First, the state transfers the funds to be distributed to the counties from the Federal Trust Fund to the Forest Reserve Fund. Second, the state prepares a schedule showing the amount to be distributed to each county. Third, the state prepares the distribution checks and mails them to each county. Finally, the state sends each county a formal notice of the reason for the distribution and what the funds can be used for. Each distribution process takes 10 working days; 50 percent of the funds must be used for schools and 50 percent for roads.

Oregon's process for allocating payment:

The Forest Service deposits the 25-Percent revenue-sharing funds into the state's short-term treasury interest-bearing account in October and December of each year. After each of the two deposits, the state verifies the amount of the deposit with information received from the Forest Service, then electronically distributes the funds to the counties in which the funds were derived as reported by the Forest Service to the state.

The state uses the same process to make the two distributions in October and December. First, the state establishes a distribution date. Second, the state calculates the amount to be distributed to each county, including interest less a 60-cent processing fee. Third, the state electronically distributes the funds to the counties. Finally, the state sends each county a formal notice of the reason for the distribution and what the funds could be used for. Each distribution process takes 8 to 12 working days; 25 percent of the funds must be used for schools and 75 percent for roads.

(continued)

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Washington's process for allocating payment:

The Forest Service deposits 25 percent of the revenue-sharing funds into the state's interest-bearing account in October and December of each year. After each of the two deposits, the state calls the Forest Service to verify the amount of each deposit, then distributes the funds to the counties in which the funds were derived as reported by the Forest Service to the state.

The state uses the same process to make the two distributions in October and December. First, the state prepares a schedule of the amount to be distributed to each county. Second, the state notifies the counties of when the distributions are to be made and the amount of the distributions. Third, the state distributes the funds to the counties electronically. Fourth, the state prepares, for the Superintendent of Public Instruction, a schedule showing the amount of funds distributed to each county that would be available for common school expenditures. Finally, the state sends a notice to the counties informing them of the reason for the distribution and what the funds are to be used for. Each distribution process takes 2 working days; 50 percent of the funds must be used for schools and 50 percent for roads or schools.

In January, the state makes a separate—that is, third—distribution to each county to which the 25-Percent funds were distributed. The third distribution is for the interest earned on the 25-Percent funds. The interest earned and distributed is based on the average balance of the 25-Percent funds for the period of time when they were held by the state before they were distributed to the counties.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.3: Forest Service's Spotted Owl Payment

Agency: Forest Service

Name of payment: Spotted Owl payment

Statutory authority: Omnibus Budget Reconciliation Act of 1993, as amended (Sec. 13982 of P.L. 103-66, as amended by P.L. 103-443)

General description of payment:

Distribution of gross receipts to states for the benefit of counties. This special payment amount is in lieu of the amounts under the 25-Percent payment for the states and is for selected counties to compensate them for the decline in timber harvests due to the protection of the northern spotted owl's habitat.

The 25-Percent payment law specifies that the payments must be used for roads and schools.

Agency's methodology and process for calculating and distributing payment:

For fiscal years 1991 and 1992, the annual appropriations laws stipulated that the payments would be no less than 90 percent of the average payments for fiscal years 1988-90 and fiscal years 1986-90, respectively. For fiscal year 1993, the percentage was reduced to 85 percent. For fiscal years 1994-2003, a legislative formula—with decreasing annual percentages—governs payments specifying the amounts that the states are to receive. For fiscal years 1999-2003, payments are the greater of the Spotted Owl payment or the 25-Percent payment.

As provided by the appropriations acts, in fiscal years 1991-93, the Forest Service made the payments required by the spotted owl formula from its national forest receipts as part of its 25-Percent payment. (See table II.2.) The Forest Service also made its payments from its national forest receipts in fiscal years 1994-95 even though a special appropriation had been approved for fiscal years 1994-2003.^a Because of decreasing national forest receipts in fiscal year 1996 that would preclude the Forest Service from making all necessary payments from its National Forest Fund, the Forest Service took steps to initiate and use the special spotted owl appropriation for fiscal year 1996 and beyond.

As part of its calculations for the 25-Percent payment, the Forest Service incorporated the special Spotted Owl payment formula to identify the amounts that will be owed—in lieu of the 25-Percent payment—to the counties within 18 national forests—8 in Oregon, 6 in California, and 4 in Washington—affected by the Spotted Owl payment. This payment is made as part of the 25-Percent payment process and time frame; that is, an interim payment to the counties in October and a final payment for the balance of the fiscal year funds in December.

For fiscal years 1995-97, the Spotted Owl payment exceeded the amount that would have been required under the 25-Percent payment by about \$279 million. These special payments are due to expire in 2003.

California's process for allocating payment:

The Spotted Owl payment is combined with the 25-Percent payment for the rest of the state and distributed in the same manner. (See table II.2.)

Oregon's process for allocating payment:

The Spotted Owl payment is combined with the 25-Percent payment for the rest of the state and distributed in the same manner. (See table II.2.)

Washington's process for allocating payment:

The Spotted Owl payment is combined with the 25-Percent payment for the rest of the state and distributed in the same manner. (See table II.2.)

(Table notes on next page)

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

^aIn our report, Forest Service: Unauthorized Use of the National Forest Fund (GAO/RCED-97-216, Aug. 29, 1997), we said that the Forest Service was required to use the special appropriation for fiscal years 1994-95. Thus, we recommended that the Forest Service take steps to rectify the inappropriate use of the National Forest Fund and to use the correct appropriation for fiscal years 1994-95 and the future. The Forest Service had not implemented our recommendation as of August 13, 1998. However, the Forest Service is in the process of working with the U.S. Treasury and the Office of Management and Budget on the methodology that should be used to comply with our recommendation.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.4: Forest Service's Grasslands Payment

Agency: Forest Service

Name of payment: National Grasslands payment

Statutory authority: Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012)

General description of payment:

Distribution to counties of net receipts from Forest Service grasslands.

The law stipulates that the funds must be used for roads and/or schools.

Agency's methodology and process for calculating and distributing payment:

Twenty-five percent of the gross receipts from grasslands (grazing receipts are collected by the Forest Service and mineral receipts are collected by MMS, which transmits the receipts to the Forest Service for distribution) is distributed to the 80 counties containing Forest Service grasslands.

Grasslands managers (through local national forest offices) supply receipt data to the Forest Service's Financial Management personnel, who, using several financial reports, calculate the county payments.

Distributions are paid annually to the counties in March on a calendar-year basis.

The Forest Service notifies the U.S. Treasury of the amounts to be distributed to the counties, and the Treasury transmits the funds electronically to the counties.

California's process for allocating payment:

Does not apply; payments are made directly to counties.

Oregon's process for allocating payment:

Does not apply; payments are made directly to counties.

Washington's process for allocating payment:

Does not apply; no grasslands are located in Washington.

Table II.5: Forest Service's Quinault Special Payment

Agency: Forest Service

Name of payment: Quinault Special payment

Statutory authority: P.L. 100-638, sec. 4(b)(2) (102 Stat. 3327, 3328)

General description of payment:

Distribution of gross receipts from a special management area established to compensate the Quinault Indian tribe and the state of Washington for land that the Forest Service gave back to the tribe.

The payment must be used for roads and schools.

Agency's methodology and process for calculating and distributing payment:

From gross receipts generated on the special management area, 45 percent is distributed to the state of Washington, 45 percent to the Quinault tribe, and 10 percent into a Forest Service timber management fund.

The Forest Service's headquarters combines this with the 25-Percent payment to Washington State and makes one payment. The Olympic National Forest made the 45-percent payment for the tribe to the Bureau of Indian Affairs, which forwards the payment to the tribe.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply to Oregon.

Washington's process for allocating payment:

Washington distributes the amounts of Quinault payments to the counties as part of its regular 25-Percent Forest Service payments. (See table II.2.)

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.6: Forest Service's Arkansas Smoky Quartz Payment

Agency: Forest Service

Name of payment: Arkansas Smoky Quartz payment

Statutory authority: Department of the Interior and Related Agencies Appropriations Act, 1989 (P.L. 100-446, sec. 323)

General description of payment:

Distribution to the state of Arkansas of 50 percent of the receipts from the sale of quartz mined on the Ouachita National Forest in Arkansas.

The funds distributed to the state are to be used for public schools and public roads in the counties in which the Ouachita National Forest are located.

Agency's methodology and process for calculating and distributing payment:

Fifty percent of the receipts from the sale of quartz from the Ouachita National Forest are distributed to the state of Arkansas.

The Forest Service calculates these payments by subtracting the quartz receipts from the total forest receipts and applying the 50-percent rate to these quartz receipts. The quartz payment is then added to the state's 25-Percent payment and distributed in one payment.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply to Oregon.

Washington's process for allocating payment:

Does not apply to Washington.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.7: Forest Service's Payments to Minnesota

Agency: Forest Service

Name of payment: Payments to Minnesota

Statutory authority: Act of June 22, 1948 (16 U.S.C. 577g, 577g-1)

General description of payment:

Payment to the state of Minnesota for the fair appraisal value of Forest Service lands in three counties—Cook, Lake, and St. Louis—to be distributed to those counties.

The law does not stipulate how the payments are to be used.

Agency's methodology and process for calculating and distributing payment:

Three-quarters of 1 percent of the appraised value of national forest lands in Cook, Lake, and St. Louis counties is paid to the state of Minnesota. The appraised value of the lands is determined by the Secretary of Agriculture every 10 years.

This special payment replaces the 25-Percent payment to the states. The Forest Service adds this amount to the 25-Percent payment to the remainder of Minnesota and makes one payment to Minnesota. The state is to make the distribution to the counties.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply to Oregon.

Washington's process for allocating payment:

Does not apply to Washington.

Table II.8: Bureau of Land Management's Payment in Lieu of Taxes

Agency: Bureau of Land Management (BLM)

Name of payment: Payment in Lieu of Taxes (PILT)

Statutory authority: Payments in Lieu of Taxes Act of 1976, as amended (31 U.S.C. 6901-6907)

General description of payment:

Distributions to local units of government designed to supplement other federal land revenue-sharing payments that local governments receive. The PILT payment is applicable to more counties than any of the other federal land management revenue-sharing payments.

The law does not stipulate how the funds should be spent.

Agency's methodology and process for calculating and distributing payment:

The act authorizes BLM to make two types of annual payments. The first payment under section 6902 is the traditional PILT payment to units of local government (generally counties) that have certain federally owned "entitlement lands" within the boundaries of the county. This payment represents 99 percent of the total PILT payments in fiscal year 1997 and is calculated under a very complex, multistep formula based primarily on the acres of federal land in the county, the population of the county, and the previous year's payments made by other federal agencies on the lands.

BLM obtains the population data from the Bureau of the Census and acreage data from each of the federal agencies that have eligible acres within each county's boundaries—about 595 million acres. However, the previous year's payments from designated federal agencies are provided by the governor's office from each state. BLM also obtains similar payment data from each of the land management agencies as a check on the amounts the states provide.

The second payment under sections 6904 and 6905 authorizes payments of 1 percent of the fair market value of certain county lands acquired by the National Park Service and the Forest Service.

The combination of these payments represents the total calculated PILT payment. However, since the payment is based solely on annual appropriations, if sufficient funds are not appropriated, BLM prorates the payments to each of the counties. During fiscal years 1995-97, the counties received about 77, 68, and 53 percent of their eligible payments, respectively. A detailed presentation of the PILT program, the formula used, and an example of the payment calculation for an individual county is provided in appendix III.

California's process for allocating payment:

Does not apply; payments are made directly to the counties.

Oregon's process for allocating payment:

Does not apply; payments are made directly to the counties.

Washington's process for allocating payment:

Does not apply; payments are made directly to the counties.

Table II.9: Bureau of Land Management's Mineral Leasing Act Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Mineral Leasing payment

Statutory authority: Mineral Leasing Act (30 U.S.C. 191)

General description of payment:

Distribution of gross receipts from oil and gas rights of way (for oil and gas pipelines) to states. The funds are to be used for the planning, construction, and maintenance of public facilities and for the provision of public service.

Agency's methodology and process for calculating and distributing payment:

For all states other than Alaska, 50 percent is distributed to the state, 40 percent is distributed to the Bureau of Reclamation, and 10 percent is distributed to the General Fund of the U.S. Treasury. Alaska receives 90 percent of the receipts, and the remaining 10 percent is distributed to the General Fund of the U.S. Treasury.

BLM is required to make these payments to the states not later than the last business day of the month of the revenues' receipt. Monthly, BLM calculates the payments due to the states and initiates the authorization for payment. The U.S. Treasury issues the payment to the states electronically, and BLM notifies the states of the amount to be paid and how much is attributable to each county.

Annually, BLM transfers the amounts due to the Bureau of Reclamation and the General Fund of the U.S. Treasury.

California's process for allocating payment:

The state deposits the BLM Mineral Leasing funds in the state's State School Fund and does not distribute the BLM payments to the counties directly.

Oregon's process for allocating payment:

BLM deposits the Mineral Leasing revenue-sharing funds into the state's short-term treasury interest-bearing account monthly. After each deposit, the state verifies the amount of the deposit with information received from BLM. To make the distributions, the state (1) calculates the amount to be distributed to each county, including interest less a 60-cent processing fee; (2) electronically distributes the funds to the counties; and (3) sends the counties a formal notice of the reason for the distribution.

The state distributes the funds to the counties in which the funds were derived as reported by BLM. The state distributes the funds on a quarterly basis—March 31, June 30, September 30, and December 31. The state law requires that the moneys be used to support public schools or for the construction and maintenance of public roads.

Washington's process for allocating payment:

The state receives only about \$10 in Mineral Leasing revenue-sharing funds from BLM. The funds are for one county, and the state distributes the funds to that county.

Table II.10: Bureau of Land Management's Section 15, Outside Grazing Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Section 15—Outside Grazing Leases payment

Statutory authority: Taylor Grazing Act (43 U.S.C. 315i, 315m)

General description of payment:

Distribution of gross receipts paid to the states from grazing leases, located outside grazing districts. The funds are to be used for the benefit of the counties in which the lands producing the revenues are located; however, no particular use is specified.

Agency's methodology and process for calculating and distributing payment:

From gross receipts, 50 percent is distributed to the Range Improvement Fund for later appropriation to BLM for managing rangelands, and 50 percent is distributed to the states from grazing permits in their states.

Payments are based on fiscal-year receipts and are made in two installments. BLM processes the proposed payments through the U.S. Treasury, and BLM notifies the states, by fax machine, of how much they will be receiving and which counties generated the receipts. The payment for the first 11 months of the fiscal year is made by September 30 and by mid-November for the 12th month. For the most part, funds are transferred electronically.

California's process for allocating payment:

BLM deposits Section 15 revenue-sharing funds into the state's Federal Trust Fund interest-bearing account in September and November of each year. After each deposit, the state verifies the amount of the deposit with information received from BLM. After both deposits have been made, the state (1) calculates the amount to be distributed to each county, (2) transfers the funds to be distributed to the counties from the Federal Trust Fund to the Federal Grazing Fees Fund, (3) prepares and mails the distribution checks to the counties, and (4) sends the counties a formal notice of the reason for the distribution and what the funds are to be used for.

The state distributes the funds to the counties in which the funds were derived as reported by BLM to the state. Distributions are made annually, usually around the first of February. The funds are to be used to improve rangeland and control predators.

Oregon's process for allocating payment:

BLM deposits Section 15 revenue-sharing funds into the state's short-term treasury interest-bearing account in October and December of each year. After each deposit, the state verifies the amount of the deposit with information received from BLM. After the deposits are verified, the state (1) establishes a distribution date; (2) calculates the amount to be distributed to each county, including interest less a 60-cent processing fee; (3) electronically distributes the funds to the counties; and (4) sends the counties a formal notice of the reason for the distribution.

The state distributes the funds to the counties in which the funds were derived as reported by BLM to the state. Distributions are made annually in December. Oregon law requires that the funds be expended only for range improvements in those counties that have grazing districts; otherwise, the funds are available for general government purposes in those counties that have leased lands but no grazing districts.

Washington's process for allocating payment:

BLM deposits Section 15 revenue-sharing funds into the state's General Fund interest-bearing account in December. After each deposit, the state verifies the amount of the deposit with information received from BLM. After each deposit is verified, the state (1) verifies the amount to be distributed to the counties according to BLM records, (2) distributes the funds to the counties electronically, (3) sends the counties a formal notice of the reason for the distribution, and (4) sends the counties an annual report showing the amount of Section 15 funds distributed to each county.

The state distributes the funds to the counties in which the funds were derived as reported by BLM to the state. The state makes the distributions in December and does not specify how the funds must be used.

Table II.11: Bureau of Land Management's Section 3 Inside Grazing Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Section 3—Inside Grazing Permits payment

Statutory authority: Taylor Grazing Act (43 U.S.C. 315b, 315i)

General description of payment:

Distribution to states of gross receipts collected by BLM as grazing permit fees inside grazing districts. The funds are to be used for the benefit of the counties in which the lands producing the revenues are located; however, no particular use is specified.

Agency's methodology and process for calculating and distributing payment:

From gross receipts, 50 percent is distributed to the Range Improvement Fund for later appropriation to BLM for managing rangelands; 37.5 percent is distributed to the General Fund of the U.S. Treasury; and 12.5 percent is distributed to the states from which the grazing receipts were earned.

Payments are based on fiscal-year receipts and are made in two installments. Payments for the first 11 months are based on the receipts received by August 30. In mid-October, calculations for the 12th month are made.

BLM processes the proposed payments through the U.S. Treasury, and BLM notifies the states, by fax machine, of how much they will be receiving and which counties generated the receipts. The payment for the first 11 months of the fiscal year is made by September 30 and for the 12th month by mid-November. For the most part, funds are transferred electronically.

California's process for allocating payment:

BLM deposits Section 3 revenue-sharing funds into the state's Federal Trust Fund interest-bearing account in September and November of each year. After each deposit, the state verifies the amount of the deposit with information received from BLM. After both deposits have been made, the state (1) calculates the amount to be distributed to each county, (2) transfers the funds to be distributed to the counties from the Federal Trust Fund to the Federal Grazing Fees Fund, (3) electronically distributes the funds to the counties, and (4) sends the counties a formal notice of the reason for the distribution and what the funds are to be used for.

The state distributes the funds only to the eight counties from which the funds were derived on the basis of the proportion of the acres of a grazing district that are situated in each county to the total acres in the grazing district. Distributions are made annually, usually around the first of February. Funds are to be used to improve rangeland and control predators.

Oregon's process for allocating payment:

BLM deposits Section 3 revenue-sharing funds into the state's short-term treasury interest-bearing account in October and December of each year. After each deposit, the state verifies the amount of the deposit with information received from BLM. After both deposits are made, the state (1) establishes a distribution date; (2) calculates the amount to be distributed to each county, including interest less a 60-cent processing fee; (3) distributes the funds electronically to the counties; and (4) sends the counties a formal notice of the reason for the distribution.

The state distributes the funds to the counties in which the funds were derived as reported by BLM to the state. Distributions are made annually in December. Oregon law requires that the funds be expended only for range improvements in those counties that have grazing districts; otherwise, the funds are available for general government purposes in those counties that have leased lands but no grazing districts.

Washington's process for allocating payment:

Does not apply. No BLM Section 3 revenue-sharing funds are derived by any of the counties in the state.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.12: Bureau of Land Management's Proceeds of Sales Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Proceeds of Sales of Lands and Materials payment

Statutory authority: Department of the Interior Appropriations Act, 1952 (65 Stat. 252)

General description of payment:

Distribution to states of the net proceeds from the sale of lands and materials on public domain lands in 16 reclamation states west of the Mississippi River and outside reclamation states. Materials include such minerals materials as sand or gravel, timber, salvage timber, or vegetative materials, such as plants, mushrooms, and firewood.

The law specifies that payments are to be used for educational purposes or for the construction of public roads and improvements. It does not specify that the payments must be distributed to the counties for these purposes.

Agency's methodology and process for calculating and distributing payment:

For reclamation states, 76 percent of the gross receipts are distributed to the Bureau of Reclamation's Reclamation Fund, 20 percent to the General Fund of the U.S. Treasury, and 4 percent to the states. Ninety-six percent of the gross receipts from salvage timber sales are distributed to BLM's Forest Ecosystem Health Recovery Fund and 4 percent to the states.

For nonreclamation states, 96 percent of the gross receipts are distributed to the General Fund of the U.S. Treasury and 4 percent to the states. Salvage sale receipts are treated the same way as they are in reclamation states.

Distribution to the states is on a fiscal-year basis. The distribution for the first 11 months is paid as of September 30 and for the 12th month as soon as practical after September 30. BLM annually distributes the funds electronically to the Bureau of Reclamation and the General Fund of the U.S. Treasury, usually in the November/December time frame.

California's process for allocating payment:

The state does not distribute the Proceeds of Sales revenue-sharing funds received from BLM to its counties. Instead, the state uses the funds for state school expenditures.

Oregon's process for allocating payment:

BLM deposits Proceeds of Sales revenue-sharing funds into the state's short-term treasury interest-bearing account in October and December of each year. After each deposit, the state verifies the amount of the deposit with information received from BLM. After both deposits for each year are made, the state (1) establishes a distribution date, (2) calculates the amount to be distributed to each county, including interest less a 60-cent processing fee, (3) electronically distributes the funds to the counties, and (4) sends the counties a formal notice of the reason for the distributions and what the distributed funds are to be used for.

The state distributes the Proceeds of Sales funds to all 36 counties in the state on a pro rata basis that is based on the total number of square miles in each county compared with the total number of square miles in the state. Distributions are made annually in December. The state requires that counties use the funds for the repair and/or construction of roads and bridges.

Washington's process for allocating payment:

The state does not distribute the Proceeds of Sales revenue-sharing funds received from BLM to its counties. Instead, the state deposits the funds in the common school construction fund for allocation by the Superintendent of Public Instruction to the school districts in each county.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.13: Bureau of Land Management's Oregon & California Grant Lands Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Oregon and California (O&C) Grant Lands payments

Statutory authority: Act of August 28, 1937 (43 U.S.C. 1181f)

General description of payment:

Distribution to counties of gross receipts derived from the sale of timber and other resources from the O&C grant lands that have been revested to the federal government. Eighteen counties participate in this distribution.

The law does not stipulate how the counties should use the funds.

Agency's methodology and process for calculating and distributing payment:

BLM collects most of the receipts from the O&C lands; however, the Forest Service administers some of the timber sales in this area and transfers the receipts to BLM for distribution. MMS collects receipts from the sale of minerals and makes distribution under the Mineral Leasing Act.

Prior to fiscal year 1991, BLM distributed 50 percent of the gross receipts to the counties and 50 percent to the General Fund of the U.S. Treasury on a fiscal-year basis. Payments were made for the 11-month period by the end of September and the 12th month payment as soon as fiscal-year records were completed. For fiscal years 1991-93, payments to the counties were based on 50 percent of the average payments for fiscal years 1986-90, not to exceed the total receipts from the O&C lands, or 50 percent, if greater.

For fiscal years 1994-98, payments are a set amount that is based on the average payment to a county during fiscal years 1986-90. For fiscal years 1999-2003, BLM pays the higher of the special payment amount or what is due under the 50-percent receipt calculation. In any case, only one payment is made. These payments are made from the special spotted owl appropriation for fiscal years 1994-2003. (See table II.15.)

Annually, in September or earlier, BLM requests that the U.S. Treasury transfer funds to cover the payments. BLM electronically transfers the payments to one bank and specifies the amount due to each county. The bank breaks the total into 18 separate county accounts. BLM notifies the payees of the payment to be received. BLM annually distributes the funds electronically to the General Fund of the U.S. Treasury, usually in the November/December time frame except for the salvage sale receipts, which go into BLM's Forest Ecosystem Health Recovery Fund, and 2001 (k) (P.L. 104-19) timber sales receipts, which are distributed to BLM and the Forest Service's Timber Pipeline Restoration Funds.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply; payments are made directly to the counties.

Washington's process for allocating payment:

Does not apply to Washington.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.14: Bureau of Land Management's Coos Bay Wagon Road Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Coos Bay Wagon Road Grant Fund payment

Statutory authority: Act of May 24, 1939 (43 U.S.C. 1181f-1)

General description of payment:

Distribution of gross receipts to Coos and Douglas counties in Oregon derived from the sale of timber and other resources from the reconveyed Coos Bay Wagon Road Grant Lands. Payments to these counties are to compensate them for the amounts of property taxes that would have been due to the counties if the lands had not been reconveyed to the federal government.

Under the law that created the Coos Bay Wagon Road Grant Fund, payments must be used for schools, roads, highways, bridges, and port districts.

Agency's methodology and process for calculating and distributing payment:

From the receipts (primarily timber receipts), 25 percent is distributed to the General Fund of the U.S. Treasury, and 75 percent is distributed to the Coos Bay Wagon Road Grant Fund.

Until 1994, BLM received tax bills from the counties four times a year. Actual distributions from the fund covered only the tax bills received, and the remainder stayed in the fund. Once every 10 years, any balance in the fund not needed to cover the tax bills was transferred to the General Fund of the U.S. Treasury. The balance of the fund in fiscal year 1998 is about \$28 million, which will be returned to the General Fund in 2000.

For fiscal years 1994-98, payments are a set amount based on a declining percentage of the average tax bill for fiscal years 1986-90. For fiscal years 1999-2003, payments shall be the greater of the special payment amount or what is due under the tax calculations. Payments are made from the special spotted owl appropriation. (See table 11.15.) Receipts—other than from salvage sales—are now deposited in the General Fund of the U.S. Treasury. Salvage sales receipts are deposited in the BLM Forest Ecosystem Health Recovery Fund.

Annually, in September, BLM requests that the U.S. Treasury transfer funds to the counties for the special spotted owl guarantee payment. BLM notifies the payees of the payment to be received.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply; payments are made directly to the counties.

Washington's process for allocating payment:

Does not apply to Washington.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.15: Bureau of Land Management's Spotted Owl Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Spotted Owl payment

Statutory authority: Omnibus Budget Reconciliation Act of 1993, as amended (sec. 13983 of P.L. 103-66 as amended by P.L. 103-443)

General description of payment:

Special payment to selected counties in lieu of the O&C Grant Lands payment and the Coos Bay Wagon Road Grant Fund payment to compensate for the decline in timber harvests for the protection of the northern spotted owl habitat.

Agency's methodology and process for calculating and distributing payment:

For fiscal years 1991 and 1992, the annual appropriations laws stipulated that the payments to the O&C counties would be no less than 90 percent of the average payments for fiscal years 1988-90 and 1986-90, respectively, but could not exceed the total amount of the receipts generated in the O&C lands. In fiscal year 1993, the percentage was reduced to 85 percent. In fiscal year 1994, the law provided for a new payment calculation for the O&C and Coos Bay Wagon Road lands on the basis of the decreasing annual percentages of payments received by the counties for fiscal years 1986-90.

For fiscal years 1994-98, BLM paid this special payment amount. For fiscal years 1999-2003, payments in the formula must be compared with the amount that the O&C counties and Coos Bay counties would have received on the basis of actual receipts and tax payments, respectively. The counties receive the higher amount, and BLM uses the special spotted owl appropriation to make the payments for both the O&C Grant Lands payment (see table II.13) and the Coos Bay Wagon Roads payment. (See table II.14.)

While BLM previously made two payments to the counties for the O&C payment and four payments for the Coos Bay tax bill payments, it now makes only one payment a year.

Before the end of the fiscal year, BLM requests that the U.S. Treasury make available from the special appropriation the amount that will be needed to cover both payments. BLM then notifies the Treasury of the amounts that will be due to each county, and the payment is made by the end of September. For the O&C payment, BLM pays one bank, and the bank prepares separate payments for each of the 18 counties. For the Coos Bay payments, BLM has the Treasury make a payment to each of the County Treasurers for Coos and Douglas counties.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply; payments are made directly to the counties.

Washington's process for allocating payment:

Does not apply to Washington.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.16: Bureau of Land Management's National Grasslands Payment

Agency: Bureau of Land Management (BLM)

Name of payment: National Grasslands payment

Statutory authority: Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012)

General description of payment:

Distribution of net receipts to counties from lands transferred to the Department of the Interior for administration by BLM. Receipts are generally from grazing and oil and gas leases.

The law stipulates that the payments must be used for roads and/or schools.

Agency's methodology and process for calculating and distributing payment:

From gross receipts, 50 percent is distributed to the Range Improvement Fund for later appropriation to BLM for managing rangelands; 25 percent is distributed to the General Fund of the U.S. Treasury; and 25 percent is distributed to counties in which the receipts were earned.

BLM's districts collect the receipts for commodities other than oil and gas. MMS collects the oil and gas receipts and transfers them monthly to BLM.

Payments to the counties are on a calendar-year basis and are generally made in March for the prior calendar year. Counties are notified of the payments, and copies of the payment reports are sent to both the county and state treasurers.

BLM is authorized to reduce the county payments by the cost of administering the payments but has opted not to do so because the cost would be minimal.

California's process for allocating payment:

Does not apply; payments are sent directly to the counties.

Oregon's process for allocating payment:

Does not apply; payments are sent directly to the counties.

Washington's process for allocating payment:

Does not apply; payments are sent directly to the counties.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.17: Bureau of Land Management's Nevada Land Sales Payment

Agency: Bureau of Land Management (BLM)

Name of payment: Nevada Land Sales payment

Statutory authority: Public Law 96-586 (94 Stat. 3381, 3382)

General description of payment:

Distribution to either the state of Nevada, city of Las Vegas, or Clark County of gross receipts from the sale of certain lands within Clark County, Nevada.

The law stipulates that the payments to the state must be used for its general education program and the payments to the county or municipality are to be used for the acquisition and development of recreational lands and facilities.

Agency's methodology and process for calculating and distributing payment:

Of the gross receipts from land transactions, 85 percent is distributed to the General Fund of the U.S. Treasury to purchase lands in the Lake Tahoe area; 10 percent is distributed to either the city of Las Vegas or Clark County (depending on where the receipts were generated); and 5 percent is distributed to the state of Nevada.

The BLM State Office prepares the land transactions, and the Las Vegas District Office collects the moneys and notifies the BLM Business Center of whether the proceeds from the transaction are payable to the state, county, or city of Las Vegas.

Distributions are made annually, usually in the February/March time frame, to the state and to Clark County or Las Vegas, depending on where the land transactions occurred. BLM notifies the state treasurer of the amounts paid to the county and city. Similar information is sent to the county treasurer.

The funds distributed to the General Fund of the U.S. Treasury are available to the Forest Service to purchase lands in the Lake Tahoe area.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply to Oregon.

Washington's process for allocating payment:

Does not apply to Washington.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.18: Bureau of Land Management's National Petroleum Reserves Payment

Agency: Bureau of Land Management (BLM)

Name of payment: National Petroleum Reserve in Alaska payment

Statutory authority: National Petroleum Reserves Production Act of 1976, as amended (42 U.S.C. 6508)

General description of payment:

Distribution of gross receipts from the sales, rents, bonuses, and royalties from oil and gas leases in the National Petroleum Reserve in Alaska.

The law states that the funds be used for the planning, construction, maintenance, and operation of essential public facilities and other necessary provisions of public service in Alaska.

Agency's methodology and process for calculating and distributing payment:

Fifty percent of the gross receipts from the National Petroleum Reserve are distributed to the state of Alaska and 50 percent to the General Fund of the U.S. Treasury.

The payment began in the mid-1970s, but no receipts were generated during fiscal years 1995-97. When receipts were generated, MMS would collect the receipts and transfer the moneys to BLM for semiannual distribution to the state.

BLM distributes the funds as soon as practical after March 31 and September 30 to the State Treasurer of Alaska and distributed them annually to the General Fund of the U.S. Treasury as soon as practical after September 30.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply to Oregon.

Washington's process for allocating payment:

Does not apply to Washington.

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Table II.19: Bureau of Land Management's South Half of Red River Payment

Agency: Bureau of Land Management (BLM)

Name of payment: South Half of Red River Oklahoma/Oklahoma Royalties payment

Statutory authority: Department of the Interior Appropriations Act, 1952 (65 Stat. 248, 252)

General description of payment:

Distribution of gross receipts from royalties from oil and gas leases on lands bordering the South Half of the Red River in Oklahoma to the Bureau of Indian Affairs (BIA) and the state of Oklahoma.

Distributions to BIA are to benefit the Apache, Comanche, and Kiowa Indians of Oklahoma. The law specifies that the payments must be used in accordance with the Mineral Leasing Act, that is, for the planning, construction, and maintenance of public facilities.

Agency's methodology and process for calculating and distributing payment:

From the royalties generated on these lands, 62.5 percent is distributed to BIA, and 37.5 percent is distributed to the state of Oklahoma. MMS collects the receipts and transfers them to BLM for distribution.

Payments to the state are made semiannually—generally, in April for the March 31 payment and in November for the September 30 payment.

Annual payments, which are based on fiscal-year royalties, are made to BIA electronically as soon as practical after September 30.

California's process for allocating payment:

Does not apply to California.

Oregon's process for allocating payment:

Does not apply to Oregon.

Washington's process for allocating payment:

Does not apply to Washington.

Table II.20: Minerals Management Service's Mineral Leasing Payments for Public Domain Lands

Agency: Minerals Management Service (MMS)

Name of payment: Mineral Leasing Payments for Public Domain Lands

Statutory authority: Mineral Leasing Act, as amended (30 U.S.C. 191)

General description of payment:

Distribution of net receipts generated from royalties, rents, and bonuses from minerals leases on public domain lands. The law states that the funds are to be used by the state and those subdivisions socially and economically affected by the development of minerals for the planning, construction, and maintenance of public facilities and for the provision of public service.

Agency's methodology and process for calculating and distributing payment:

From gross receipts, MMS subtracts costs—in the form of a net receipts-sharing deduction^a—and makes monthly payments to the states on the receipts generated from minerals leases on public domain lands. The public domain lands may include lands designated as "state select lands," which results in a larger portion of the receipts being distributed to the state.

For states other than Alaska, MMS distributes 50 percent of the net receipts to the state, 40 percent to the Bureau of Reclamation's Reclamation Fund, and 10 percent to the General Fund of the U.S. Treasury. For receipts generated on state select lands or in the state of Alaska, 90 percent of the receipts are distributed to the state and 10 percent to the General Fund of the U.S. Treasury.

Under the requirements of the Federal Oil and Gas Royalty Management Act of 1982, as amended, MMS must distribute the state's share of the receipts generated by the last day of the month that the receipts are warranted—that is deposited—at the U.S. Treasury. MMS collects the receipts on the BLM's, FWS' Forest Service's, and various military branches' public domain lands; verifies the lessee's payments; and processes the payment through the U.S. Treasury to the states on a monthly basis. If MMS is late in making its payment to the states, it is responsible for the additional cost of the interest that must be paid to the states. MMS then sends the state a detailed record of the receipts generated in the previous month as well as an identification of the county in which the lease was located.

California's process for allocating payment:

The state distributes to the counties only a small portion of MMS Mineral Leasing revenue-sharing funds. In fiscal year 1997, for example, only about 6 percent of the mineral leasing funds, or \$3 million of \$53 million, received from MMS were distributed. All of the distributed funds were from a portion of the geothermal-leasing receipts. The state deposits the remainder of the geothermal funds, as well as all other MMS Mineral Leasing funds, in specific state accounts—such as the general fund, the surface mining and reclamation account, the state school fund, grants, the renewable resources investment fund, and the teachers' retirement fund—or allocates them to two school districts.

MMS deposits all Mineral Leasing funds into the state's Federal Trust Fund interest-bearing account each month. After each monthly deposit, the state (1) verifies the amount of the deposit, (2) calculates the amount of the geothermal funds to be distributed to each county, (3) transfers the funds to be distributed to the counties from the Federal Trust Fund to the Geothermal Resources Development Account, (4) prepares and mails the distribution checks to the counties in which the funds were derived as reported by MMS to the state, and (5) sends the counties a formal notice of the reason for the distribution and what the funds are to be used for.

State law requires that the counties use the funds for any of 11 specific purposes.

(continued)

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Oregon's process for allocating payment:

MMS deposits Mineral Leasing revenue-sharing funds into the state's short-term treasury interest-bearing account monthly. After each deposit, the state verifies the amount of the deposit with information received from MMS. On a quarterly basis—March 31, June 30, September 30, and December 31—the state distributes MMS Mineral Leasing funds to the counties. To make the distributions, the state (1) calculates the amount to be distributed to each county, including interest, less a 60-cent processing fee; (2) electronically distributes the funds to the counties; and (3) sends the counties a formal notice of the reason for the distribution.

The state distributes the funds to the counties in which the funds were derived as reported by MMS. The state does not specify how the funds are to be used.

Washington's process for allocating payment:

The state does not distribute MMS Mineral Leasing funds to counties. Instead, the state deposits the funds in the common school construction fund. The funds are to be used for the construction of common school facilities in the 39 counties.

^aThe Net Receipts Sharing Deduction, authorized in P.L. 103-66, sec. 10201, is an annual calculation of a portion of MMS', BLM's, and the Forest Service's costs to operate the Mineral Leasing program. One-twelfth of the annual deduction is subtracted from the monthly payments to the state and is deposited in the General Fund of the U.S. Treasury.

Table II.21: Minerals Management Service's Mineral Leasing Payments for Acquired Lands

Agency: Minerals Management Service (MMS)

Name of payment: Mineral Leasing Payments for Acquired Lands

Statutory authority: Mineral Leasing Act for Acquired Lands, as amended (30 U.S.C. 355)

General description of payment:

Distribution of gross receipts generated from rents, bonuses, and royalties from minerals leases on acquired lands. The states are to use the payments for the same purpose as designated by other revenue-sharing programs for the lands on which the lease is situated.

Agency's methodology and process for calculating and distributing payment:

MMS collects receipts on acquired federal lands and on BLM's and the Forest Service's grasslands and FWS's refuges. MMS, however, unless otherwise provided, is prohibited from making payments directly to counties and therefore must transmit the moneys to the appropriate agencies for actual distribution to the counties. The cognizant agencies make the distribution of minerals receipts on grasslands or refuges according to the grasslands and refuges distribution statutes. (See tables II.4, II.16, and II.23.)

On a monthly basis, MMS instructs the U.S. Treasury to transfer 100 percent of the receipts generated to BLM or FWS. MMS then sends the agencies detailed reports on the source of the receipts and the counties where the leases are located to enable the agencies to make the proper distribution. MMS does not charge these federal agencies for collecting the receipts.

The Forest Service distributed receipts from acquired lands on national forests to states through the end of fiscal year 1992. Beginning in fiscal year 1993, however, MMS (pursuant to the Energy Policy Act of 1992) started distributing 25 percent of the minerals receipts generated on acquired national forest lands to the states and 75 percent to the General Fund of the U.S. Treasury. MMS notifies the Forest Service of the distributions made on its behalf.

California's process for allocating payment:

The state distributes to the counties only a small portion of MMS' Mineral Leasing revenue-sharing funds. In fiscal year 1997, for example, only about 6 percent of the Mineral Leasing funds, or \$3 million of \$53 million, received from MMS were distributed. All of the distributed funds were from a portion of the geothermal-leasing receipts. The state deposits the remainder of the geothermal funds, as well as all other MMS Mineral Leasing funds, in specific state accounts—such as the general fund, the surface mining and reclamation account, the state school fund, grants, the renewable resources investment fund, and the teachers' retirement fund—or allocates them to two school districts.

MMS deposits all Mineral Leasing funds into the state's Federal Trust Fund interest-bearing account each month. After each monthly deposit, the state (1) verifies the amount of the deposit, (2) calculates the amount of the geothermal funds to be distributed to each county, (3) transfers the funds to be distributed to the counties from the Federal Trust Fund to the Geothermal Resources Development Account, (4) prepares and mails the distribution checks to the counties in which the funds were derived as reported by MMS to the state, and (5) sends the counties a formal notice of the reason for the distribution and what the funds are to be used for.

State law requires that the counties use the funds for any of 11 specific purposes.

(continued)

Appendix II
Department of the Interior's and Forest
Service's Payments to States and Counties

Oregon's process for allocating payment:

MMS deposits Mineral Leasing revenue-sharing funds into the state's short-term treasury interest-bearing account monthly. After each deposit, the state verifies the amount of the deposit with information received from MMS. On a quarterly basis—March 31, June 30, September 30, and December 31—the state distributes MMS' Mineral Leasing funds to the counties. To make the distributions, the state (1) calculates the amount to be distributed to each county, including interest, less a 60-cent processing fee; (2) electronically distributes the funds to the counties; and (3) sends the counties a formal notice of the reason for the distribution.

The state distributes the funds to the counties in which the funds were derived as reported by MMS. The state does not specify how the funds are to be used.

Washington's process for allocating payment:

The state does not distribute MMS' Mineral Leasing funds to counties. Instead, the state deposits the funds in the common school construction fund. The funds are to be used for the construction of common school facilities in the 39 counties.

Table II.22: Minerals Management Service's Offshore Mineral Leasing Payment

Agency: Minerals Management Service (MMS)

Name of payment: Off-shore Mineral Leasing payment

Statutory authority: Section 8(g) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1337(g))

General description of payment:

Distribution of gross receipts from off-shore leases within each state's payment zone and annual settlement disbursements to the states.

The law does not specify what use the state must make of the funds.

Agency's methodology and process for calculating and distributing payment:

The Outer Continental Shelf Lands Act (OCSLA) Amendments of 1978 amended section 8(g) of the OCSLA by providing that the states were to receive a "fair and equitable" division of revenues generated from the leasing of lands within 3 miles of a state's seaward boundary. However, the federal government and the states could not agree on the meaning of the term "fair and equitable."

Congress resolved the dispute through the OCSLA Amendments of 1985 (P.L. 99-272). The law provides for a series of annual settlement payments to be disbursed to the states over a 15-year period from fiscal year 1987 through fiscal 2001. The law also provides for recurring disbursements of 27 percent of the gross receipts received within each of the states' section 8(g) zones. The remaining receipts go to the General Fund of the U.S. Treasury.

MMS negotiates the minerals leases and collects the receipts, verifies the lessee's payments, and processes the payment through the U.S. Treasury to the states on a monthly basis. MMS is required to make these payments to the states by the last day of the month following the month in which the receipts are deposited in the Treasury. MMS sends the state a detailed record of the receipts generated in the previous month.

Annually, the settlement payments are made to six states before April 15 of each year. Since offshore receipts are not associated with or generated within a county, the distributions are to the state.

California's process for allocating payment:

California distributes these payments to the General Fund of California, which is the principal operating fund for the majority of governmental activities and consists of all moneys received in the U.S. Treasury that are not required by law to be credited to any other fund.

Oregon's process for allocating payment:

Oregon does not receive 8(g) payments.

Washington's process for allocating payment:

Washington does not receive 8(g) payments.

Table II.23: Fish and Wildlife Service's Refuge Revenue Sharing Payment

Agency: Fish and Wildlife Service (FWS)

Name of payment: Refuge Revenue Sharing payment

Statutory authority: Refuge Revenue Sharing Act, as amended (16 U.S.C. 715s)

General description of payment:

Distribution of net receipts from FWS lands for various products or privileges, such as grazing, oil and gas, forest products, and concession fees, to counties in which FWS lands are located. Congress may add appropriations to make up any difference between net receipts and the payments due.

The law does not stipulate how the counties should use the funds.

Agency's methodology and process for calculating and distributing payment:

From net receipts (FWS is allowed to deduct some administrative expenses from gross receipts), counties receive 25 percent of the receipts collected on reserved lands (BLM's public domain lands administered by FWS). For fee lands (those acquired by FWS), the counties receive whichever is greater: (1) 25 percent of net receipts, (2) 0.75 percent of the appraised value of the lands (updated every 5 years), or (3) \$0.75 per acre. However, the land payments cannot be less than those made in fiscal year 1977. Monthly, MMS collects the minerals receipts on the refuges and transmits them to FWS for deposit into the National Wildlife Refuge Fund.

FWS' payments to the counties are made from the National Wildlife Refuge Fund. This fund receives the net receipts from the prior and current fiscal-year appropriations. If the net receipts and appropriations are insufficient to pay the full entitlement, the payments are distributed on a pro rata basis. When a refuge spans over a number of counties, the distribution of the receipts generated by that refuge is based upon the acreage within that refuge and is prorated on the basis of the acreage of each county instead of on which county generated the receipts.

Annually, in November, FWS' Finance staff send a data file containing basic regional land data to each of its seven Regional Realty Offices for updating—acquisitions, deletions, or increased land appraisals. On the basis of updated data, FWS' Finance staff calculate the county payments and send the data back to the regions for review.

After review by the regions, FWS' Finance staff request checks from the U.S. Treasury. The Treasury checks are mailed to the regions for distribution to the counties. The county payments—which may be hand carried to the county—are usually made in the first quarter of the calendar year.

California's process for allocating payment:

Does not apply; payments are made directly to the counties.

Oregon's process for allocating payment:

Does not apply; payments are made directly to the counties.

Washington's process for allocating payment:

Does not apply; payments are made directly to the counties.

Operational Overview of the Payment in Lieu of Taxes Program

The Payment in Lieu of Taxes (PILT) program is probably the most complex but least understood of the land management compensation programs. It has the broadest geographic coverage of the revenue-sharing programs. PILT was authorized by the Payment in Lieu of Taxes Act of 1976, as amended (31 U.S.C. 6901-6907). The Bureau of Land Management (BLM) administers the program and is responsible for calculating the payments according to formulas established by law and for distributing the funds appropriated by the Congress to units of local government, usually counties. Under current law, local governments are compensated through various other revenue-sharing programs for losses to their tax bases due to the presence of federally owned land within their boundaries. PILT guarantees some payment to most counties that have federal lands within their boundaries. Since the first payments in 1977, payments have averaged about \$102 million annually, and, to date, over \$2 billion in payments have been made to local governments. These payments may be used by the counties for any governmental purpose.

The PILT payment is composed of three separate formulas dealing with (1) section 6902 payments to local governments (generally counties) under two alternatives that are based on “entitlement lands” within the county, (2) section 6904 payments to counties for lands acquired for the National Park System or National Forest Wilderness Areas, and (3) section 6905 payments to counties for lands owned by the federal government in the Redwood National Park and those acquired in the Lake Tahoe Basin.

Section 6902 Payments

Seven categories of federal land are eligible for PILT payments under this section. The most significant categories of lands are those in the National Forest System, those in the National Park System, and lands administered by BLM and the Fish and Wildlife Service (FWS). In total, about 595 million acres of federal land are covered under this section. Under the act, calculating a county’s payment first requires determining the answers to several questions:

1. What is the population of the county?
2. How many acres of eligible lands are in the county?
3. What, if any, was the previous year’s payment (offset) for eligible lands under the other payment programs of federal agencies for these lands?

The population data are provided by the Bureau of the Census, and the acreage data are provided by each of the federal agencies that have eligible acres within each county's boundaries. However, the previous year's payments from designated federal agencies are provided by the governor's office from each state. (App. II, table II.1 shows a listing of the PILT offsets for the Forest Service, BLM, the Minerals Management Service (MMS), and FWS. There are a few other offsets, but these programs were not covered by our review.)

Moreover, the law contains a table that sets the maximum payment (ceiling) that a county may receive on the basis of population. The relationship between the population and ceiling is not linear, that is, the ceiling increases in relation to the population until the population reaches 50,000. Counties with a population of 50,000 or more have the same ceiling, regardless of their population. The fiscal year 1997 ceiling was \$1.825 million (50,000 x \$36.50).

The law also provides for minimum and standard payment rates that are based on acreage. The fiscal year 1997 minimum rate was \$0.18, and the standard rate was \$1.36 per acre. At the beginning of each fiscal year, all of the variables above are adjusted for inflation on the basis of the Consumer Price Index for the 12 months ending the preceding June 30. Table III.1 shows the differences in ceilings and the minimum and standard rates for fiscal years 1995-99.

Table III.1: Maximum Payments (Ceiling) Based on Population and Minimum and Standard Rates Based on Acreage, Fiscal Years 1995-99

Fiscal year	Population ceiling	Minimum rate (dollars/acre)	Standard rate (dollars/acre)
1995	\$1,237,500	\$0.12	\$0.93
1996	1,541,500	0.16	1.16
1997	1,825,000	0.18	1.36
1998 ^a	1,962,500	0.20	1.47
1999 ^a	2,200,000	0.22	1.65

^aNot adjusted for inflation, since the payments have not been made.

Calculation

Once the answers to the three questions shown earlier are known, a comparison of the results must be made:

Alternative A: Which is less—the county's eligible acreage times the standard rate or the county's ceiling? Pick the lesser of these two and from

it, subtract the previous year's total payment for the eligible land under the other payments or revenue-sharing programs of the agencies that control the land (offset).

Alternative B: Which is less—the county's eligible acreage times the minimum rate or the county's ceiling? Pick the lesser of these two.

The county is eligible to receive whichever of the above calculations—Alternative A or Alternative B—is greater. However, under Alternative A, if the total calculated payment (eligible areas x the standard rate) exceeds the ceiling, the deduction for the other federal agencies' prior-year payments is made from the ceiling to arrive at the Alternative A figure.

The following example shows how the section 6902 payment is computed for a hypothetical county in 1997. Our example assumes that the county has a population of 50,000, has an area of 200,000 acres, and received payments totaling \$60,500 from other land management agencies in the previous year.

Table III.2: Example of a PILT
Calculation for a Section 6902
Payment

Example where Alternative A is greater than B

Ceiling based on population (50,000 x \$36.50)	\$1,825,000
Alternative A:	
200,000 acres x \$1.36 per acre	272,000
Deduction for prior-year payments ^a	(60,500)
Payment to county—Alternative A	<u>\$211,500</u>
Alternative B:	
200,000 acres x \$0.18 per acre	\$36,000
No deduction under this alternative	<u>0</u>
Payment to county—Alternative B	<u>\$36,000</u>

^aOnly the amount of federal land payments actually received by the county in the prior fiscal year are deducted. If a county receives a federal land payment but is required by state law to pass all or part of it to financially and politically independent school districts or other single- or special-purpose districts, such redistributed payments are considered not to have been received by the county and are not deducted from the section 6902 payment.

In this case, the county would receive \$211,500. However, if the ceiling were \$200,000 because the population was much lower than 50,000 in this example, the Alternative A payment would be \$139,500 (\$200,000 minus \$60,500)

Section 6904 Payments

Section 6904 provides units of local government (generally counties) with annual payments for any lands or interest therein within their boundaries that were acquired after December 31, 1970, as additions to the National Park System or National Forest Wilderness Areas. These lands must have been subject to local real property taxes within the 5-year period preceding their acquisition by the federal government. Payments under this section are made in addition to payments under section 6902. They are based on 1 percent of the fair market value of the lands at the time of acquisition but may not exceed the amount of real property taxes assessed and levied on the property during the last full fiscal year before the fiscal year when acquired. Section 6904 payments for each acquisition are to be made annually for 5 years following each acquisition.

Section 6905 Payments

Section 6905 provides units of local government (generally counties) with annual payments for any lands or interest therein owned by the federal government in the Redwood National Park or acquired in the Lake Tahoe Basin under the Act of December 23, 1980 (P.L. 96-586, 94 Stat. 3383). Section 6905 payments will continue beyond the 5-year limitation. These payments will continue until the total amount paid equals 5 percent of the fair market value of the lands at the time of acquisition. However, the payment for each year cannot exceed the actual property taxes assessed and levied on the property during the last full fiscal year before the fiscal year in which the property was acquired by the federal government.

Payments Based on Availability of Appropriations

Total eligible payments to the counties are determined by combining the amounts determined under sections 6902, 6904 and 6905. However, if the Congress appropriated less than the amount needed for the full payment, the percentage of the shortfall is prorated equally to each of the eligible county payments. For example, in fiscal years 1995-97, the counties received about 77, 68, and 53 percent of their eligible payments, respectively. BLM makes two annual payments to the counties in September of each year. The first is the section 6902 payment, and the second payment is the combination of section 6904 and section 6905 payments. The section 6902 payment was 98 percent of the total payment

Appendix III
Operational Overview of the Payment in
Lieu of Taxes Program

for fiscal years 1995 and 1996 and 99 percent of the total fiscal year 1997 payment.

Distribution of Federal Payments to California's, Oregon's, and Washington's Counties for Fiscal Year 1997

State/ County	Federal payments to states ^a						Total ^d
	Forest Service's 25-Percent Payment	BLM's Mineral Leasing	BLM's Outside Grazing	BLM's Inside Grazing	BLM's Proceeds of Sales	Minerals Management Service	
California							
Alameda	0	0	0	0	0	0	0
Alpine	332,080	0	0	213	6	26	332,325
Amador	158,155	0	165	0	13	0	158,334
Butte	276,046	0	0	0	0	0	276,046
Calaveras	130,522	0	394	0	1,095	0	132,012
Colusa	159,857	0	88	0	0	0	159,946
Contra Costa	0	0	0	0	0	6,545	6,545
Del Norte	1,832,443	0	0	0	0	0	1,832,443
El Dorado	1,006,949	1,067	238	0	9	0	1,008,263
Fresno	1,216,589	0	4,351	0	0	1,199,919	2,420,858
Glenn	450,670	6	180	0	0	1,737	452,593
Humboldt	1,298,600	107	1,550	0	97	0	1,300,354
Imperial	0	636	0	0	10,659	1,951,540	1,962,834
Inyo	252,321	0	182	965	4,396	2,748,006	3,005,870
Kern	262,920	3,182	8,583	3,655	5,965	6,387,530	6,671,835
Kings	0	172	1,034	0	5	16,812	18,022
Lake	630,279	0	34	0	24	2,238,786	2,869,124
Lassen	1,754,561	0	0	11,741	8,593	24,899	1,799,793
Los Angeles	495,995	2,041	11	0	0	370,968	869,015
Madera	485,925	0	524	0	0	0	486,449
Marin	0	0	0	0	0	0	0
Mariposa	260,665	0	733	0	3	0	261,402
Mendocino	441,868	0	0	0	0	0	441,868
Merced	0	0	237	0	0	0	237
Modoc	2,071,948	851	554	3,287	31	0	2,076,672
Mono	309,101	0	0	2,837	313	565,160	877,410
Monterey	28,258	0	2,019	0	99	16,157	46,533
Napa	0	0	194	0	0	0	194
Nevada	420,425	0	81	0	481	0	420,987
Orange	28,920	0	0	0	0	0	28,920
Placer	767,886	8	0	0	375	0	768,270
Plumas	1,721,985	0	146	0	0	0	1,722,132
Riverside	75,090	5,357	657	0	6,084	0	87,188
Sacramento	0	0	0	0	0	4,641	4,641

Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997

Federal direct payment to counties							
Total state distribution to counties ^b	FWS' Refuge Revenue Sharing	Forest Service's Grasslands	BLM's PILT	BLM's O&C Grant Lands	BLM's Coos Bay Wagon Road	Total ^d	Total county payments ^{c,d}
0	119,847	0	1,756	0	0	121,603	121,603
332,293	0	0	40,372	0	0	40,372	372,665
158,321	0	0	31,304	0	0	31,304	189,625
276,046	30,766	0	14,580	0	0	45,346	321,392
130,917	0	0	33,996	0	0	33,996	164,913
159,946	134,341	0	27,051	0	0	161,392	321,338
0	17,295	0	3,381	0	0	20,676	20,676
1,832,443	204	0	44,303	0	0	44,507	1,876,950
1,007,187	0	0	191,525	0	0	191,525	1,198,712
1,220,939	0	0	682,435	0	0	682,435	1,903,374
450,849	108,655	0	19,270	0	0	127,925	578,774
1,300,150	19,101	0	864,284	0	0	883,385	2,183,535
630,730	16,898	0	536,214	0	0	553,112	1,183,842
1,207,498	0	0	497,636	0	0	497,636	1,705,134
273,291	26,248	0	717,432	0	0	743,680	1,016,971
1,034	0	0	6,621	0	0	6,621	7,655
1,416,346	0	0	36,610	0	0	36,610	1,452,956
1,775,367	0	0	157,410	0	0	157,410	1,932,777
496,006	0	0	430,538	0	0	430,538	926,544
486,449	0	0	246,283	0	0	246,283	732,732
0	8,241	0	61,159	0	0	69,400	69,400
261,398	0	0	275,030	0	0	275,030	536,428
441,868	0	0	89,244	0	0	89,244	531,112
237	107,434	0	25,949	0	0	133,383	133,620
2,075,241	33,390	0	162,657	0	0	196,047	2,271,288
504,630	0	0	168,327	0	0	168,327	672,957
30,277	7,715	0	250,954	0	0	258,669	288,946
194	347	0	43,657	0	0	44,004	44,198
420,506	0	0	81,441	0	0	81,441	501,947
28,920	0	0	32,143	0	0	32,143	61,063
767,886	0	0	151,337	0	0	151,337	919,223
1,722,132	0	0	112,159	0	0	112,159	1,834,291
75,747	70,650	0	952,635	0	0	1,023,285	1,099,032
0	13,743	0	5,429	0	0	19,172	19,172

(continued)

**Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997**

State/ County	Federal payments to states ^a						Total ^d
	Forest Service's 25-Percent Payment	BLM's Mineral Leasing	BLM's Outside Grazing	BLM's Inside Grazing	BLM's Proceeds of Sales	Minerals Management Service	
San Benito	0	0	2,130	0	0	1,544	3,674
San Bernardino	229,503	22,989	7,619	239	2,433	1,715,898	1,978,681
San Diego	135,666	1,039	3,093	0	0	1	139,798
San Francisco	0	0	0	0	0	0	0
San Joaquin	0	0	0	0	0	0	0
San Luis Obispo	17,584	168	6,419	0	0	26,185	50,356
San Mateo	0	0	0	0	0	0	0
Santa Barbara	57,850	16	175	0	0	95,619	153,659
Santa Clara	0	0	28	0	203	0	231
Santa Cruz	0	0	0	0	0	38	38
Shasta	2,126,625	1,980	2,478	0	7,898	0	2,138,981
Sierra	907,469	0	0	0	0	3	907,473
Siskiyou	5,840,735	753	1,340	0	490	33,977	5,877,294
Solano	0	10	0	0	0	10,180	10,190
Sonoma	0	0	0	0	0	2,324,119	2,324,119
Stanislaus	0	0	430	0	46	0	476
Sutter	0	0	0	0	0	70	70
Tehama	1,238,114	291	2,503	0	70	0	1,240,978
Trinity	4,776,816	1,156	0	0	788	0	4,778,759
Tulare	636,647	0	1,217	131	0	0	637,995
Tuolumne	995,563	0	752	0	804	0	997,119
Ventura	52,390	305	16	0	4	546,040	598,756
Yolo	0	0	0	0	0	0	0
Yuba	77,926	0	7	0	258	0	78,191
Total to Counties	33,962,946	42,131	50,161	23,068	51,244	20,286,400	54,415,950
Other Revenue ^e	0	0	0	0	0	32,596,918	32,596,918
State Total	33,962,946	42,131	50,161	23,068	51,244	52,883,318	87,012,869
Oregon							
Baker	525,109	647	0	8,024	168	0	533,949
Benton	316,510	0	0	0	0	0	316,510
Clackamas	4,521,120	0	0	0	1,620	(442)	4,522,298
Clatsop	0	0	0	0	0	0	0
Columbia	0	0	0	0	0	0	0
Coos	512,632	0	0	0	16,351	0	528,983
Crook	482,702	201	293	5,076	80	0	488,352

**Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997**

Federal direct payment to counties							
Total state distribution to counties ^b	FWS' Refuge Revenue Sharing	Forest Service's Grasslands	BLM's PILT	BLM's O&C Grant Lands	BLM's Coos Bay Wagon Road	Total ^d	Total county payments ^{c,d}
2,130	0	0	72,005	0	0	72,005	74,135
237,481	0	0	888,745	0	0	888,745	1,126,226
138,759	239,264	0	300,707	0	0	539,971	678,730
0	0	0	1,711	0	0	1,711	1,711
0	0	0	1,559	0	0	1,559	1,559
24,003	0	0	315,169	0	0	315,169	339,172
0	4,266	0	1,869	0	0	6,135	6,135
58,025	0	0	500,493	0	0	500,493	558,518
28	18,358	0	1,795	0	0	20,153	20,181
0	7,510	0	9	0	0	7,519	7,519
2,129,103	1,449	0	94,390	0	0	95,839	2,224,942
907,469	0	0	41,431	0	0	41,431	948,900
5,856,440	1,241	114	247,170	0	0	248,525	6,104,965
0	18,787	0	3,782	0	0	22,569	22,569
826,298	3,085	0	2,296	0	0	5,381	831,679
430	38,079	0	2,903	0	0	40,982	41,412
0	50,110	0	2	0	0	50,112	50,112
1,240,617	56,163	0	42,644	0	0	98,807	1,339,424
4,776,816	0	0	147,807	0	0	147,807	4,924,623
638,323	10,617	0	780,146	0	0	790,763	1,429,086
996,314	0	0	270,956	0	0	270,956	1,267,270
52,407	4,440	0	404,004	0	0	408,444	460,851
0	0	0	23,171	0	0	23,171	23,171
77,933	0	0	4,740	0	0	4,740	82,673
37,447,421	1,168,244	114	11,144,626	0	0	12,312,984	49,760,405
0	0	0	0	0	0	0	0
37,447,421	1,168,244	114	11,144,626	0	0	12,312,984	49,760,405
543,338	0	0	143,461	0	0	143,461	686,799
318,934	82,295	0	2,002	1,974,462	0	2,058,759	2,377,693
4,533,681	943	0	50,041	3,899,738	0	3,950,722	8,484,402
2,440	33,147	0	59	0	0	33,206	35,646
1,920	2,635	0	0	1,447,470	0	1,450,105	1,452,025
518,040	13,495	0	6,537	4,145,667	491,094	4,656,793	5,174,833
497,478	0	0	90,017	0	0	90,017	587,495

(continued)

**Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997**

State/ County	Federal payments to states ^a						Total ^d
	Forest Service's 25-Percent Payment	BLM's Mineral Leasing	BLM's Outside Grazing	BLM's Inside Grazing	BLM's Proceeds of Sales	Minerals Management Service	
Curry	3,590,220	0	0	0	162,885	0	3,753,104
Deschutes	3,072,339	2,030	386	4,957	522	33,222	3,113,455
Douglas	14,247,538	0	0	0	22,031	0	14,269,570
Gilliam	0	55	2,475	0	0	0	2,530
Grant	2,281,682	0	9,451	187	14,463	0	2,305,783
Harney	673,062	0	258	39,029	5,437	(2,139)	715,647
Hood River	1,841,677	0	0	0	0	0	1,841,677
Jackson	4,084,201	0	885	0	10,434	0	4,095,520
Jefferson	554,074	0	922	0	0	11,378	566,373
Josephine	1,960,760	0	16	0	27,512	0	1,988,287
Klamath	9,735,144	541	5,200	784	4,073	0	9,745,742
Lake	1,967,682	0	7	21,160	650	0	1,989,499
Lane	21,548,517	0	0	0	0	0	21,548,517
Lincoln	3,337,422	0	9	0	145	0	3,337,576
Linn	7,162,170	0	0	0	644	0	7,162,814
Malheur	3,281	222	0	64,113	1,002	0	68,618
Marion	2,706,152	0	0	0	0	(539)	2,705,614
Morrow	252,615	0	150	0	0	0	252,765
Multnomah	685,880	0	0	0	0	0	685,880
Polk	6,171	0	0	0	0	0	6,171
Sherman	0	178	1,333	0	0	0	1,512
Tillamook	1,774,919	0	0	0	1	0	1,774,920
Umatilla	681,988	191	680	0	209	0	683,068
Union	567,843	0	161	4	527	0	568,535
Wallowa	536,869	0	614	0	0	0	537,483
Wasco	1,904,381	146	2,498	0	0	0	1,907,025
Washington	0	0	0	0	0	0	0
Wheeler	214,520	0	3,022	0	576	0	218,118
Yamhill	493,356	0	0	0	0	0	493,356
Total to Counties	92,242,534	4,210	28,361	143,334	269,330	41,481	92,729,250
Other Revenue ^e	0	0	0	0	0	0	0
State Total	92,242,534	4,210	28,361	143,334	269,330	41,481	92,729,250
Washington							
Adams	0	0	0	0	0	0	0
Asotin	94,832	0	356	0	16	0	95,204

**Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997**

Federal direct payment to counties							
Total state distribution to counties ^b	FWS' Refuge Revenue Sharing	Forest Service's Grasslands	BLM's PILT	BLM's O&C Grant Lands	BLM's Coos Bay Wagon Road	Total ^d	Total county payments ^{c,d}
3,601,201	0	0	56,801	2,564,692	0	2,621,493	6,222,694
3,126,036	0	0	137,258	0	0	137,258	3,263,294
14,285,474	0	0	91,143	17,601,518	67,602	17,760,263	32,045,737
5,967	0	0	20,989	0	0	20,989	26,956
2,307,824	0	0	168,620	0	0	168,620	2,476,444
740,221	109,151	0	300,180	0	0	409,331	1,149,552
1,846,237	0	0	19,692	0	0	19,692	1,865,929
4,099,731	0	0	44,855	11,010,610	0	11,055,465	15,155,196
572,310	0	12,908	28,274	0	0	41,182	613,492
1,968,631	0	0	33,616	8,488,077	0	8,521,693	10,490,324
9,775,094	121,875	0	207,044	1,644,214	0	1,973,133	11,748,227
2,015,645	39,759	0	300,180	0	0	339,939	2,355,584
21,597,365	0	0	132,973	10,729,548	0	10,862,521	32,459,887
3,345,768	8,162	0	17,609	252,956	0	278,727	3,624,495
7,180,569	785	0	45,997	1,855,010	0	1,901,792	9,082,361
95,862	0	0	681,167	0	0	681,167	777,029
2,713,462	24,544	0	19,730	1,025,877	0	1,070,151	3,783,613
258,912	5,659	0	75,706	0	0	81,365	340,277
688,322	0	0	7,255	765,894	0	773,149	1,461,471
8,263	21,974	0	42	1,517,736	0	1,539,752	1,548,014
3,844	0	0	37,341	0	0	37,341	41,185
1,781,023	4,564	0	8,925	393,487	0	406,976	2,187,999
693,027	677	0	199,869	0	0	200,546	893,573
574,639	0	0	282,361	0	0	282,361	857,000
547,199	0	0	233,702	0	0	233,702	780,901
1,916,915	0	0	20,471	0	0	20,471	1,937,386
2,032	26,129	0	1,619	442,673	0	470,421	472,453
222,709	0	0	29,174	0	0	29,174	251,883
496,184	722	0	2,476	505,912	0	509,110	1,005,294
92,886,298	496,516	12,908	3,497,186	70,265,541	558,697	74,830,848	167,717,146
0	0	0	0	0	0	0	0
92,886,298	496,516	12,908	3,497,186	70,265,541	558,697	74,830,848	167,717,146
0	3,805	0	2,918	0	0	6,723	6,723
95,241	50	0	39,861	0	0	39,911	135,152

(continued)

Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997

State/ County	Federal payments to states ^a						Total ^d
	Forest Service's 25-Percent Payment	BLM's Mineral Leasing	BLM's Outside Grazing	BLM's Inside Grazing	BLM's Proceeds of Sales	Minerals Management Service	
Benton	0	0	61	0	3,779	16,998	20,838
Chelan	1,748,946	0	275	0	0	0	1,749,220
Clallam	1,519,303	0	0	0	0	0	1,519,303
Clark	9,415	0	0	0	0	0	9,415
Columbia	281,163	0	18	0	0	0	281,181
Cowlitz	273,087	0	0	0	0	0	273,087
Douglas	2	0	2,962	0	0	0	2,964
Ferry	620,116	0	678	0	0	0	620,794
Franklin	0	0	217	0	0	0	217
Garfield	168,287	0	7	0	0	0	168,295
Grant	0	0	(3,120)	0	0	0	(3,120)
Grays Harbor	437,855	0	0	0	0	0	437,855
Island	0	0	0	0	0	0	0
Jefferson	2,048,421	0	0	0	0	0	2,048,421
King	1,345,091	0	0	0	0	0	1,345,091
Kitsap	0	0	0	0	0	0	0
Kittitas	655,645	0	466	0	0	(26,343)	629,768
Klickitat	116,017	0	989	0	0	60	117,066
Lewis	3,273,293	0	0	0	0	825,886	4,099,179
Lincoln	0	0	4,081	0	0	0	4,081
Mason	481,680	0	0	0	0	0	481,680
Okanogan	1,373,838	0	4,283	0	7,043	0	1,385,164
Pacific	0	0	0	0	0	0	0
Pend Oreille	633,487	0	0	0	16	0	633,502
Pierce	498,258	0	0	0	0	0	498,258
San Juan	0	0	0	0	0	0	0
Skagit	838,040	0	0	0	0	0	838,040
Skamania	6,788,828	0	0	0	0	0	6,788,828
Snohomish	1,423,229	0	0	0	0	0	1,423,229
Spokane	0	0	173	0	2	0	176
Stevens	284,384	0	247	0	12,524	0	297,155
Thurston	2,477	0	0	0	0	0	2,477
Wahkiakum	0	0	0	0	0	0	0
Walla Walla	4,289	10	0	0	0	0	4,299
Whatcom	1,342,954	0	0	0	0	0	1,342,954

Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997

Federal direct payment to counties							
Total state distribution to counties ^b	FWS' Refuge Revenue Sharing	Forest Service's Grasslands	BLM's PILT	BLM's O&C Grant Lands	BLM's Coos Bay Wagon Road	Total ^d	Total county payments ^{c,d}
61	5,241	0	26,042	0	0	31,283	31,344
1,750,188	6,874	0	454,402	0	0	461,276	2,211,464
1,520,143	15,455	0	51,816	0	0	67,271	1,587,414
9,421	58,490	0	372	0	0	58,862	68,283
281,337	327	0	92,788	0	0	93,115	374,452
273,238	5,656	0	3,268	0	0	8,924	282,162
2,964	0	0	32,403	0	0	32,403	35,367
621,137	0	0	177,065	0	0	177,065	798,202
217	0	0	22,786	0	0	22,786	23,003
168,388	0	0	57,655	0	0	57,655	226,043
(3,120)	4,005	0	107,311	0	0	111,316	108,196
438,097	9,918	0	16,290	0	0	26,208	464,305
0	0	0	349	0	0	349	349
2,049,554	24,202	0	67,648	0	0	91,850	2,141,404
1,345,834	0	0	31,446	0	0	31,446	1,377,280
0	0	0	0	0	0	0	0
656,473	0	0	126,456	0	0	126,456	782,929
117,070	93,171	0	4,154	0	0	97,325	214,395
3,275,103	0	0	45,664	0	0	45,664	3,320,767
4,081	0	0	46,765	0	0	46,765	50,846
481,947	0	0	15,834	0	0	15,834	497,781
1,378,880	1,850	0	451,611	0	0	453,461	1,832,341
0	112,448	0	2,433	0	0	114,881	114,881
633,837	896	0	130,518	0	0	131,414	765,251
498,533	4,530	0	100,901	0	0	105,431	603,964
0	0	0	1,660	0	0	1,660	1,660
838,504	0	0	145,658	0	0	145,658	984,162
6,792,582	26,126	0	80,615	0	0	106,741	6,899,323
1,424,016	0	0	60,446	0	0	60,446	1,484,462
173	57,235	0	1,384	0	0	58,619	58,792
284,788	231,804	0	114,306	0	0	346,110	630,898
2,478	16,571	0	60	0	0	16,631	19,109
0	11,486	0	1	0	0	11,487	11,487
4,291	3,101	0	14,738	0	0	17,839	22,130
1,343,697	0	0	223,913	0	0	223,913	1,567,610

(continued)

Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997

State/ County	Federal payments to states ^a						Total ^d
	Forest Service's 25-Percent Payment	BLM's Mineral Leasing	BLM's Outside Grazing	BLM's Inside Grazing	BLM's Proceeds of Sales	Minerals Management Service	
Whitman	0	0	442	0	0	0	442
Yakima	2,162,205	0	2,090	0	0	1,293	2,165,588
Total to Counties	28,425,142	10	14,226	0	23,381	817,894	29,280,653
Other Revenue ^e	0	0	0	0	0	0	0
State Total	28,425,142	10	14,226	0	23,381	817,894	29,280,653

Appendix IV
Distribution of Federal Payments to
California's, Oregon's, and Washington's
Counties for Fiscal Year 1997

Federal direct payment to counties							Total county payments ^{c,d}
Total state distribution to counties ^b	FWS' Refuge Revenue Sharing	Forest Service's Grasslands	BLM's PILT	BLM's O&C Grant Lands	BLM's Coos Bay Wagon Road	Total ^d	
442	0	0	9,979	0	0	9,979	10,421
2,165,490	9,228	0	51,053	0	0	60,281	2,225,771
28,455,086	702,469	0	2,812,569	0	0	3,515,038	31,970,124
0	0	0	0	0	0	0	0
28,455,086	702,469	0	2,812,569	0	0	3,515,038	31,970,124

^aThese payments reflect the amount of the total state payment attributable to the various counties.

^bThese payments reflect the amount of the federal payment that the state actually distributed to the counties. In addition, the state of Oregon also pays interest on the BLM and MMS Mineral Leasing payments. During federal fiscal years 1995 through 1997, Oregon paid about \$2,400 more in interest to the counties on these payments which is not reflected in the above table. Because of the differences in the state and federal fiscal years, and the way interest was calculated, allocating the amount attributable to the individual counties for each of the 3 fiscal years could not be easily done.

^cThis amount reflects the total amount paid to the counties by the state and directly from the federal agencies.

^dTotals may not equal due to rounding.

^eOther revenue reflects MMS' off-shore minerals leasing payment, interest, or the annual settlement paid to the state that is not attributable to individual counties.

Objectives, Scope, and Methodology

Specifically, we agreed to provide information on (1) the programs that the federal land management agencies use to compensate states and counties and identify the major differences among these programs; (2) the process that California, Oregon, and Washington use to distribute the federal payments to the counties and the major differences among the states' programs; and (3) the amount of federal compensation that California, Oregon, and Washington received and distributed to their counties compared with the amounts that the federal agencies calculated as attributable to the receipts generated in the counties during fiscal years 1995-97.

Federal Programs

To determine the land management agencies' methodology and processes to calculate and distribute the federal revenue-sharing funds and to identify the major differences between these programs, we obtained and reviewed the laws authorizing the various compensation programs. We held detailed discussions with the Forest Service, BLM, MMS, and FWS representatives responsible for distributing payments under the 22 federal programs to the states and counties. We obtained and reviewed the agencies' written guidance on the methodology they use for each of these 22 programs and discussed the process and time frames that they follow to make these payments to the states and the counties. On the basis of these discussions and our review of documents, we were able to identify the major differences between the various agencies' programs, processes, and methodologies.

Because the amount of federal acreage is a critical component of the federal compensation programs, we interviewed the Forest Service's and FWS' headquarters "lands" representative as well as BLM's Oregon State Office's representative to discuss their methodologies, processes, and timing for updating and reporting changes to the federal acreage totals and the lands valuations. We did not, however, evaluate the accuracy of the land totals or valuations developed because this was beyond the scope of our review.

We also obtained the agencies' year-end statistics for national disbursements as well as detailed listings by state for the amounts of receipts generated in each county in California, Oregon, and Washington for fiscal years 1995-97. We relied on the agencies' data on the amounts distributed to states and counties but did not evaluate whether the agencies accurately implemented the methodology established by law. We discussed the systems that the agencies used to collect, calculate, and

distribute the federal payments but did not perform an in-depth analysis of these systems, since it was beyond the scope of our agreements with the congressional requester, nor did we verify the amounts distributed with the U.S. Treasury. We did, however, verify with the states the amounts received from the federal agencies.

We did not independently verify the reliability of the financial data provided nor did we trace the data to the systems from which they came. These systems were, in some cases, subject to audit procedures by the Office of Inspector General (OIG) in connection with the agencies' financial statement audits.

For fiscal years 1995-97 and previous fiscal years, the Department of Agriculture's OIG reported that because of significant internal control weaknesses in various accounting subsystems, the Forest Service's accounting data were not reliable. Despite these weaknesses, we used the data because they were the only data available and are the data that the agency uses to manage its programs.

For fiscal years 1995-97, the Department of the Interior's OIG issued unqualified opinions on the financial statements of BLM, MMS, and FWS. However, for fiscal year 1996, the OIG reported that there were weaknesses in the general controls at the Bureau of Reclamation's administrative service center, which processes financial information for BLM and FWS, and that certain of these weaknesses still existed in fiscal year 1997. Furthermore, for fiscal year 1997, the OIG reported weaknesses in the general controls over the MMS Royalty Management Program's automated information system.

State Programs

To determine California's, Oregon's, and Washington's methodologies and processes to calculate and distribute the federal revenue-sharing funds to the counties within those states and to identify the major differences between these programs, we met with the representatives of each state responsible for implementing the state's distribution program. We obtained and reviewed the states' laws and written guidance on the distribution of federal revenue-sharing funds from the land management agencies. Because Washington distributes a large portion of its federal receipts to the state's school construction fund for the benefit of all counties, we met with representatives of the Superintendent of Public Instruction to discuss their process for allocating moneys to the various school districts. On the basis of these discussions and our review of

documents, we were able to identify the major differences between the various states' programs, processes, and methodologies.

We also obtained the states' statistics reflecting the federal funds received and the amounts disbursed to each county for fiscal years 1995-97. We relied on the states' data on the amounts distributed to the counties but did not evaluate whether the states accurately implemented the methodology established by their state law.

As with the federal programs, we relied on the representatives' description of the systems used to calculate and distribute the federal funds to the counties. Also, because it was beyond the scope of our review, we did not contact individual counties to verify the amount of federal payments they received or whether the counties were using the federal funds in accordance with federal and state laws.

Reconciliation of Distributions

To determine the amounts that each county in California, Oregon, and Washington received compared with the amounts that the federal agencies indicated were generated in those counties for fiscal years 1995-97, we analyzed the federal and state distribution records. Because each of the states has a July 1 to June 30 fiscal year, we aggregated each state's monthly or quarterly distribution records to conform to the federal fiscal year (Oct. 1 to Sept. 30), which we used as the basis of our comparison. In addition, because the states record the receipts on a cash basis, we adjusted the state schedules to reflect any federal payments made for the year or month of September but received by the state in October or later to correctly represent the amounts received by the state, reflective of a specified fiscal year.

In comparing the federal amounts attributable to each county with the state's distribution—or lack of distribution—to that county, we reconciled the differences between the two amounts for each of the 3 fiscal years. In some instances, the state's methodology for distributing the receipts was based on a ratio of that county's acreage to the entire state or as part of the grazing acreage rather than on a distribution of the moneys to the counties where the receipts were generated. In other instances, one state paid interest on all federal distributions, and another state paid interest on one federal distribution. In these cases, the payments differed by the amount of state interest paid. On the basis of these reconciliations between the federal and state distributions, we were able to identify the amounts distributed to the counties and to identify the reasons why other

federal disbursements were not distributed to the counties. As agreed with the congressional requester, we included only the comparison of fiscal year 1997 distributions by counties in this report (see app. IV), since it was generally representative of all 3 fiscal years evaluated.

To ensure the accuracy of our data analysis, we provided each federal and state representative an opportunity to review the individual federal and state schedules that we prepared and requested that he/she verify the amounts displayed. We conducted our review from January to August 1998 in accordance with generally accepted government auditing standards.

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Land and Water Conservation Fund: Overview, Funding History, and Issues

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Summary

The Land and Water Conservation Fund (LWCF) Act of 1965 was enacted to help preserve, develop, and ensure access to outdoor recreation facilities to strengthen the health of U.S. citizens. The law created the Land and Water Conservation Fund in the U.S. Treasury as a funding source to implement its outdoor recreation goals.

The LWCF has been used for three general purposes. First, it has been the principal source of monies for land acquisition for outdoor recreation by the four federal agencies—the National Park Service, Bureau of Land Management, Fish and Wildlife Service, and Forest Service. Second, the LWCF also funds a matching grant program to assist states in recreational planning, acquiring recreational lands and waters, and developing outdoor recreational facilities. Under this traditional state grant program, a portion of the appropriation is divided equally among the states, with the remainder apportioned based on need, as determined by the Secretary of the Interior. The states award their grant money through a competitive selection process based on statewide recreation plans and establish their own priorities and criteria. For FY2014, Congress appropriated funds for a competitive state grant program in addition to the traditional state grant program. Third, beginning in FY1998, LWCF has been used to fund other federal programs with related purposes.

The LWCF is authorized at \$900 million annually through September 30, 2015. While the fund accrues revenues and collections from multiple sources, nearly all of the revenues are derived from oil and gas leasing in the Outer Continental Shelf (OCS). Congress determines the level of appropriations each year, and yearly appropriations have fluctuated widely since the origin of the program. Of the total revenues that have accrued throughout the history of the program (\$36.2 billion), less than half have been appropriated (\$16.8 billion). FY2001 marked the highest funding ever, with appropriations exceeding the authorized level by reaching nearly \$1 billion. For FY2014, the most recent fiscal year, the appropriation was \$306.0 million.

The \$16.8 billion appropriated throughout the history of the program has been unevenly allocated among federal land acquisition (62%), the state grant program (25%), and other purposes (13%). Similarly, federal land acquisition funds have been allocated unevenly among the four federal agencies. Under more recent legislation (P.L. 109-432), a portion of revenues from certain OCS leasing is provided without further appropriation to the state grant program. These mandatory funds, which thus far have been relatively small, are to supplement any funds appropriated by Congress.

There is a difference of opinion as to the appropriate level of funds for LWCF and how those funds should be used. Current congressional issues include deciding the amount to appropriate for land acquisition, the state grant program, and other purposes, if any. Pending legislative proposals address a variety of issues. They include proposals to permanently authorize the LWCF, provide mandatory appropriations for the fund, provide for a minimum percentage and/or amount of funding for acquisitions that increase access to federal lands for recreational purposes, direct revenues from additional sources to the LWCF, specify or change the allocation for the state grant program, and expand or otherwise alter the purposes for which LWCF funds could be used.

Contents

Introduction.....	1
How the Fund Works	1
Purposes of LWCF Appropriations.....	2
Federal Land Acquisition	2
Stateside Program.....	3
Traditional State Grants.....	3
Competitive State Grants.....	5
Mandatory Appropriations	5
Other Purposes.....	5
Funding History	6
Overview of FY1965-FY2014	6
Allocation Among Land Acquisition, State Grants, and Other Purposes	9
Legislation	11
Current Issues	12

Figures

Figure 1. LWCF Appropriations, FY1965-FY2014.....	7
---	---

Tables

Table 1. LWCF Appropriations, FY1965-FY2014	7
Table 2. Total LWCF Appropriations, FY2005-FY2014	9
Table 3. LWCF Appropriations for Other Purposes, FY1998-FY2014	10

Contacts

Author Contact Information.....	14
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Introduction

The Land and Water Conservation Fund (LWCF) Act of 1965¹ was enacted to help preserve, develop, and ensure access to outdoor recreation resources. A main goal of the law was to facilitate participation in recreation and strengthen the “health and vitality” of U.S. citizens. The law sought to accomplish these goals by “providing funds” for federal acquisition and development of lands and other areas and by “providing funds for and authorizing” federal assistance to states in recreation planning, acquiring lands and waters, and development of recreation facilities.

The law created the Land and Water Conservation Fund in the Treasury as a funding source to implement the outdoor recreation goals it set out. The fund is currently authorized at \$900 million annually through September 30, 2015. The LWCF is a “trust fund” that accumulates revenues from the federal motorboat fuel tax and surplus property sales. To supplement these sources to reach the annual authorized level of \$900 million, the fund accumulates revenues from oil and gas leases on the Outer Continental Shelf (OCS). For many years, the OCS revenues have accounted for almost all of the deposits.

Monies in the fund are available for outdoor recreation purposes only if appropriated by Congress, and the level of annual appropriations has varied widely since the origin of the fund in 1965. One current issue is whether to provide permanent appropriations for LWCF, rather than continue the current procedure of providing appropriations each year. Also of current debate is whether to direct additional monies to LWCF, to be used for purposes provided for in the LWCF Act or for other purposes. Perennial congressional issues include (1) deciding the amount to appropriate for federal land acquisition, determining the level of acquisition funds for each of the four agencies, and identifying which lands should be acquired; (2) deciding the level of funding for the state grant program; and (3) determining what, if any, other purposes should be funded through LWCF and at what level. The primary context for debating these issues traditionally has been the annual Interior appropriations legislation.

How the Fund Works

The LWCF is not a true trust fund in the way “trust fund” is generally understood in the private sector. The fund is credited with revenues totaling \$900 million annually, but these credited monies cannot be spent unless appropriated by Congress. From FY1965 through FY2014, about \$36.2 billion has been credited to the LWCF. Less than half that amount—\$16.8 billion—has been appropriated, leaving an unappropriated balance of \$19.4 billion in the fund.² Further, interest is not accrued on the accumulated unappropriated balance that has been credited to the LWCF. While some supporters assert that the LWCF was originally intended to be a revolving fund, whereby the money would be maintained in an account separate from the General Treasury that could accrue interest, this has not been the case. The fund’s basic purpose has not been altered even though the authorizing legislation has been amended, most notably to raise the

¹ Act of September 3, 1964; P.L. 88-578, 78 Stat. 897. 16 U.S.C. §§460l-4, et seq.

² These figures are derived primarily from the Office of Budget, Department of the Interior, at <http://www.doi.gov/budget/budget-data.cfm>. See the entry for “Land and Water Conservation Fund: MS Excel Spreadsheet.” Data updated on March 5, 2014.

authorization ceiling and to mandate that offshore oil and gas leasing revenues should make up any shortfall from other specified financing sources.

Purposes of LWCF Appropriations

Appropriations from LWCF have been made for three general purposes: (1) federal acquisition of land and waters and interests therein; (2) grants to states for recreational planning; acquiring recreational lands, waters, or related interests; and developing outdoor recreational facilities; and (3) related purposes.³ Each year, Congress determines the total appropriations from the Fund, and the amount for each of these three general purposes.

The LWCF Act states that not less than 40% of the appropriations from the fund are to be available for federal purposes. This language resulted from a 1976 amendment, at a time when funds were being appropriated for federal land acquisition and for the stateside program. Funding for other federal purposes did not occur until FY1998. This provision replaced language in the LWCF Act that had provided that, “in the absence of a provision to the contrary in the Act making an appropriation from the fund,” the appropriation from the fund was to be 60% for state purposes and 40% for federal purposes. That language had specified that during the first five years in which appropriations were made from the fund, the President could vary these percentages by not more than 15 points to meet the needs of states and the federal government.

Federal Land Acquisition

The LWCF remains the principal source of funds for federal acquisition of lands for outdoor recreation. Most federal lands are acquired (and managed) by four agencies—the Forest Service (FS) in the Department of Agriculture, and the National Park Service (NPS), Fish and Wildlife Service (FWS), and Bureau of Land Management (BLM) in the Department of the Interior. These four agencies manage about 95% of all federally owned lands. Of these agencies, only the FWS has another significant source of acquisition funding. Specifically, under the Migratory Bird Conservation Fund the FWS has a permanently appropriated source of funding for land acquisition.⁴ The BLM also has authority to keep the proceeds of certain land sales (primarily in Nevada) and use them for subsequent acquisitions and other purposes.

The LWCF Act provides that “unless otherwise allotted in the appropriation Act making them available,” appropriations from the fund for federal purposes are to be allotted by the President for certain purposes.⁵ These purposes include water development projects with recreational benefits; land acquisition in areas administered by the Secretary of the Interior for recreational purposes; and land acquisition in national park, national forest, and national wildlife system units. In practice, the appropriations acts typically identify the purposes for which the federal funds are to be used.

³ Hereinafter, these purposes are referred to respectively as (1) federal land acquisition, (2) the stateside program, and (3) other purposes.

⁴ For more information on the Migratory Bird Conservation Fund, see the FWS land acquisition section of CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*.

⁵ 16 U.S.C. §460l-9(a).

In many respects, the process for appropriating funds for federal land acquisition is similar from year to year. The annual budget submission from each of the four federal agencies typically has included proposals for lands the agencies seek to acquire with requested LWCF funds. The number of specific acquisitions sought by the agencies varies from year to year. The most recent budget requests—for FY2015—sought discretionary appropriations for 45 acquisitions by DOI agencies and 17 acquisitions by the Forest Service. The FY2015 budget requests also included a proposal for additional acquisitions with mandatory appropriations from the LWCF; this would require a change in law. Together, the three DOI agencies sought mandatory appropriations for 80 specific acquisitions and the Forest Service sought mandatory appropriations for 21 acquisitions. In total, for FY2015 the four agencies sought appropriations (discretionary and mandatory) for 163 acquisitions. By contrast, some recent requests have sought to fund a smaller number of acquisitions. For example, for FY2013, 34 acquisitions were sought for the three DOI agencies and 17 for the FS. The large backlog of potential acquisitions provides each agency with options in its annual request. The requests also sometimes seek funding for certain types of acquisitions, such as those that would facilitate access to federal lands for recreation and sportsmen, as proposed in the FY2015 BLM and Forest Service budget requests. Congress reviews agency requests, and then determines the funding level for each agency's acquisitions.

The LWCF Act restricts appropriations to those acquisitions that have been previously authorized by law. However, it allows LWCF appropriations to be used for pre-acquisition work where “authorization is imminent and where substantial monetary savings could be realized.”⁶

In recent years, Congress typically has provided the agencies with a portion of the acquisition funding for one or more related purposes. For instance, funds have been provided for acquisition management to cover the costs of land purchases, such as appraisals and title research. Acquisition funds also have been provided to cover the costs of land exchanges, as well as the acquisition of lands within the boundaries of federal land units (“inholdings”) that may become available throughout the year. Further, in some cases funds have been appropriated for “emergencies” or “hardships,” for acquisition of lands from an owner who must sell quickly and where the agency determines there is a need to purchase the lands quickly.⁷

Appropriations laws typically provide that LWCF funds for land acquisition remain available until expended, meaning the funds can be carried over from fiscal year to fiscal year. Often an appropriation is not used in the fiscal year provided, because the process for completing a land acquisition has many components and often takes more than one year.

Stateside Program

Traditional State Grants

Another portion of the LWCF, administered by the NPS, provides matching grants to states (including the District of Columbia and U.S. territories) for recreation planning, acquisition of lands and waters, and facility development. Grants are provided for outdoor recreation purposes

⁶ 16 U.S.C. §460l-9(b).

⁷ In addition, a portion of the NPS appropriation has been specified for the American Battlefield Protection Program for grants for non-federal acquisition of lands (and interests) in eligible Civil War battlefields. For additional information on these acquisition grants, see the NPS website at <http://www.nps.gov/abpp/grants/grants.htm>.

only, rather than for indoor facilities such as community centers. Through September 30, 2013, state and local governments received 42,216 grants for outdoor recreation projects. This figure includes 7,680 grants for acquisition; 27,382 grants for developing recreation facilities; 3,190 grants for redeveloping older recreational facilities; 3,259 grants for a combination of these activities; and 705 state planning grants for studies of recreation potential, need, opportunity, and policy.⁸ Acquisitions funded through LWCF state grants must remain in recreation use in perpetuity, unless the Secretary of the Interior approves of the conversion of the land to another use and acceptable replacement lands are substituted. Conversions occur due to changing state or local needs, such as to use park lands to build schools, widen roads, and develop civic facilities. When warranted, the NPS approves about 50-75 conversions yearly nationwide, typically involving a portion of the area funded with an LWCF state grant.⁹

Appropriations to the state grant program typically do not include earmarks or other directions to the NPS to guide how these funds should be distributed or spent. The Secretary of the Interior apportions the appropriation for state grants in accordance with a formula set out in the LWCF Act.¹⁰ The formula calls for a portion of the appropriation to be divided equally among the states.¹¹ The remaining appropriation is to be apportioned based on need, as determined by the Secretary.¹² Under law, the determination of need is to include the population of the state relative to the population of the United States, the use of outdoor recreation resources within a state by people outside the state, and the federal resources and programs within states. In current practice, population is the biggest factor in determining state need. No state can receive more than 10% of the total appropriation.

States have up to three years to use the money—the federal fiscal year in which the apportionment is made and the next two fiscal years. It is rare for a state not to use the money during this time, according to the NPS. Under law, the Secretary is to reapportion any amount that is not paid or obligated during the three-year period.

To be eligible for a grant, a state must prepare and update a statewide outdoor recreation plan. This plan must address the needs and opportunities for recreation and include a program for reaching recreational goals. It generally does not include specific projects. Under law, the plan is required to be approved by the Secretary; this responsibility has been delegated to the NPS. The states award their grant money through a competitive, open project selection process based on their recreation plans and their own priorities and selection criteria. They can use the money for state projects or for pass-through to localities. States send their ranked state or local projects to the NPS for formal approval and obligation of grant money. Under law, payments to states are limited to 50% or less of a project's total costs. The remaining cost is borne by the state or local project sponsor.¹³

⁸ These figures were provided by the NPS in a communication to CRS on July 14, 2014.

⁹ This information was provided by the NPS in a communication to CRS on July 14, 2014.

¹⁰ 16 U.S.C. §460l-8.

¹¹ Specifically, the law provides that 40% of the first \$225.0 million, 30% of the next \$275.0 million, and 20% of all additional appropriations are to be apportioned equally among the states.

¹² The apportionment among states (including the District of Columbia and U.S. territories), for FY2002 through FY2013, is available on the NPS website at <http://www.nps.gov/nrcr/programs/lwcf/funding.html>.

¹³ For more information on the stateside program, see the *Land and Water Conservation Fund State Assistance Program: Federal Financial Assistance Manual* on the NPS website at <http://www.nps.gov/nrcr/programs/lwcf/manual/lwcf.pdf>.

Competitive State Grants

The Obama Administration had proposed that a portion of the appropriations for state grants be provided through a new competitive grant program.¹⁴ For FY2014, Congress appropriated \$3.0 million for a nationally competitive grant program of the \$48.1 million total provided for stateside grants. As developed by the NPS, this new LWCF “Outdoor Recreation Legacy Partnership Program” will provide grants for land acquisition and development for outdoor recreation projects in densely settled areas with populations of 50,000 or more. Priority will be given to communities that are economically disadvantaged or are underserved in terms of outdoor recreation opportunities, and to projects that engage and empower youth including through opportunities for employment and training, among other priorities. Grants are expected to range from \$250,000 to \$500,000, with between 6 and 12 grants awarded. Projects must comply with the LWCF Act and other program requirements that apply to the traditional state grants. Such requirements include a nonfederal funding match, and land use for outdoor recreation in perpetuity except with the approval of the Secretary of the Interior, as noted above.¹⁵

Mandatory Appropriations

Additional monies are provided for state grants under provisions of the Gulf of Mexico Energy Security Act of 2006 (GOMESA).¹⁶ Specifically, 12.5% of the revenues from certain OCS leasing in the Gulf of Mexico are directed to the stateside program in accordance with the terms of the LWCF Act. The funds are to be in addition to any amounts appropriated by Congress for LWCF. The money is available without further appropriation, and is available until expended. An estimated \$8.2 million in proceeds from pertinent OCS leasing was collected in FY2008 and disbursed to the stateside program in FY2009. Since then, the disbursements to the stateside program under this authority have decreased. An estimated \$0.1 million in revenue from such OCS leasing was dispersed to the stateside program in FY2013, and \$1.4 million was projected to be dispersed in FY2014.¹⁷ Mandatory appropriations are expected to increase beginning in FY2018, due to additional revenues from leasing in the Gulf of Mexico.¹⁸ The funds are available to the states until expended, unlike the three-year duration of the funds appropriated annually for the stateside program.

Other Purposes

As noted above, the LWCF Act lists the federal purposes to which the President is to allot LWCF funds “unless otherwise allotted in the appropriation Act making them available.”¹⁹ A portion of the LWCF appropriation has been provided for other federal purposes (i.e., other than land acquisition) in FY1998 and each year since FY2000. Because there is no set of “other purposes” specified to be funded from LWCF, Presidents have sought funds for a variety of purposes and

¹⁴ See for example: U.S. Dept. of the Interior, National Park Service, *Budget Justifications and Performance Information, Fiscal Year 2013*, pp. LASA-34-35.

¹⁵ Details of the grant program are at <http://www.grants.gov/custom/viewOppDetails.jsp?oppId=257670>.

¹⁶ §105, Division C, P.L. 109-432.

¹⁷ U.S. Dept. of the Interior, National Park Service, *Budget Justifications and Performance Information, Fiscal Year 2015*, p. M-LASA-G-1.

¹⁸ Ibid. Revenues generated in one year are available in the next year.

¹⁹ 16 U.S.C. §460l-9(a).

Congress has chosen which, if any, other purposes to fund from LWCF. For instance, for FY2008, President George W. Bush sought LWCF funds for 11 programs within the FWS, FS, and other agencies, and Congress provided funding for two of these programs. Since FY1998, the LWCF has been used for a broad array of other purposes, including FS highway rehabilitation and maintenance, the Historic Preservation Fund, the Payments in Lieu of Taxes program, FS State and Private Forestry programs, FWS State and Tribal Wildlife Grants, and FWS Cooperative Endangered Species Grants.

Funding History

Overview of FY1965-FY2014

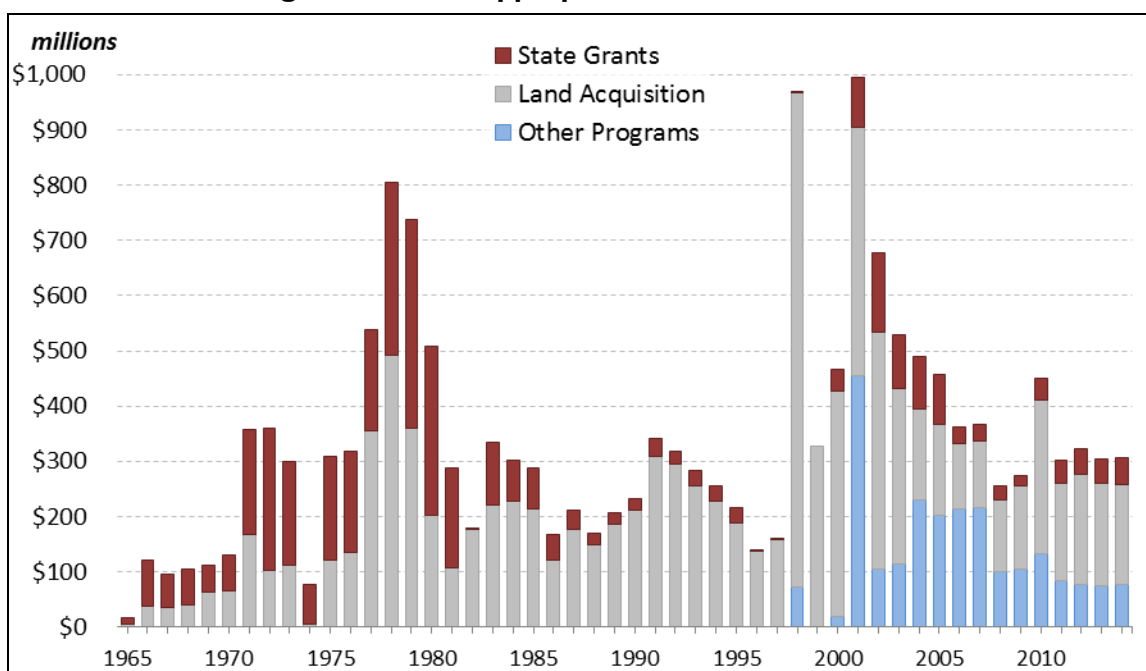
Total annual appropriations from the LWCF have fluctuated widely since the origin of the program over four decades ago (see **Figure 1** and **Table 1**, below).²⁰ Until FY1998, LWCF funding rarely exceeded \$400 million; from FY1977 to FY1980, funding ranged from \$509 million (FY1980) to \$805 million (FY1978), and averaged \$647 million annually. LWCF appropriations spiked dramatically in FY1998—to \$969 million—from the FY1997 level of \$159 million. FY1998 was the first year that LWCF appropriations exceeded the authorized level of \$900 million.²¹ They included \$270 million in the usual funding titles for land acquisition by the four federal land management agencies; an additional \$627 million in a separate title, funding both the acquisition of the Headwaters Forest in California and New World Mine outside Yellowstone National Park; and \$72 million for other purposes.

Another spike occurred in FY2001, when appropriations again exceeded the authorized level and totaled nearly \$1 billion. This record level of funding was provided partly in response to President Clinton's Lands Legacy Initiative, which sought \$1.4 billion for 21 resource protection programs including the LWCF. It also was provided in response to some congressional interest in securing increased and more certain funding for the LWCF. The 106th Congress considered legislation to fully fund the LWCF and to make it operate like a private sector trust fund. Such proposals sought to divert offshore oil and gas revenues to a Conservation and Reinvestment Act (CARA) Fund and to permanently appropriate receipts credited to the LWCF, among other related purposes.

When it became clear that CARA legislation would not be enacted, Congress included aspects of the legislation in the FY2001 Interior and Related Agencies Appropriations law (P.L. 106-291). These provisions established the Conservation Spending Category (CSC), with the LWCF as a major component in the CSC. The CSC provisions set a target for total funding for all the component programs in FY2001 at \$1.6 billion, including \$1.2 billion through Interior appropriations and \$400 million through Department of Commerce appropriations. Under law, the target was to increase each year until it reached \$2.4 billion in FY2006. However, Congress generally did not use the CSC structure in appropriating funds to the LWCF and related programs. The CSC was authorized in Interior Appropriations law through FY2006, while the Commerce Appropriations law authorized it for only FY2001.

²⁰ Figures in **Table 1** and elsewhere in this report do not always add to the totals indicated due to rounding.

²¹ The LWCF had accumulated receipts sufficient to cover an appropriation exceeding the annual authorization. Specifically, in 1997 the LWCF had a balance of \$11.9 billion in unappropriated receipts, which represented the difference between the receipts into the Fund and the appropriations from the Fund since its creation.

Figure I. LWCF Appropriations, FY1965-FY2014

Source: The primary source for these data is the DOI Budget Office, at <http://www.doi.gov/budget/budget-data.cfm>. See the entry for “Land and Water Conservation Fund Receipts: MS Excel Spreadsheet.” Data updated on March 5, 2014.

Notes: The graph does not reflect \$76 million provided for the transition quarter from July 1, 1976, to September 30, 1976. Also, dollars are not adjusted for inflation.

Table I. LWCF Appropriations, FY1965-FY2014

(in millions of dollars)

Fiscal Year	Land Acquisition	State Grants	Other Purposes	Total
1965	\$6	\$10	\$0	\$16
1966	\$38	\$84	\$0	\$122
1967	\$36	\$59	\$0	\$95
1968	\$40	\$64	\$0	\$104
1969	\$64	\$48	\$0	\$112
1970	\$66	\$65	\$0	\$131
1971	\$168	\$189	\$0	\$357
1972	\$102	\$259	\$0	\$361
1973	\$113	\$187	\$0	\$300
1974	\$5	\$71	\$0	\$76
1975	\$122	\$186	\$0	\$308
1976	\$136	\$181	\$0	\$317
1977	\$356	\$182	\$0	\$538
1978	\$491	\$314	\$0	\$805
1979	\$361	\$376	\$0	\$737

Fiscal Year	Land Acquisition	State Grants	Other Purposes	Total
1980	\$202	\$307	\$0	\$509
1981	\$108	\$180	\$0	\$288
1982	\$176	\$4	\$0	\$180
1983	\$220	\$115	\$0	\$335
1984	\$227	\$75	\$0	\$302
1985	\$213	\$74	\$0	\$287
1986	\$121	\$47	\$0	\$168
1987	\$176	\$35	\$0	\$211
1988	\$150	\$20	\$0	\$170
1989	\$186	\$20	\$0	\$206
1990	\$212	\$20	\$0	\$232
1991	\$309	\$33	\$0	\$342
1992	\$294	\$23	\$0	\$317
1993	\$256	\$28	\$0	\$284
1994	\$228	\$28	\$0	\$256
1995	\$189	\$28	\$0	\$217
1996	\$137	\$1	\$0	\$138
1997	\$158	\$1	\$0	\$159
1998	\$896	\$1	\$72	\$969
1999	\$328	\$0	\$0	\$328
2000	\$406	\$41	\$20	\$467
2001	\$449	\$90	\$456	\$995
2002	\$429	\$144	\$105	\$677
2003	\$316	\$97	\$115	\$529
2004	\$165	\$94	\$230	\$488
2005	\$164	\$91	\$203	\$459
2006	\$119	\$30	\$213	\$362
2007	\$120	\$30	\$216	\$366
2008	\$129	\$25	\$101	\$255
2009	\$152	\$19	\$104	\$275
2010	\$278	\$40	\$132	\$450
2011	\$177	\$40	\$84	\$301
2012	\$199	\$45	\$78	\$322
2013	\$187	\$43	\$74	\$303
2014	\$180	\$48	\$78	\$306

Source: The primary source for these data is the DOI Budget Office, at <http://www.doi.gov/budget/budget-data.cfm>. See the entry for “Land and Water Conservation Fund Receipts: MS Excel Spreadsheet.” Data updated on March 5, 2014.

Notes: Figures do not reflect \$76 million provided for the transition quarter from July 1, 1976, to September 30, 1976. Also, dollars are not adjusted for inflation.

Total LWCF appropriations, and the funding levels for each federal agency, the stateside program, and other purposes, have declined over the past decade (from FY2005 to FY2014). During this decade, appropriations declined by 44% from the FY2005 high (\$459.0 million) to the FY2008 low (\$255.1 million), while ending the decade in FY2014 with a 30% decrease (to \$306.0 million). **Table 2** lists appropriations from FY2005 through FY2014.

Table 2. Total LWCF Appropriations, FY2005-FY2014

(in millions of dollars)

Purpose	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011	FY2012	FY2013	FY2014
Land Acquisition										
Bureau of Land Management	\$11.2	\$8.6	\$8.6	\$8.9	\$14.8	\$29.7	\$22.0	\$22.3	\$21.2	\$19.5
Fish and Wildlife Service	\$37.0	\$28.0	\$28.0	\$34.6	\$42.5	\$86.3	\$54.9	\$54.6	\$50.8	\$54.4
National Park Service	\$55.1	\$34.4 ^a	\$34.4	\$44.4	\$45.2	\$86.3	\$54.9	\$57.0	\$52.8	\$50.0
Forest Service	\$61.0	\$40.9	\$41.9	\$41.2	\$49.8	\$63.5	\$32.9	\$52.5	\$49.8	\$43.5
DOI OVS ^b	—	\$7.3	\$7.4	—	—	\$12.1	\$12.1	\$12.7	\$12.0	\$12.2
<i>Total Land Acquisition</i>	<i>\$164.3</i>	<i>\$119.2</i>	<i>\$120.4</i>	<i>\$129.1</i>	<i>\$152.2</i>	<i>\$277.9</i>	<i>\$176.8</i>	<i>\$199.1</i>	<i>\$186.6</i>	<i>\$179.6</i>
State Grants	\$91.2	\$29.6	\$29.6	\$24.6	\$19.0 ^c	\$40.0	\$39.9	\$44.9	\$42.6	\$48.1
Other Purposes	\$203.5	\$213.1	\$216.1	\$101.3	\$104.1 ^d	\$132.5	\$83.8	\$78.3	\$74.2	\$78.4
Total	\$459.0	\$361.9^a	\$366.1	\$255.1	\$275.3	\$450.4	\$300.5	\$322.3	\$303.3	\$306.0

Source: The primary source for these data is the DOI Budget Office, at <http://www.doi.gov/budget/budget-data.cfm>. See the entry for “Land and Water Conservation Fund Receipts: MS Excel Spreadsheet.” Data updated on March 5, 2014.

Note: Dollars are not adjusted for inflation.

- The NPS land acquisition and total appropriation figures are reduced by \$9.8 million due to the use of prior year funds for NPS federal land acquisition.
- OVS is the Office of Valuation Services. Figures reflect appropriations from LWCF to DOI Departmental Management for land acquisition appraisal services.
- This figure has been reduced by \$1.0 million due to the use of prior-year funds.
- This figure has been reduced by \$8.0 million due to the use of prior-year funds.

Allocation Among Land Acquisition, State Grants, and Other Purposes

The \$16.8 billion appropriated from the fund through FY2014 has been unevenly allocated among federal land acquisition, the stateside program, and other purposes, as shown in **Figure 1**. The largest portion of the total—\$10.4 billion (62%)—has been appropriated for federal land acquisition. The four federal land management agencies have received differing portions of this \$10.4 billion. Specifically, the NPS has received \$4.4 billion (42%); the FS, \$2.8 billion (27%); the FWS, \$2.2 billion (21%); and the BLM, \$0.9 billion (8%).²²

²² A relatively small amount (less than 1%) of the total appropriations for federal land acquisition was provided to other agencies or offices (e.g., to the Office of the DOI Secretary for land appraisal services).

The stateside program has received the second-largest portion of LWCF appropriations—\$4.2 billion (25% of the total, which includes funds for grant administration and funds under GOMESA). In the early years, more funds generally went to the stateside program than to the four federal agencies combined. For instance, stateside appropriations exceeded federal land acquisition appropriations during 12 of the 16 years from FY1965 to FY1980. The stateside program has declined as a portion of total LWCF appropriations since the early 1980s, and received no appropriations (except for program administration) from FY1996 through FY1999. Over the past decade (FY2005-FY2014), funding for the stateside program has ranged from a low of \$19.0 million (FY2009) to a high of \$91.2 million (FY2005). Stateside funding has averaged 12% of total LWCF appropriations over the decade.

Other purposes have received the remaining portion of total LWCF appropriations—\$2.1 billion (13%). No funds were provided for other purposes until FY1998. By contrast, 29% of LWCF appropriations from FY1998 through FY2014 have been for other purposes. The FWS and FS have received the largest shares: about \$1.2 billion and \$0.6 billion, respectively, of the \$2.1 billion appropriated for other purposes since FY1998.

Both the dollar amount and percentage of LWCF appropriations provided to other purposes have varied widely throughout this period, as shown in **Table 3**. The dollar value of the appropriations for other purposes was much higher in FY2001 than any other year, when these appropriations were used to fund programs in the Clinton Administration's Lands Legacy Initiative. The highest percentage of funds provided for other purposes occurred in FY2006 and FY2007, in response to President Bush's request for funding for an array of other programs. In some years, Congress has appropriated significantly less for other purposes than the Administration has requested. For instance, for FY2008 the Bush Administration sought \$313.1 million for other purposes of a total request of \$378.7 million. Congress appropriated \$101.3 million for other purposes of a total of \$255.1 million.

Table 3. LWCF Appropriations for Other Purposes, FY1998-FY2014

(in millions of dollars)

Fiscal Year	Total LWCF Appropriation	Appropriation for Other Purposes	Other Purposes as % of Total Appropriation
FY1998	\$969.1	\$72.0	7%
FY1999	\$328.2	\$0	0%
FY2000	\$466.9	\$20.0	4%
FY2001	\$995.4	\$455.9	46%
FY2002	\$677.2	\$104.6	15%
FY2003	\$528.9	\$115.5	22%
FY2004	\$488.1	\$229.7	47%
FY2005	\$459.0	\$203.5	44%
FY2006	\$361.9	\$213.1	59%
FY2007	\$366.1	\$216.1	59%
FY2008	\$255.1	\$101.3	40%
FY2009	\$275.3	\$104.1 ^a	38%
FY2010	\$450.4	\$132.5	29%

Fiscal Year	Total LWCF Appropriation	Appropriation for Other Purposes	Other Purposes as % of Total Appropriation
FY2011	\$300.5	\$83.8	28%
FY2012	\$322.3	\$78.3	24%
FY2013	\$303.3	\$74.2	24%
FY2014	\$306.0	\$78.4	26%

Source: The primary source for these data is the DOI Budget Office, at <http://www.doi.gov/budget/budget-data.cfm>. See the entry for “Land and Water Conservation Fund Receipts: MS Excel Spreadsheet.” Data updated on March 5, 2014.

Note: Dollars are not adjusted for inflation.

a. This figure has been reduced by \$8.0 million due to the use of prior-year funds.

Legislation

A variety of measures pertaining to the LWCF have been introduced in the 113th Congress. One bill (S. 338 as introduced) seeks to permanently authorize the LWCF at \$900 million; the program is currently authorized through September 30, 2015. It also would provide permanent appropriations at the authorized level, rather than continue the current procedure of providing discretionary appropriations each year. The bill does not make explicit how the appropriations would be allocated among LWCF purposes or agencies.

Several bills specify that a portion of LWCF funding would be used for acquisitions that increase access to federal lands for recreational purposes, such as hunting and fishing. The bills differ as to whether they provide for a minimum percentage and/or dollar amount of funding; pertain to requested, authorized, or appropriated funding; or contain other provisions affecting LWCF. For instance, in addition to the provisions noted above, S. 338 also would amend the LWCF Act to provide not less than 1.5% of the authorized funding for projects that would secure recreational public access to federal land. S. 1554, on which hearings were held, provides that not less than 1.5% of LWCF funds appropriated for federal purposes would be used for recreational public access projects. It also would direct the heads of the BLM, FWS, NPS, and FS to prepare and make available to the public reports on public access to federal lands for recreational purposes. S. 2363 (Sec. 201) provides that not less than 1.5% of the appropriation for LWCF, or \$10.0 million—whichever is greater—would be used for recreational access projects identified on priority lists developed by the Secretary of the Interior and the Secretary of Agriculture. The bill was considered on the Senate floor in July, but no vote on final passage has occurred. Three other measures are similar to S. 2363, except that they pertain to funding requested for the LWCF: H.R. 3962 and S. 1660 (Sec. 201), both as introduced, and S. 1996 (Sec. 201), which is on the Senate calendar.

Other 113th Congress bills would direct additional sources of funds to the LWCF. For instance, S. 199 (as introduced) would direct a portion of revenues from energy development in certain Arctic offshore areas to the LWCF, to be used for the state grant program. S. 279 (Sec. 204), on which hearings were held, would make revenues from solar or wind energy development on public lands and National Forest System lands available for activities authorized under LWCF. H.R. 1686 (as introduced) would establish a new treasury fund consisting of taxes paid on disposable carryout bags, and direct payments from this fund into the LWCF.

Additional measures pertain to the LWCF state grant program. H.R. 2727, as introduced, would require that not less than 40% of LWCF appropriations be available for the state grant program. This would be parallel to the provision in law which provides that not less than 40% of LWCF appropriations are for federal purposes. Other bills would amend provisions of GOMESA pertaining to the distribution of OCS revenues to the LWCF for the state grant program; these revenues provide a source of mandatory funding for this program. Such bills include S. 17 (Sec. 105) as introduced, and S. 1273, on which hearings were held. Still other measures would expand the purposes for which state grants could be used. Under H.R. 4765 (Sec. 307), as introduced, state grants could be used for programs that increase access to and use of parks and open space in low-income communities and on or near Indian reservations.

Some pending bills would expand or otherwise alter the federal purposes for which LWCF appropriations could be used. H.R. 2424 (Sec. 213) as introduced, for example, would authorize appropriations of \$50.0 million (for specified fiscal years) for the Secretary of Housing and Urban Development to provide financial assistance to entities to carry out park and infrastructure projects. H.R. 5220 (as introduced) would authorize LWCF funds to be used for maintenance of federal lands and waters (and interests) instead of for acquisitions.

Current Issues

There are differing opinions as to the appropriate level of LWCF appropriations and for what purposes these funds should be used. The LWCF has broad support from resource protection advocates, many of whom seek stable and predictable funding through consistent levels of appropriations. Most of these advocates seek higher appropriations in general. For instance, the Obama Administration proposed discretionary appropriations of \$900 million for FY2012. Some advocates have specific priorities, such as higher acquisition funding for one of the four federal agencies, the state grant program, or a particular site or area. Advocates of higher federal land acquisition funding promote a strong federal role in acquiring and managing sensitive areas and natural resources.

Some advocates of higher LWCF funding seek partial or full permanent appropriations. For instance, the Obama Administration proposed \$900 million for LWCF for FY2015 through a combination of discretionary (\$350.0 million) and mandatory (\$550.0 million) appropriations. Further, the Administration proposed amending current law to appropriate mandatory funding of \$900 million annually beginning in FY2016.²³ Questions include how to offset any new permanent appropriations and how to allocate permanent appropriations among different LWCF programs and purposes.

There is also broad opposition to the LWCF based on varied concerns, with opponents generally seeking reduced levels of funds for LWCF. Some of the opposition stems from an interest in reducing the current size of the federal estate and minimizing further acquisition of privately owned land by the federal government either generally or at specific sites, especially in the West, where federal ownership is already concentrated. The concerns involve preferences for private ownership, impacts of federal land ownership on uses of private lands, and reduced local tax revenues that result from public ownership. Some opponents believe that maintaining (and

²³ U.S. Dept. of the Interior, National Park Service, *Budget Justifications and Performance Information, Fiscal Year 2015*, p. LASA-1.

rehabilitating) the land and facilities that federal agencies already own should take priority over further acquisitions. For instance, a pending House bill (H.R. 5220) seeks to bar funding for federal acquisitions while authorizing funding for maintenance. Further, for FY2015, the House Budget Committee supported focusing on eliminating the maintenance backlog before acquiring additional federal lands.²⁴ Since federal agencies cannot use LWCF funds for maintenance, some supporters of this priority favor more funding to other accounts that can be used for maintenance and less for LWCF. Others have sought LWCF reductions as part of a broader focus on reducing the large federal deficit, or on the grounds that there is inadequate cooperation among LWCF programs and between LWCF and other programs.²⁵

One area of congressional focus has been the stateside program, with debate over the level of funds for grants. In some years, Congress and/or the Administration have not supported funds, or have supported relatively low levels of funds, for new stateside grants. Reasons include that state and local governments have alternative sources of funding for parkland acquisition and development, the current program could not adequately measure performance or demonstrate results, and large federal deficits require a focus on core federal responsibilities. Stateside supporters assert that the program contributes significantly to statewide recreation planning; state leadership in protection and development of recreation resources; and long-term outdoor recreation overall, and particularly through locally sponsored projects that are readily accessible to communities. They see the program as a way to help fiscally constrained local governments and leverage state and local funds for recreation. Further, advocates assert that investments in recreation save money in other areas; for instance, they say that these investments promote healthier lifestyles and thus save health care expenditures. A related issue is how LWCF funding should be split between federal purposes and state grants.

Whether to change the way that funds are apportioned to the states has been under consideration. Under the traditional state grant program, a portion of the appropriation is to be distributed equally among the states, with the percentage varying depending on the total amount of appropriations.²⁶ Further, the Secretary of the Interior has discretion to apportion the balance based on need, and population has been the biggest factor in determining need. For FY2014, Congress approved a portion of the state grant funds for a competitive grant program. While the Administration and some in Congress have supported continuing this program, the extent to which it will continue is uncertain.²⁷

Another focus has been on which, if any, purposes other than land acquisition and stateside grants should be funded through the LWCF. Some seek to channel LWCF funding to a broader array of

²⁴ House Committee on the Budget, *Concurrent Resolution on the Budget—Fiscal Year 2015*, H.Rept. 113-403 on H.Con.Res. 96, pp. 53-54.

²⁵ See, for example, the report of the House Appropriations Committee on H.R. 2584, providing FY2012 appropriations for Interior, Environment, and Related Agencies: H.Rept. 112-151, pp. 14-15.

²⁶ The LWCF Act provides that 40% of the first \$225.0 million, 30% of the next \$275.0 million, and 20% of all additional appropriations are to be apportioned equally among the states.

²⁷ The Obama Administration, the House Appropriations Committee, and the chair of the Senate Appropriations Subcommittee on Interior, Environment and Related Agencies supported continuing this program for FY2015. For the Administration's proposal, see U.S. Dept. of the Interior, National Park Service, *Budget Justifications and Performance Information, Fiscal Year 2015*, pp. LASA-92. For the recommendation of the House Appropriations Committee, see H.Rept. 113-551 on H.R. 5171, pp. 35-36 and p. 153. For the Senate Subcommittee chair's recommendation, see the draft explanatory statement, p. 20 and p. 88, at <http://www.appropriations.senate.gov/sites/default/files/INTFY15Report.pdf>.

purposes to protect federal lands. For instance, the Bush Administration sought LWCF funds for cooperative conservation programs through which federal land managers partner with other landowners to protect natural resources and improve recreation on lands under diverse ownership. The Obama Administration also has supported the use of LWCF funds for other purposes, although generally fewer than the Bush Administration. A factor in the debate has been the unappropriated balance in the fund, and whether to allow these funds to be used for broader purposes beyond those currently authorized. Traditional fund beneficiaries have expressed concern about expanding the uses of appropriations if that expansion is accompanied by reductions in the amount available for federal land acquisition or state grants.

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Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States


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Table of Contents

Executive Summary	2
I. Introduction.....	2
II. EPA Cannot Accurately Quantify Increases in Jurisdiction by Using the Corps' ORM2 Database	4
A. The ORM2 Records Are Not Compatible with the Draft Rule's Jurisdictional Categories	5
B. The ORM2 Records Underrepresent the Universe of Jurisdictional Areas	7
III. Errors with EPA's Incremental Acreage Calculations.....	9
IV. Errors with EPA's Incremental Cost Calculations.....	15
A. Section 404.....	15
B. Other (Non-404) Programs.....	20
1. Section 401 State Certification.....	21
2. Section 402 NPDES Permits.....	21
3. Section 311 Oil Spill Prevention Plans.....	24
4. Section 303 Water Quality Standards.....	24
V. Errors with EPA's Incremental Benefits Calculations.....	26
A. Section 404.....	26
B. Other (Non-404) Programs.....	29
VI. Conclusion	31

Executive Summary

The Environmental Protection Agency's (EPA) March 2014 *Economic Analysis of Proposed Revised Definition of Waters of the United States* (EPA analysis) presents the agency's estimates of the probable costs and benefits associated with a definitional change to the term "waters of the United States" used throughout Clean Water Act (CWA) programs. EPA is proposing an expansion of the definition of the term "waters of the United States" to include categories of waters that were previously never regulated as waters of the United States, such as all waters in floodplains, riparian areas, and certain ditches. The inclusion of these waters will broaden the scope of the CWA and will increase the costs associated with each program. Unfortunately, the EPA analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definitional changes. This is compounded by the exclusion of several important types of costs and the use of a flawed benefits transfer methodology, which EPA uses to estimate the benefits of expanding jurisdiction. The errors, omissions, and lack of transparency in EPA's study are so severe as to render it virtually meaningless. The agency should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA.

I. Introduction

The March 2014 *Economic Analysis of Proposed Revised Definition of Waters of the United States* represents EPA's estimate of the economic impacts associated with a change in the scope of the waters regulated under the CWA. The analysis centers of the meaning of the term "waters of the United States," which determines whether the requirements of the federal CWA apply. After several landmark Supreme Court decisions rejected expansive federal jurisdiction, EPA produced several guidance documents explaining how the agency would proceed in making jurisdictional determinations in the CWA section 404 program. The guidance documents were not legally binding and created additional uncertainties about the scope of CWA jurisdiction.

Recently, EPA proposed a rule to revise the “waters of the United States” definition for all CWA programs (402, 401, 311, etc.). The draft rule, for the first time, includes a regulatory definition of “tributary” that explicitly includes many kinds of irrigation, storm water, roadside and other ditches. The draft rule also extends jurisdiction to “adjacent waters,” which includes, for the first time, adjacent non-wetlands. It also defines a new component of the “adjacent” definition—“neighboring.” The term “neighboring,” for the purposes of defining the term “adjacent” in the new rule, includes waters located within riparian and floodplain areas. The draft rule also defines “riparian areas” and “floodplain” for the first time. The new rule would also regulate all “other waters” if they have significant nexus, which would be determined on a case by case basis. EPA asserts that these changes would improve the clarity of the CWA and would expand environmental benefits by requiring additional compensatory mitigation for discharges of dredged or fill material into such waters. It also recognizes the possibility of increased costs to permit seekers and regulatory agencies, albeit for a very narrow range of potential actions. EPA’s economic analysis, which is required by law for a proposed rule change, outlines the economic impacts associated with a change in the definition of “waters of the United States.”

A threshold problem with EPA’s analysis is that it deals only with the “other waters” category of CWA jurisdiction. The economic analysis focuses on how jurisdiction might change for “isolated waters” that are not jurisdictional under the current CWA framework as a result of *SWANCC*, but are likely to become jurisdictional under an expanded definition of “other waters”. This would allow for jurisdiction over isolated areas that, when aggregated, are found to have a significant nexus to traditional navigable waters.

According to EPA’s analysis, “‘other waters’ is a regulatory term for wetlands and non-wetlands waters that do not fall into the category of waters susceptible to interstate commerce (e.g., ‘traditional navigable waters’ or TNWs), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of the first four categories on this list.” As discussed in more detail below, to determine how jurisdiction would change for the “other waters” category, the U.S. Army Corps of Engineers (Corps) performed a sample review of 262 project files from the Corps’ ORM2 database “isolated waters” category. All of these 262 records are considered outside

the scope of CWA jurisdiction under current regulatory policies, but the agencies predicted that approximately 17% of these records would be subject to CWA jurisdiction under the new rule.¹ The agencies did not do a similar sample review to determine how jurisdiction might change for other jurisdictional categories of waters (i.e., tributaries and adjacent waters, as newly defined). EPA's Economic Analysis simply assumes that the small percentage of FY 2009-2010 ORM2 streams and wetlands records that are not jurisdictional under current regulatory policies (2% of streams and 1.5% of wetlands) would become jurisdictional under the new rule.

But the agencies' draft rule does much more than just expand the scope of the "other waters" category. As previously explained, it also includes several new categories of jurisdiction and new definitions for regulatory terms, which will result in regulation of new features and areas that are not jurisdictional or considered waters of the United States under the current CWA framework. These changes will sweep in many new areas yet EPA's analysis does not quantify or address this change.

This report provides an analysis of the calculations employed by EPA. In many cases, the lack of transparency and supporting documentation in EPA's analysis made the replication of calculations difficult. The following sections address the methodology behind the incremental acreage determination, the program cost calculations, and the benefit calculations.

II. EPA Cannot Accurately Quantify Increases in Jurisdiction by Using the Corps' ORM2 Database

To quantify the increased extent to which EPA and the Corps will assert CWA jurisdiction as a result of the draft waters of the U.S. rule, EPA evaluated data records from FY 2009-2010 in the Corps' ORM2 (Operation and Maintenance Business Information Link, Regulatory Module) database. Although records from the Corps' internal ORM2 database are not available to the

¹ Given the existing confusion regarding 404 jurisdiction that has been well documented, see GAO-04-297, it is questionable whether the assertion of jurisdiction by the Corps was consistent or accurate. Indeed, many have questioned existing assertions as overbroad.

public, we obtained a portion of the underlying ORM2 data used for these calculations through a Freedom of Information Act request. EPA's use of the ORM2 numbers to calculate how much the draft rule will increase CWA jurisdiction is problematic because the ORM2 database was not designed for this purpose and its data do not fit this exercise.

EPA cannot accurately quantify increases in jurisdiction by relying solely on the Corps' ORM2 database for several reasons. As is explained more fully below, the categories of ORM2 records do not marry up with the draft rule's categories of jurisdictional waters. In addition, the ORM2 data fail to capture the entire universe of areas that are jurisdictional under the current CWA framework because it only accounts for situations in which regulated entities engage in the section 404 jurisdictional determination or permitting process. Even for those instances where regulated entities engage in that process, the ORM2 database does not capture all aquatic resources on the subject parcel because the Corps focuses only on impacted areas and mitigation sites. Finally, because Corps staff is not required to fill in the "aquatic resource type" field in the ORM2 database, EPA failed to account for a large portion of records in its calculations of the increase in jurisdiction.

A. THE ORM2 RECORDS ARE NOT COMPATIBLE WITH THE DRAFT RULE'S JURISDICTIONAL CATEGORIES

The categories of records available on the ORM2 database do not match up with the categories of jurisdictional waters provided in the proposed "waters of the US" rule. The ORM2 records are categorized according to "aquatic resource types" based on EPA's and the Corps' 2008 Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* Therefore, the ORM2 database records are categorized based on concepts developed by the agencies after *Rapanos* and *SWANCC*, such as "traditional navigable waters,"

“relatively permanent waters,” “wetlands adjacent to relatively permanent waters,” and “isolated waters.”²

In the draft rule, the agencies introduce new categories of jurisdictional waters and new definitions for important terms. The draft rule provides, for the first time, a regulatory definition of “tributaries,” which explicitly includes ditches. It also includes an “adjacent waters” category that includes both wetlands and non-wetlands. As it did previously, the draft rule defines “adjacent” as “bordering, contiguous or neighboring.” But the rule, for the first time, defines “neighboring” to include riparian areas and floodplains, and provides new, broad definitions of “riparian area” and “floodplain.” The rule also, for the first time, provides a regulatory definition for “significant nexus,” and provides that “other waters” may be jurisdictional on a case-specific basis if they, individually or when aggregated with other similarly situated waters, have a significant nexus with other jurisdictional waters.

Importantly, the ORM2 database does not track information on these new terms and categories of jurisdiction. For example, EPA’s analysis recognizes that the ORM2 “isolated waters” category does not take into account the rule’s new aggregation principle and explains that EPA could not assess the potential impacts of aggregation of other waters within a watershed without “actual field experience.” Indeed, EPA’s analysis also acknowledges that there will be additional costs to the Corps to update the ORM2 system to “reflect needed data elements” as a result of the rule’s new jurisdictional categories. But EPA does not alter its analysis to account for this major deficiency. As a result, numbers extrapolated from the ORM2 records, which do not marry up

² When inputting records into the ORM2 database, a Corps field officer can select any one of the following aquatic resource types: (1) traditional navigable waters (TNWs); (2) wetlands adjacent to TNWs; (3) relatively permanent waters (RPWs) that flow directly or indirectly into TNWs; (4) wetlands directly abutting RPWs that flow directly or indirectly into TNWs; (5) wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs; (6) non-RPWs that flow directly or indirectly into TNWs; (7) wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs; (8) tributary consisting of both RPWs and non-RPWs; (9) isolated (interstate or intrastate waters), including isolated wetlands; (10) uplands; (11) wetlands assessed for delineation purposes only (and not for jurisdictional purposes); and (12) impoundments. Alternatively, as discussed below, the Corps field officer may input records without completing the “aquatic resource type” field.

with the draft rule's categories of jurisdiction, are not useful for approximating the percentage of increase in jurisdiction or the increase in jurisdictional acreage.

B. THE ORM2 RECORDS UNDERREPRESENT THE UNIVERSE OF JURISDICTIONAL AREAS

The ORM2 data does not capture the entire universe of jurisdictional areas under the current CWA framework. First, the Corps records account only for situations in which regulated entities seek a section 404 permit, approved jurisdictional determination (AJD), or wetland delineation. The ORM2 database does not include records for preliminary jurisdictional determinations (PJDs), which allow for a party to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner to move ahead expeditiously to obtain a Corps permit. With a PJD, the landowner agrees to treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S.³ Thus, EPA's Economic Analysis fails to account for large numbers of acres across the country that may be impacted by the regulations. Indeed, most regulated entities in the 404 program have relied on PJDs after 2008 due to the uncertainty of jurisdiction stemming from inconsistency across agency policies. Waters for which jurisdiction is unclear is precisely the group of waters that the agencies are purporting to address in this draft rule. Accordingly, EPA's claim that these waters are irrelevant for analyzing the draft rule's economic impacts is incorrect.

Second, EPA purports to account for its failure to capture the entire universe of jurisdictional areas by explaining,

Landowners and developers may assume that some waters are non-jurisdictional and not request a determination or engage in the permitting process. These waters would not be represented in the ORM2 FY2009-2010 database. However, these waters are also likely to be the most isolated and the least connected to

³ See U.S. Army Corps of Engineers, Regulatory Guidance Letter 08-02 (June 26, 2006).

other waters and therefore the least likely to have their status changed under this proposed rule.

In other words, EPA is saying that the waters for which a reasonable person is likely to have never needed a JD are only those so isolated that they would not be jurisdictional anyway. But the new rule, by capturing ditches, intermittent streams, streams that are connected only underground, adjacent waters, and waters that have been disconnected from downstream waters by barriers, includes many waters that no reasonable person every would have thought of as jurisdictional.

In relying on the Corps' ORM2 database, EPA's Economic Analysis does not recognize the instances in which landowners have not engaged in the section 404 permitting process because they have not sought to fill areas of their land or because their property is not jurisdictional under the current regulatory framework. This situation is not limited to areas with isolated waters. The draft rule brings in many features (*e.g.*, adjacent waters, ditches) that were not previously jurisdictional and would not be included in the Corps' ORM2 records.

Third, even for those instances where landowners engage in the jurisdictional determination or permitting process, the ORM2 database does not capture all aquatic resources on the subject parcel. Rather, the Corps records focus on *impacted* areas and mitigation sites. For example, if an applicant seeks a permit to impact .25 acres on a 5-acre parcel of land, only the aquatic resources on the .25 acres that would be impacted are captured in the ORM2 database. Aquatic resources on the remainder of the parcel would not be captured.

Fourth, "aquatic resource type" is not a required field for Corps staff to fill out in the ORM2 database. As a result, of the 196,208 ORM2 FY2009-2010 records used by EPA in its calculations, 36,063 (18.4%) did not have an associated aquatic resource type selected. This "water type null" category was not accounted for in EPA's calculation of the 2.7% increase in jurisdictional waters under the new rule or any other calculations in the economic analysis.

Finally, by relying on only ORM2 data, EPA fails to evaluate the extent to which the expansion of jurisdiction could have consequences for activities other than the discharge of dredged or fill material. EPA's analysis simply assumes that the distribution of water body types and the relative distribution of jurisdictional vs. non-jurisdictional waters will be the same, regardless of whether the activity in question is the discharge of dredged or fill material, the discharge of wastewater or stormwater, or an activity subject to CWA section 311 or similar spill control requirement. EPA did not make any attempt to evaluate whether the numbers and types of water affected by these activities were the same as those affected by activities subject to 404.

For all these reasons, EPA's use of ORM2 data throughout its economic analysis to quantify the increase in jurisdiction is highly suspect and results in woefully inaccurate projections.⁴

III. Errors with EPA's Incremental Acreage Calculations

Calculations of costs and benefits in EPA's analysis rely on an estimate of the acreage that would become jurisdictional under a definitional change. The Corps estimates this incremental acreage by examining their ORM2 database of CWA permit applications. Corps staff reviewed a sample of 262 old project files relating to section 404 using the new jurisdictional criteria. Of these files, 67% pertained to streams, 27% to wetlands, and 6% to "other waters." The Corps found that 98% of the streams, 98.5% of the wetlands, and 0% of the other waters were jurisdictional under existing guidance. Under the new criteria, it found that 100% of the streams and wetlands and 17% of the other waters would become jurisdictional.⁵ Corps staff concluded that an expanded definition of "waters of the United States" would result in 2.7% more jurisdictional waters than under the current definition. These calculations are summarized in Table 1.

⁴ As explained more fully below, EPA's sensitivity analysis does not adequately make up for this deficiency because the 2.7% percentage increase figure used throughout the economic analysis is based on ORM2 data without sensitivity analysis calculations.

⁵ EPA reviewed a subset of 50 project files for "other waters" and determined 15% would be jurisdictional.

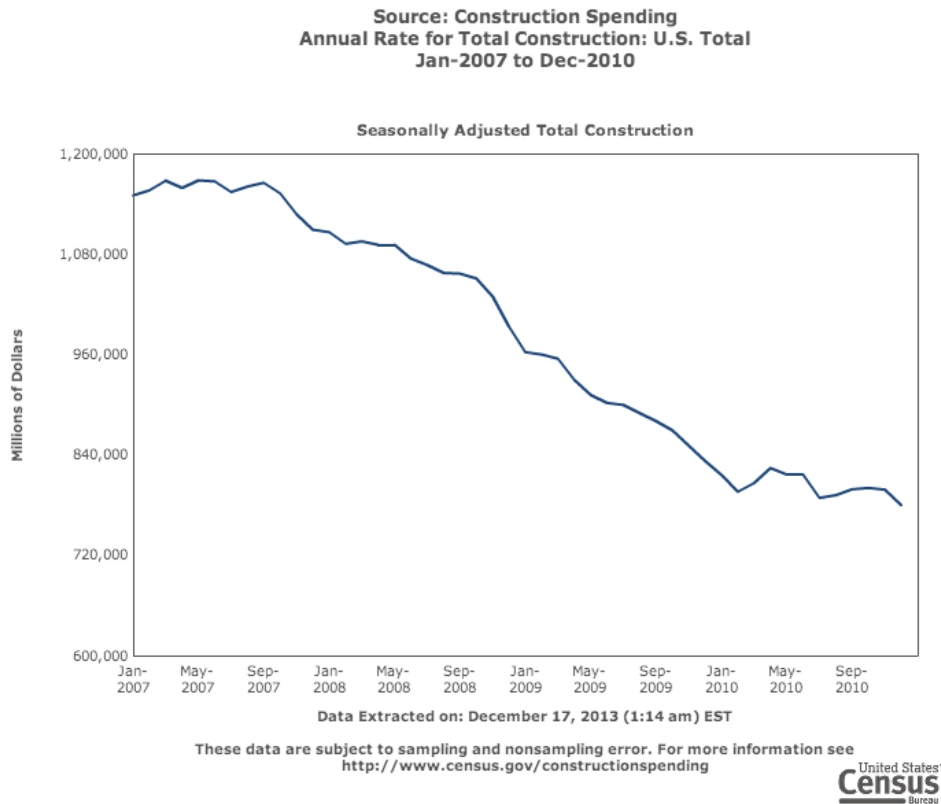
Table 1: Calculation of Increased Jurisdiction

	No. ORM Records	No. Positive Juris.	Proj. Positive Juris.	% Total ORM2		
				Records	% Positive Juris.	Proj. Positive Juris.
Streams	95,476	93,538	95,476	67%	98.0%	100.0%
Wetlands	38,280	37,709	38,280	27%	98.5%	100.0%
Other Waters	8,209	0	1,396	6%	0.0%	17.0%
Total	141,965	131,247	135,152	100%	92.5%	95.2%

EPA's analysis arrives at the conclusion that the new rule will result in a total of 1,332 acres of added impacts from additional permits under section 404 alone. This incremental acreage represents a 2.7% increase in the number of permits multiplied by the average impact per permit (see Table 3). Although EPA argues that it has used upper bound estimates of costs for many of the cost categories, its analysis is flawed in at least four major ways. This leads to a significant underestimation of total added impacts.

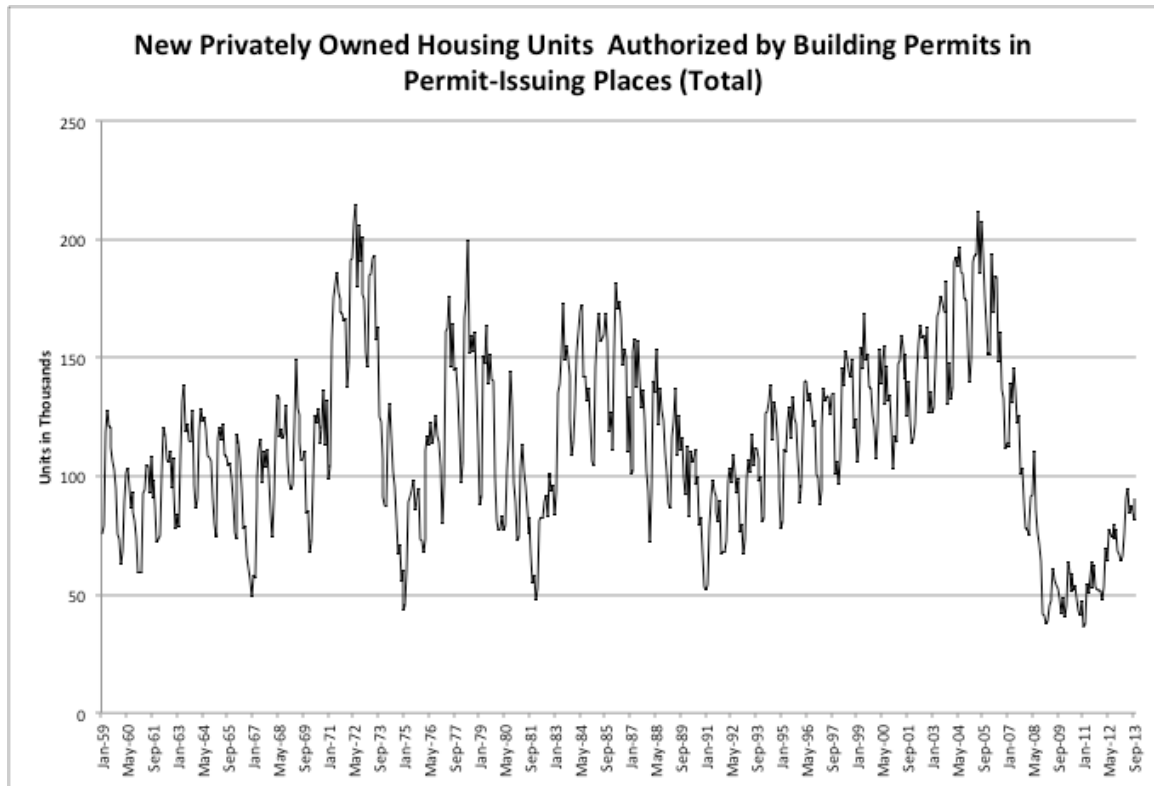
The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. As Figure 1 indicates, construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in artificially low numbers of applications and affected acreage. Even if the percent increase in added permits is correct, using the number of permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector.

Figure 1: United States Construction Spending, 2007-2010



If one examines building permit data for all types of construction since 1959, it is apparent that choosing FY 2009/2010 as representative years is problematic, as building permit filings were at an all-time low during this period. Figure 2 displays Census data on building permits at the national level. Again, this figure shows that the baseline time period chosen by EPA is not representative and biases the added acres calculation downwards, unless the nation's building sector never recovers.

Figure 2: New Privately Owned Housing Units Authorized by Building Permits



EPA’s analysis uses an expert review to calculate a percent increase in jurisdiction. In order to arrive at the 2.7% estimate, EPA reviewed historical filing and made judgment calls as to which filings would be subject to the new rule. According to its analysis the projected percent of positive jurisdiction would rise to 100% for streams and wetlands filings (up from 98% and 98.5%, respectively) and 17% for “other waters” (up from 0%). This analysis assumes that the new rule will not affect the number of total filings. It is clear that projects that were previously not thought to be subject to the new rules did not file permitting requests. Under the new rules, however, more projects likely will be required to seek permits. What this means is that the share of projects entering the permitting process is likely to increase, which will increase the projected number of positive jurisdictional determinations and the incremental acreage estimates.

Although the report’s conclusions remain unchanged, EPA provides a brief sensitivity analysis to address the influx of new applicants that had previously not entered the permitting process. It acknowledges that permit applications associated with “other” waters could double under the

proposed rule and provides several alternative estimates of the incremental effects associated with this increase. These scenarios are included in Table 2, which is reproduced from the EPA analysis.

Table 2: Alternative Incremental Jurisdiction Results from EPA Analysis ⁶

Scenario ¹	Description	Option 1: Proportional Doubling ²		Option 2: Non-Juris. Doubling ³	
		% Other Waters Juris.	% Incremental Increase	% Other Waters Juris.	% Incremental Increase
A	5% of non-jurisdictional other waters are jurisdictional under the proposed rule	21.0%	2.9%		
B	10% of non-jurisdictional other waters are jurisdictional under the proposed rule	26.0%	3.2%		
C	There are double the number of other waters	17.0%	3.5%	8.5%	2.7%
D	There are double the number of other waters and 5% of non-jurisdictional other waters are jurisdictional under the proposed rule	21.0%	4.0%	13.0%	3.2%
E	There are double the number of other waters and 10% of non-jurisdictional other waters are jurisdictional under the proposed rule	26.0%	4.5%	18.0%	3.6%
1	Scenarios A and B do not include a doubling of records. Their impacts are listed under the proportional doubling columns for simplicity				
2	Proportional doubling refers to the doubling of records for both jurisdictional and non-jurisdictional other waters "in the same proportions as the original set of records"				
3	Non-Jurisdictional doubling refers to the doubling that "includes only [non-jurisdictional] other waters, and that adjacent other waters are only represented in the original set of records".				

EPA suggests that the doubling of records for only non-jurisdictional waters and an additional 5% increase in jurisdictional waters (scenario D, option 2) is the most likely alternative. Thus, EPA's upper bound estimate of the incremental increase in jurisdiction associated with a definitional change is 3.2%. However, the assertion is completely unjustified and is not accompanied by an explanation for why the number of section 404 permits may double with only a 5% increase in residual positive jurisdictional determinations. Additionally, this

⁶ The derivation of these values is complex and omitted from this table. There are small discrepancies between EPA values and the author's recreation of EPA values, presumably due to rounding.

assessment is completed as an afterthought to the economic analysis and has no bearing on the calculations of costs and benefits associated with a definitional change.

The analysis considers only permitting data from section 404 and applies the estimated shares to all other relevant sections of the CWA. There is no reason to believe that this is a valid approach given the significant differences in the location of these types of economic activities and the nature of the activities that give rise to permitting requirements across the sections. EPA recognizes this limitation, writing “while there is only one CWA definition of ‘waters of the United States,’ there may be other statutory factors that define the reach of a particular CWA program or provision.”⁷ Unfortunately, this warning is ignored in the current analysis, and the incremental acreage estimation for all programs relies wholly on section 404 estimates.

EPA derived the number of acres per permit using the FY 2009/2010 data, taking the total number of acres permitted during that period and dividing this number by the number of permits issued. The analysis as presented does not allow one to study the underlying heterogeneity at the state level. There is a danger of significantly underestimating the impacts by using a 2.7% increase in combination with the average project size. If the new rules disproportionately affect larger projects, the proposed approach using averages underestimates the affected acres. There is no way of knowing whether this is the case without being able to review the expert judgment analysis conducted by EPA and the Corps.

Before turning to the calculation of incremental costs, it is worth noting that there are scientifically valid approaches to determining the number of acres that would become jurisdictional under the proposed rule. For the reasons describe above, the ORM2 database used by EPA is not a valid basis for inferring incremental impacts. The most important reason is that it is not a random or representative sampling of all affected projects and areas, rather it suffers from potentially severe selection bias.

⁷ EPA 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. p 3.

IV. Errors with EPA's Incremental Cost Calculations

A. SECTION 404

EPA's analysis calculates the costs of the proposed definitional change for several CWA regulatory programs, but emphasizes costs associated with section 404. Since many 404 permits are issued for development near wetlands and small streams, the systematic inclusion of these waters in the CWA is expected to increase costs to developers and administrative entities. Authors of EPA's analysis recognize four categories of costs associated with section 404 compliance. These include: permit application costs; compensatory mitigation costs; permitting time costs; and impact avoidance and minimization costs. Due to information constraints, the report quantifies only the first two types of costs.

Section 404 permit application costs are calculated by taking the number of individual and general section 404 permits that were issued in FY 2009/2010 and determining how many more would be issued under the new rule (2.7%).⁸ These additional permits are multiplied by the average geographic impact per permit to determine how many additional acres would be impacted under the revised definition.⁹ This incremental acreage of newly jurisdictional waters is multiplied by two different estimates of per-acre costs; a 1999 Corps review of permitting costs for "typical" projects up to three acres in size and a study by Sunding and Zilberman in 2000 that synthesized internal estimates of permitting costs from a sample of public and private developers. These calculations are summarized in Table 3.

⁸ Information about section 404 permits comes from the Corps' ORM2 database.

⁹ Average impact per added permit reflects an average of permanent impacts from projects in FY2010 and excludes temporary impacts, ecological restoration and conversion activities.

Table 3: Derivation of Permit Application Costs

Permit Type	Permits issued FY2010	Added Permits (2.7% increase)	Average Impact Per Added Permit (Acres)	Total Added Impacts (Acres)	Costs from Corps' Analysis (2010\$)	Costs from Sunding and Zilberman Study (2010\$)	Additional Annual Cost (2010\$ millions)
Individual	2,766	75	12.81	960	\$31,400 / permit	\$57,180 / permit + \$15,441 / acre	\$2.4 - \$19.1
General	49,151	1,327	0.28	372	\$13,100 / permit	\$22,079 / permit + \$12,153 / acre	\$17.4 - \$33.8
Total	51,917	1,402		1,332			\$19.8 - \$52.9
<i>Calculations</i>	<i>A</i>	<i>B = A*0.027</i>	<i>C</i>	<i>D = B*C</i>	<i>E</i>	<i>F_{1,2}</i>	<i>Lower: E*B Upper: (F₁*B)+(F₂*D)</i>

The distinction between individual and general permits is important for the purpose of evaluating the cost of a definitional change. Individual permits are required for activities that are expected to have significant impacts on a nearby water body. General permits are issued for projects that will have minimally adverse effects and fit within specific categories (i.e., bank stabilization projects, hydropower projects, etc.). The EPA analysis ignores any potential changes to the distribution of individual and general permits. The addition of jurisdictional waters could force a restructuring in the permitting system where projects that were previously eligible for general permits must apply for individual permits. These changes would have notable implications to the overall cost of the definitional change, but they are omitted from the analysis.

The EPA analysis also ignores the heterogeneity in impacted acreage within these two categories. Instead, they calculate an average for each type of permit that provides a single estimate of project size. This estimate is derived from FY 2009/2010 ORM2 data and suffers from the same sampling limitations discussed above. Since projects developed during this period were likely smaller (in addition to less numerous), this has the effect of compounding the underestimation of project costs. To illustrate the implications of this methodology, suppose the incremental

increase estimates are “updated” by increasing the number of new permits by 24% and the average size of impacts by 10%.¹⁰ The incremental acreage estimates would be 36% higher (1,812 acres), with associated costs ranging from \$24.5 million to \$68.0 million (a 24-28% increase from EPA estimates). While this methodology still suffers from important shortcomings, this exercise reveals how sensitive section 404 permitting costs are to issues of sampling bias.

EPA’s analysis of section 404 permit application costs suffers from several additional deficiencies. The data on permitting costs from the Sunding and Zilberman study are nearly 20 years old and are not adjusted for inflation or any other changes in the permit system. Thus, they likely underestimate the present cost of the permitting process. This underestimation is enhanced by the exclusion of other costs addressed in the Sunding and Zilberman study. Specifically, the EPA analysis ignores the costs of avoidance and delay, which are likely to dominate the out-of-pocket expenses for permit application and mitigation. The study suggests that general permits cost \$28,915 and take an average of 313 days to complete, and individual permits cost \$271,596 and take an average of 788 days to complete, not counting the costs of mitigation or design changes.¹¹ These delay estimates are likely to be larger if the influx of new permits is not offset by additional staff and infrastructure for processing. Delays and forced design changes stifle economic output and may prevent businesses from functioning at their full potential. Thus, the Sunding and Zilberman study is misused in the EPA analysis to generate upper bound estimates that markedly underestimate the cost of section 404 permitting.

The incremental costs of compensatory mitigation were calculated by taking the amount of wetland and stream mitigation that occurred in each state during FY 2010 and multiplying by EPA’s expected 2.7% growth in the acreage of jurisdictional waters. This incremental mitigation

¹⁰ As discussed above, construction spending at the end of 2010 was 24% below spending at the end of 2008. A 10% increase in project size is a reasonable adjustment to account for the use of FY 2009/2010 data in cost estimations.

¹¹ Sunding and Zilberman, 2002. *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources Journal 59, pp 74-76.

requirement is multiplied by an average unit cost for mitigation (a weighted average across all states) to get an estimate of the annual costs of compensatory mitigation. These calculations are summarized in Table 4.

Table 4: Derivation of Compensatory Mitigation Costs

Water Body Type	Units of Mitigation	Unit Costs (\$2010)	Annual Cost (2010\$ millions)
Streams	49,075 feet	\$177 - \$265	\$8.7 - \$13.0
Wetlands	2,042 acres	\$24,989 - \$49,207	\$51.0 - \$100.5
Total			\$59.7 - \$113.5
<i>Calculations</i>	<i>A</i>	<i>B</i>	<i>C = A*B</i>

The EPA analysis derives estimates for the amount of mitigation using methods discussed in their 2011 economic analysis.¹² It assumes that all non-jurisdictional streams would become jurisdictional, requiring 49,075 feet (9.3 miles) of mitigation. The 2011 estimate of incremental wetland mitigation where all non-“other” waters are jurisdictional and 17% of “other” waters are jurisdictional (the same assumptions adopted in the current EPA analysis) is 2,517 acres. This value is more than 23% higher than the estimate provided in Table 5. This discrepancy results from different estimations of baseline mitigation in the two analyses.¹³ Despite this difference, EPA suggests the current estimate “is consistent with the level of mitigation the Corps has estimated for the past 10-15 years” and provides no justification of the discrepancy. For reasons discussed above, this is likely to underestimate the extent of mitigation in a “normal” year.

¹² EPA 2011. *Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction*.

¹³ The 2014 analysis suggests there were approximately 32,500 acres of permittee-responsible mitigation documented in ORM2 records, 8,200 acres of bank mitigation documented in the Regional Internet Bank Information Tracking System (RIBITS) database, and 2,200 acres of in-lieu fee (ILF) mitigation in FY 2010 (Description to Exhibit 7). The 2011 analysis suggests there were approximately 44,000 acres of permittee-responsible mitigation, 7,000 acres of bank mitigation, and 2,000 acres of ILF mitigation in FY 2010 (EPA 2011, footnote 3).

The unit costs of mitigation also do not match 2011 EPA estimates. The weighted average utilized in the current analysis relies on state-level unit costs that are systematically lower than previously published. Table 5 provides a sample of these discrepancies for the first 10 states (listed alphabetically). While the lower bound estimates are the same between the two analyses, the upper bound estimates are depressed in the 2014 analysis. There is no discussion of these differences. If the higher estimates are accurate, this creates a strong downward bias of mitigation cost estimates in the 2014 analysis. Even if the lower estimates are more accurate, the exclusion of proper documentation and explanation is troublesome and reduces the validity of the current analysis.

Table 5: Discrepancies Between EPA Estimates for Unit Costs of Mitigation

State	2011 Analysis				2013 Analysis			
	Unit Cost Stream- Low	Unit Cost Stream- High	Unit Cost Wetland- Low	Unit Cost Wetland- High	Unit Cost Stream- Low	Unit Cost Stream- High	Unit Cost Wetland- Low	Unit Cost Wetland- High
AK	\$170	\$316	\$500	\$30,000	\$170	\$243	\$500	\$15,250
AL	\$350	\$888	\$10,000	\$20,000	\$350	\$619	\$10,000	\$15,000
AR	\$170	\$316	\$2,000	\$5,000	\$170	\$243	\$2,000	\$3,500
AZ	\$170	\$316	\$9,000	\$23,000	\$170	\$243	\$9,000	\$16,000
CA	\$170	\$316	\$18,500	\$300,000	\$170	\$243	\$18,500	\$159,250
CO	\$170	\$316	\$32,000	\$100,000	\$170	\$243	\$32,000	\$66,000
CT	\$170	\$316	\$124,000	\$160,000	\$170	\$243	\$124,000	\$142,000
DE	\$170	\$316	\$40,000	\$40,000	\$170	\$243	\$40,000	\$40,000
FL	\$170	\$316	\$35,000	\$145,000	\$170	\$243	\$35,000	\$90,000
GA	\$106	\$293	\$12,000	\$122,000	\$106	\$200	\$12,000	\$67,000

EPA estimates administrative costs associated with a rule change to be between \$7.4 and \$11.2 million annually. This calculation is based on a 2.7% increase in the number of employee hours needed to make jurisdictional determinations, process permits, consult with various stakeholders, generate environmental impact statements, ensure program compliance, and enforce permit regulations. Additionally, EPA suggests that additional permit applications may require increased consultation with other agencies (to comply with the Endangered Species Act and other statutes). This would increase costs to these agencies and drive up the price tag of a definitional change. These costs are omitted from this analysis.

B. OTHER (NON-404) PROGRAMS

EPA calculated costs associated with other CWA programs by adopting previous estimates and accounting for growth in jurisdictional waters and changes in program size. The cost analysis of other CWA programs is simplistic and relies on the same 2.7% acreage increase figure derived for section 404. This is especially problematic given the errors associated with the derivation of this estimate. Unsubstantiated assumptions from the incremental acreage calculations are revisited and recycled in subsequent sections to generate other cost estimates. Some of these errors could be avoided through a careful assessment of program-specific effects. Unfortunately, the EPA analysis falls short in this regard.

In its sensitivity analysis regarding the incremental acreage estimate, EPA recalculates costs and benefits under the alternative assumptions for project files related to other waters. Depending on the scenario, upper or lower bound designation, and type of doubling, they acknowledge costs could be as high as \$422 million (compared to its working upper-bound estimate of \$231 million). EPA's most-likely alternative estimate is that costs could be \$278 million, a 20% increase from current estimates. The variation between these values reveals how relatively small changes in the assumptions used to generate incremental acreages can have substantial impacts on the cost estimates. Since the validity of these assumptions is highly suspect, it becomes clear that the EPA analysis is entirely insufficient at predicting the costs associated with a "waters of the United States" definition change.

EPA explicitly omits costs to some programs that may be affected due to lack of data. EPA asserts that other programs are likely to be "cost-neutral or minimal" without providing an analysis to support this conclusion. Specifically, EPA states that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans) and section 402 (National Pollutant Discharge Elimination System (NPDES) permitting). These are bold claims that should be substantiated with a thorough analysis.

1. Section 401 State Certification

Section 401 of the CWA requires any applicant for a federal license or permit to conduct any activity that will result in a discharge to waters of the United States to obtain a state water quality certification from the state where the discharge will occur. 33 U.S.C. § 1341(a)(1). With the proposed rule's expanded definition of "waters of the United States," more activities that require federal licenses (in particular, activities requiring section 404 permits) are likely to discharge into "waters of the United States" and will therefore require section 401 certification. EPA estimated that state certification under section 401 would experience increased annual costs of \$737,100 as a result of the proposed rule. This figure is the result of a 2.7% increase in full time employees (FTE) needed to staff state permitting offices. This figure may partially account for the increased amount of state resources needed to accommodate additional state certification requests, but it does not account for the increased costs to applicants that must now obtain 401 state certification. EPA's analysis recognizes that there will be additional section 404 permits required under the proposed rule, but it does not account for the increased costs of obtaining 401 certification that are triggered by those additional section 404 permits. Nor does it address the cost of delay caused by increased Section 401 certification requirements.

2. Section 402 NPDES Permits

The CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit program controls water pollution by regulating point sources that discharge pollutants into "waters of the United States." As discussed in further detail below, EPA states that the proposed rule would be cost-neutral or minimal with respect to traditional section 402 discharge permits such as those for municipal wastewater treatment facilities or industrial operations.

To calculate the incremental costs of the rule with respect to section 402 construction stormwater permitting, EPA used the October 1999 *Economic Analysis of Final Phase II Storm Water Rule*. EPA then adjusted for a 2.7% increase in jurisdictional waters and a 30% increase in

program size.¹⁴ Accounting for inflation, this yields costs of \$25.6 to \$31.9 million per year. EPA concluded that the cost impacts for Municipal Separate Storm Sewer Systems (MS4s) would be negligible. However, under the agencies' proposed rule, which, for the first time, includes a regulatory definition of "tributary" that explicitly includes ditches and extends jurisdiction to "adjacent waters," including adjacent non-wetlands, many of the stormwater systems and features themselves could now be classified as "waters of the United States." EPA's economic analysis does not address or quantify the increased permitting requirements for stormwater conveyances that would result from the proposed rule. For example, work on the stormwater conveyances, including work aimed at achieving environmental best management practices (BMPs) as well as routine improvements required by stormwater permits, will trigger section 404 permitting requirements. Additionally, if stormwater conveyances are deemed "waters of the United States," then they will be subject to water quality standards. The costs of complying with water quality standards are discussed in more detail below.

EPA calculated incremental costs from section 402 Concentrated Animal Feeding Operations (CAFO) permitting in a manner similar to EPA's calculations for construction stormwater costs. It scaled up values from a 2003 rulemaking by 2.7% to account for increase in jurisdictional waters, but reduced them by 50% to account for a reduction in program size.¹⁵ After converting to 2010 dollars, the incremental costs totaled approximately \$5.5 million per year.

EPA calculated costs associated with increased numbers of Pesticide General Permits (PGP) to be between \$2.9 and \$3.2 million annually for operators, but made no attempt to calculate the increased impact on government entities. Growth in PGP permitting was determined to be

¹⁴ 30% program growth is derived from 130,000 "construction starts" in 1994 (from 1999 Economic Analysis) to 169,000 construction sites with permit coverage in 2011 (from EPA's GPRA management measures tracking).

¹⁵ Benefit values taken from Federal Register volume 68 number 29. 50% decrease in program growth derived from ~15,000 CAFOs considered in 2003 analysis to 7,318 permit holders in 2011 (from EPA's GPRA management measures tracking).

almost 1000%, from 35,376 affected entities where EPA administers permits to a potential group of 365,000 entities where states administer permits.

EPA claims that a definitional change will have little to no effect on traditional Section 402 NPDES discharge permits such as those for municipal wastewater treatment facilities or industrial operations.

The exclusion of potential section 402 costs associated with the NPDES permitting is troubling. EPA provides several possible explanations for its observation that discharging entities are likely to acquire permits regardless of the jurisdictional status of the receiving water, and will not be impacted by a definitional change. One explanation is that EPA has authorized 46 states to administer section 402 permitting. Because state-level jurisdictional waters must be at least as inclusive as “waters of the United States,” many states already have implemented the sort of programmatic changes being proposed in this analysis. However, this explanation has limited merit, given EPA’s assertion that “approximately two-thirds of all states place some legal constraint on the authority of state and local government officials to adopt aquatic resource protections beyond waters of the U.S.” Either way, all states will need to revisit their programs and EPA will need to reassess whether states comply with the definitional changes. As a result, both federal and state agencies will incur additional costs. Moreover, EPA completely fails to acknowledge or account for the fact that the proposed rule could affect compliance feasibility and costs for facilities that already have NPDES permits, by classifying as jurisdictional ditches, ponds, and other water features on facility sites, that facilities use for plant operations and/or compliance, and for which no discharge permit has been required previously. EPA does not account for additional costs that facilities will incur to comply with effluent limits and implement BMPs for these newly jurisdictional features. Nor does EPA’s analysis account for the fact that work done to comply with NPDES permits for these newly jurisdictional ditches, ponds, and other water features (*e.g.*, installation of structures for sediment removal) will trigger costly section 404 permitting requirements and requirements to comply with water quality standards.

3. Section 311 Oil Spill Prevention Plans

Under section 311, inland non-transportation oil facilities of a certain size that have potential to discharge to “waters of the United States” must prepare and implement a Spill Prevention, Control, and Countermeasures (SPCC) Plan. *See* 40 C.F.R. § 112.1(d)(1). EPA calculated incremental costs to Section 311 oil spill prevention plans by using average annual costs from production and storage facilities, and scaling up based on an estimate of 1,000 new facilities that will need to spend money on compliance. The average annual clean-up cost is \$9,128 for production facilities and \$13,038 for storage facilities.¹⁶ Production facilities make up approximately 35% of all facilities, while storage facilities make up the remaining 65%. After adjusting for inflation, this yields approximately \$11.7 million annually in incremental costs.

The expansion of the “waters of the United States” definition will mean a significant increase in the number of facilities that could “reasonably be expected” to discharge oil to jurisdictional waters. As a result, many facilities not previously subject to the SPCC program requirements (because they did not previously have potential to discharge to “waters of the United States”) will now be required to develop and implement an SPCC plan. This is particularly true in the arid west, where companies generally do not maintain SPCC plans because their operations are not located near navigable waters.

4. Section 303 Water Quality Standards

EPA claims that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans). This is a bold claim that should be substantiated with a thorough analysis. For example, section 303(c) requires states to establish water quality standards (consisting of uses, criteria, and an anti-degradation policy) for all navigable waters. EPA (p. 6) assumes that states may simply apply uses and criteria developed for other categories of waters (e.g., freshwater rivers and streams used by the public for fishing, swimming, boating,

¹⁶ Derived from EPA 2009, *Regulatory Impact Analysis for the Final Amendments to the Oil Pollution Prevention Regulations*.

and as sources of drinking water) for ditches, ephemeral streams, and other newly jurisdictional waters for which those uses and criteria would seem to be wholly inappropriate. In reality, though, states will have to designate uses and set water quality criteria for new waters and features that now meet the agencies' expanded definition of "waters of the United States." This process is extremely costly and burdensome for the states. Indeed, if states do not designate water quality standards for these newly jurisdictional waters, they are likely to be sued by third parties. In the past, states have been sued for failure to assign uses and set water quality criteria for all jurisdictional waters located within the state. EPA's analysis does not account for these obligations that will be forced upon the states and the states' increased litigation risk created by the proposed rule.

Similarly, Section 303(d) requires states to generate a list of impaired waters that do not meet specific water quality standards. States also must calculate total maximum daily loads (TMDLs) of various pollutants that are necessary to bring these waters into compliance. It stands to reason that the addition of newly-jurisdictional waters would increase the surveying, planning, monitoring, and enforcement necessary to achieve these tasks. EPA claims: "[t]o the extent that this proposed rule may increase the coverage where a state would wish to apply its monitoring resources, states are likely to adjust sampling locations or sampling frequency without a net cost increase."¹⁷ This is simultaneously disingenuous and discouraging, suggesting states must make important decisions about water quality from a less-comprehensive scientific investigation by spreading already scarce resources even thinner.

¹⁷ This quote is in reference to Section 305(b), which requires states to issue a report about the water quality in all navigable waters and how they meet specific water quality goals. However, it appears to reflect the EPA's position about all programs where water quality monitoring is necessary.

V. Errors with EPA's Incremental Benefits Calculations

A. SECTION 404

EPA lists several section 404 benefits that will result from a change in the “waters of the United States” definition. These include avoidance and minimization of permit impacts, which result from improved clarity in the CWA, and ecosystem benefits associated with additional compensatory mitigation that will now be required. Since quantifying the former is difficult, its analysis focuses on benefits from incremental compensatory mitigation requirements.¹⁸ The authors use a benefits transfer approach and adopt estimates of the value of wetland mitigation from previous studies. Specifically, they select 10 contingent valuation studies that provide willingness to pay (WTP) estimates for wetland preservation. Those studies span 12 states and yield estimates for wetlands that “provide a suite of services expected to be similar to those provided by waters incrementally protected under the proposed rule”. The results from these studies were standardized by determining WTP at the per-household per-acre level.¹⁹ The authors then calculate an average WTP, weighted by the number of respondents in each study. This yields values of \$0.016 and \$0.012 per household per acre using a 3% and 7% discount rate, respectively.

EPA calculates benefits for incremental compensatory mitigation by multiplying WTP estimates by the number of households and the number of acres impacted in eight different “wetland regions.” These regions were developed by the US Department of Agriculture’s Economic Research Service, and the analysis operates under the assumption that “per acre benefits values

¹⁸ EPA only addresses benefits associated with wetland mitigation and omits benefits from stream mitigation.

¹⁹ For studies that reported annual WTP, total present value was determined over a period of 50 years using a 3% and 7% discount rate. For studies that reported WTP per individual, one individual per household was assumed.

accrue to all citizens in the region.”²⁰ The calculations used to generate incremental compensatory mitigation benefits are presented in Table 6.

Table 6: Derivation of Compensatory Mitigation Benefits

Region	Incremental Impact Estimate (Acres)	Number of Households	Present Value of Benefits per Year- 7% Discount (2010\$ millions)	Present Value of Benefits per Year- 3% Discount (2010\$ millions)
Central Plains	30	3,201,336	\$1.20	\$1.50
Delta and Gulf	85	14,521,178	\$14.80	\$19.80
Mountain	145	7,390,812	\$12.90	\$17.30
Midwest	322	23,909,088	\$92.30	\$123.70
Northeast	240	23,839,690	\$68.70	\$92.10
Pacific	79	16,163,714	\$15.30	\$20.50
Prairie Potholes	241	2,176,626	\$6.30	\$8.40
Southeast	187	20,485,107	\$46.10	\$61.70
Other	3	234,779	\$0.00	\$0.00
National	1,332	111,922,330	\$257.60	\$345.10
<i>Calculations</i>	<i>A</i>	<i>B</i>	<i>C = A*B*0.012</i>	<i>D = A*B*0.016</i>

The benefit transfer analysis used to approximate section 404 benefits is poorly documented and not consistent with best practices in environmental economics. EPA synthesizes ten previous studies to estimate an average WTP for each acre of wetland mitigation. Those studies are largely irrelevant and do not provide accurate estimates of benefits. Nine of the ten studies were conducted more than a decade ago, and the earliest was written nearly 30 years ago. Several of the studies EPA relies on were never published in peer-reviewed journals. Given these shortcomings, it is reasonable to suspect that WTP estimates may not reflect the actual preferences of individuals for expanding jurisdiction over various types of waters.

While EPA attempts to value ecological services provided by wetland mitigation, it assumes that the wetlands included in the contingent valuation studies have identical functions as the wetlands that are being considered in the current analysis. This is an important flaw that undermines EPA’s benefit transfer analysis. Benefit transfer analysis operates under the

²⁰ Heimlich, R.E., R. Claassen, K.D. Wiebe, D. Gadsby, and R.M. House. 1998. Wetlands and Agriculture: Private Interests and Public Benefits. AER-765, U.S. Dept. Agr. Econ. Res. Serv., Aug.

presumption that benefits calculated for a specific geography and time can be readily applied elsewhere. This oversimplification comes at the expense of accuracy. For example, the Loomis et al. study used in the EPA analysis examined WTP to reduce contamination from agricultural drainage in wetlands in California. While this service may have considerable value, this value is likely highly localized. Indeed, Loomis found that respondents near the wetlands in question had WTPs approximately 15% higher than respondents elsewhere in the state.²¹ This pattern is likely to be more pronounced when extrapolating benefits to regions containing multiple states and heterogeneous patterns of wetlands.

EPA's analysis rests on an unstated assumption that all of the incremental wetlands affected by the definitional change would be compromised if federal jurisdiction is not expanded. Conversely, it also assumes that all would be preserved or mitigated if federal jurisdiction is extended. The reality is likely to be quite different. State and local regulatory programs frequently protect wetlands even in the absence of federal jurisdiction. State-level planning, monitoring, and enforcement activities can be carried out with state-specific concerns in mind, and may be better-suited to effectively preserve wetland resources. Thus, the benefits associated with expanding federal jurisdiction over wetlands could be partially offset by programmatic changes that pass control from states to federal agencies.

EPA makes little effort to account for changes in economic trends, recreational patterns, and stated preferences over time. It simply applies a multiplier based on the growth (or decrease) in permit applications. This suffers from the same error discussed above, where growth is based only on the subset of individuals who have already sought a permit. It does not address those who may seek a permit under the proposed rule. Even in the sensitivity analysis, which was conducted to address this issue, alternative calculations are carried out using the same multipliers and many of the same assumptions from the initial analysis. EPA concludes: "because estimated

²¹ Respondents in the San Joaquin Valley had a WTP of \$174 annually to prevent the degradation of an 85,000 acre tract of wetlands. Respondents in the rest of the state had a WTP of \$152.

benefits would also rise with more wetland protection, benefits would continue to justify costs.” This amounts to a doubling down on the original benefits estimates, which contain all of the original biases and shortcomings. This is insufficient for evaluating the benefits associated with programmatic changes of this scale.

B. OTHER (NON-404) PROGRAMS

Much like its cost estimates, EPA calculates benefits to other CWA programs by scaling up previous estimates according to the growth in jurisdictional waters and program size. Incremental benefits associated with section 402 stormwater permitting are estimated to be between \$25.4 and \$32.3 million per year. This is based on programmatic growth of 30% and a jurisdictional expansion of 2.7% from original 1998 estimates.²² Incremental benefits from additional section 402 CAFO permitting range from \$3.4 to \$5.9 million per year, and are based on a 50% contraction in program size from 2001 estimates.²³ These estimates reflect benefits to large CAFOs, which comprise 85% of the operator costs and 66% of the administrative costs.

Incremental benefits associated with section 311 (oil spill prevention plans) are calculated by summing expected annual benefits of \$14,255 per spill over 1,000 non-complying facilities.²⁴ This calculation yields annual benefits of approximately \$14.3 million.

The EPA analysis does not quantify benefits derived from expanded state certification of waters (section 401). It recognizes the lack of uniformity in section 401 implementation across states, and suggests: “[t]o the extent that states condition permits, added costs to permittees and environmental benefits associated with compensatory mitigation would be accounted for in the methodology for assessing those incremental impacts: they would accrue to the same extent as represented in the baseline.”

²² See footnote 14.

²³ See footnote 15.

²⁴ Average spill volume of 1,290 gallons (2000-2005 National Response Center data) multiplied by average clean-up costs of \$221/gallon, assuming a 1/20 chance of a spill.

Benefits to some programs that may be affected are explicitly omitted due to lack of data. EPA suggests there may be “across the board” savings in program enforcement related to increased clarity in the CWA. While there may be some legitimacy to this claim, it remains unquantified and thus plays little value in the economic analysis. Whatever enforcement benefits are realized may be offset by programmatic changes that expand permitting and administrative requirements.

A summary of costs and benefits associated with a change in the “waters of the United States” definition are provided in Table 7.

Table 7: Summary of Costs and Benefits (2010\$ millions)

Program	Costs		Benefits	
	low	high	low	high
\$404 Mitigation- Streams ²	\$8.7	\$13.0		
\$404 Mitigation- Wetlands	\$51.0	\$100.5	\$257.6	\$345.1
\$404 Permit Application ³	\$19.7	\$52.9		
\$404 Administration	\$7.4	\$11.2		
\$401 Administration ⁴	\$0.7			
\$402 Construction Stormwater	\$25.6	\$31.9	\$25.4	\$32.3
\$402 Stormwater Administration	\$0.2			
\$402 CAFO Implementation ⁵	\$5.5		\$3.4	\$5.9
\$402 CAFO Administration	\$0.2			
\$402 Pesticide General Permit ⁶	\$2.9	\$3.2		
\$311 Implementation	\$11.7		\$14.3	
Total	\$133.7	\$231.0	\$300.7	\$397.6

Notes (from EPA documents):

- | | |
|---|--|
| 1 | \$303 impacts are assumed to be cost-neutral; \$402 impacts are components of costs and benefits previously identified for past actions, not new costs and benefits associated with this proposed rule |
| 2 | Benefits of stream mitigation are not quantified |
| 3 | Costs of potential delayed permit issuance and costs and benefits of avoidance/minimization are not quantified, nor are any benefits from reduced uncertainty |
| 4 | Costs to permittees and benefits of any additional requirements as a result of \$401 certification are reflected in the mitigation estimates to the extent additional mitigation is the result, yet not calculated to the extent avoidance/minimization is the result. |
| 5 | Benefits apply to large CAFOs only, which account for 85% of implementation costs and 66% of administrative costs |
| 6 | PGP benefits and government administrative costs are not available |

VI. Conclusion

The estimates associated with section 404 compensatory wetland mitigation, which contain some of the most glaring errors, represent approximately 40% of the total costs and 85% of the total benefits. This suggests the entire analysis is fraught with uncertainty as to render it insufficient for evaluating programmatic impacts of this scale. Estimates of economic impacts to other programs rely on an incremental jurisdiction determination that is deeply flawed. Additionally,

the systematic exclusion of various costs and benefits ignores important impacts to permit applicants and permitting agencies.

In addition to the methodological errors discussed above, EPA's analysis suffers from a lack of transparency. Explanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided. This is particularly troubling given that the entire report is based on records from the Corps' internal ORM2 database, which is unavailable to outside entities. The author of this report spent considerable time replicating the calculations used in the analysis, but was unable to vet the validity of the underlying data. Any errors or inconsistencies in documentation, sample selection, or data extraction are necessarily overlooked. These shortcomings indicate that a more thorough analysis is required to properly assess the economic impacts of a definitional change.

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EPA and the Army Corps’ Rule to Define “Waters of the United States”

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Summary

On May 27, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly announced a final rule defining the scope of waters protected under the Clean Water Act (CWA). The rule revises regulations that have been in place for more than 25 years. Revisions are being made in light of 2001 and 2006 Supreme Court rulings that interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the appropriate scope of waters protected under the CWA.

According to the agencies, the new rule revises the existing administrative definition of “waters of the United States” consistent with the CWA, legal rulings, the agencies’ expertise and experience, and science concerning the interconnectedness of tributaries, wetlands, and other waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. Waters that are “jurisdictional” are subject to the multiple regulatory requirements of the CWA. Non-jurisdictional waters are not subject to those requirements.

This report describes the final revised rule—which the agencies refer to as the Clean Water Rule—and includes a table comparing the existing regulatory language that defines “waters of the United States” with the revisions. The rule is particularly focused on clarifying the regulatory status of surface waters located in isolated places in a landscape. It does not modify some categories of waters that are jurisdictional under existing rules (traditional navigable waters, interstate waters and wetlands, the territorial seas, and impoundments). The rule also lists waters that would not be jurisdictional, such as prior converted cropland and certain ditches. It makes no change to existing statutory exclusions, such as CWA permit exemptions for normal farming and ranching activities. The rule will replace EPA-Corps guidance that was issued in 2003 and 2008, which has guided agency interpretation of the Court’s rulings but also has caused considerable confusion. Much of the controversy since the Supreme Court rulings has focused on the degree to which isolated waters and small streams are jurisdictional. Under the EPA-Corps guidance, many of these waters have required case-specific evaluation to determine if jurisdiction applies. Under the final rule, some of these waters would continue to need case-specific review, but fewer than under the existing agency guidance documents. The final rule also explicitly excludes specified waters from the definition of “waters of the United States” (e.g., prior converted croplands, stormwater management systems, and groundwater).

Changes in the final rule would increase the *categorical* assertion of CWA jurisdiction, in part as a result of expressly declaring some types of waters jurisdictional by rule (such as all waters adjacent to a jurisdictional water), making these waters subject to the act’s permit and other requirements if pollutant discharges occur. Nevertheless, the agencies believe that the rule does not exceed the CWA’s lawful coverage or protect new types of waters that have not been protected historically (i.e., under existing rules that the new rule will replace). While it would enlarge jurisdiction beyond that under the existing EPA-Corps guidance, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court’s current reading of jurisdiction and would reduce jurisdiction over some waters, as a result of exclusions and exemptions. The agencies estimate that the new rule will result in positive jurisdictional assertion over approximately 3%-5% more U.S. waters, compared with current field practice.

Congressional interest in the rule has been strong since it was proposed in 2014 and is continuing in the 114th Congress. After the proposed rule was announced in 2014, some groups that had criticized the status quo in the past seemingly preferred it to the proposal, which they believed

was ambiguous and overly broad. The agencies contend that the final rule responds to those criticisms. Their stated intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Based on press reports of stakeholders' reactions to the final rule, some believe that the agencies largely succeeded in that objective, while others do not. The rule becomes effective on August 28, 2015.

Contents

Introduction.....	1
The CWA and the Revised Rule	2
Overview of the Revised Rule.....	4
Waters That Are Categorically Jurisdictional.....	4
Waters Requiring Significant Nexus Analysis	6
Exclusions and Definitions.....	8
Impacts of the Proposed Rule	10
Concerns of Agriculture and Local Governments	11
Local Government Concerns.....	13
Conclusion	13

Tables

Table 1. Comparison of “Definition of Waters of the United States” Regulatory Language.....	15
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Appendixes

Appendix. EPA’s Connectivity Report and Review by the Science Advisory Board	29
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Contacts

Author Contact Information.....	33
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Introduction

On May 27, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly announced a final rule defining the scope of waters protected under the Clean Water Act (CWA). The rule would revise regulations that have been in place for more than 25 years.¹ Revisions were proposed in March 2014 in light of Supreme Court rulings in 2001 and 2006 that interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the appropriate scope of waters protected under the CWA.²

In April 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance previously issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings for the regulated community, regulators, and the general public. The guidance documents sought to identify, in light of the Court's rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The 2011 proposed guidance identified similar categories as in the 2003 and 2008 documents, but it would have narrowed categories that require case-specific analysis in favor of asserting jurisdiction categorically for some types of waters. The new rule will replace the existing 2003 and 2008 guidance, which had remained in effect because the 2011 proposed guidance was not finalized.³

The 2011 proposed guidance was extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contended that it represented a massive federal overreach beyond the agencies' statutory authority. Most state and local officials were supportive of clarifying the extent of CWA-regulated waters, but some were concerned that expanding the CWA's scope could impose costs on states and localities as their own actions (e.g., transportation projects) become subject to new requirements. Most environmental advocacy groups welcomed the proposed guidance, which would more clearly define U.S. waters that are subject to CWA protections, but some in these groups favored even a stronger document. Still, both supporters and critics of the 2011 proposed guidance urged the agencies to replace guidance, which is non-binding and not subject to full notice-and-comment rulemaking procedures, with revised regulations that define "waters of the United States." Three opinions in the 2006 Supreme Court *Rapanos* ruling similarly urged the agencies to initiate a rulemaking, as they did subsequently.

In the 112th and 113th Congresses, a number of legislative proposals were introduced to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it; none of these proposals was enacted. Similar criticism followed almost immediately after release of the proposed rule on March 25, 2014, with some Members asserting that it would result in job losses and damage economic growth. Supporters of the Administration, on the other hand,

¹ Definition of "waters of the United States" is found at 33 C.F.R. §328.3 (Corps) and 40 C.F.R. §122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term "navigable waters." It is not defined in the CWA. See **Table 1**.

² *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

³ For background on the Supreme Court rulings, subsequent guidance, and other developments, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

defended the agencies' efforts to protect U.S. waters and reduce frustration that has resulted from the unclear jurisdiction of the act.⁴ Support was expressed by environmental and conservation organizations, among others.⁵

The CWA and the Revised Rule

The proposed rule was published in the *Federal Register* on April 21, 2014. The public comment period closed on November 14, 2014.⁶ **Table 1** on page 15 in this report provides a comparison of the existing regulatory language promulgated in 1986 that defines "waters of the United States" with language in the proposed rule and the final rule. The revised rule will become effective August 28, 2015, 60 days after publication in the *Federal Register*, to allow time for review under the Congressional Review Act.⁷ Judicial review and legal challenges to the rule can be filed beginning on July 13, 2015.⁸

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."⁹ Waters need not be truly navigable to be subject to CWA jurisdiction. Both the legislative history and the case law surrounding the CWA confirm that jurisdiction is not limited to traditional navigable waters, that is, waters that are, were, or could be used in interstate or foreign commerce.¹⁰ Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, are not subject to these federal legal requirements. The act's single definition of "navigable waters" applies to the entire law. In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the act's requirements (§301), requirements for point sources to obtain a permit prior to discharge (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), certification that federally permitted activities comply with state water quality standards (§401), and enforcement (§309). It impacts the Oil Pollution Act and other environmental laws, as well.¹¹ The CWA leaves it to the agencies to define the term "waters of the United States" in regulations, which EPA and the Corps have done several times, most recently in 1986.

⁴ Anthony Adragna and Amena Saiyid, "Republicans Contend EPA Overreached on Clean Water Act Jurisdiction Proposal," *Daily Environment Report*, vol. 58 (March 26, 2014), p. A-7.

⁵ U.S. Environmental Protection Agency, "Here's What They're Saying About the Clean Water Act Proposed Rule," press release, March 26, 2014, <http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/3f954c179cf0720985257ca7004920fa>.

⁶ Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Definition of 'Waters of the United States' Under the Clean Water Act, Proposed Rule," 79 *Federal Register* 22188-22274, April 21, 2014. The agencies extended the original 90-day comment period twice for a total of 207 days.

⁷ Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015. Hereinafter, Final Rule. Documents related to the rule on the EPA website include an economic analysis of the Clean Water Rule and a technical support document; see <http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule>.

⁸ See 40 C.F.R. §23.2.

⁹ CWA §502(7); 33 U.S.C. §1362(7).

¹⁰ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. §121, 133 (1985).

¹¹ For example, the reach of the Endangered Species Act (ESA) is affected, because that act's requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the issuance of federal permits.

According to the agencies, the new rule—which they now refer to as the Clean Water Rule—revises the existing administrative definition of “waters of the United States” in regulations consistent with legal rulings—especially the recent Supreme Court cases—and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. The agencies assert that the rule also reflects their expertise and experience in administering the CWA, including making more than 120,000 case-specific jurisdictional determinations since 2008. The rule is particularly focused on clarifying the regulatory status of surface waters located in isolated places in a landscape (the types of waters with ambiguous jurisdictional status following the Supreme Court’s 2001 ruling in *SWANCC*) and small streams, rivers that flow for part of the year, and nearby wetlands (the types of waters affected by the Court’s 2006 ruling in *Rapanos*).

In developing the rule, EPA and the Corps relied on a synthesis prepared by EPA’s Office of Research and Development of more than 1,200 published and peer-reviewed scientific reports; the synthesis discusses the current scientific understanding of the connections or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The purpose of the scientific synthesis report was to summarize current understanding of these connections, the factors that influence them, and the mechanisms by which connected waters affect the function or condition of downstream waters. The document was reviewed by EPA’s Science Advisory Board (SAB), which provides independent engineering and scientific advice to the agency and which completed its review in October 2014. A number of EPA’s critics suggested that the agencies should have deferred developing or proposing a rule until a final scientific review document was complete. Some also expressed concern that the final report would not be available during the public comment period on the rule, which closed on November 14, 2014. Based on completion of the SAB review, EPA issued a final scientific assessment report in January 2015, saying that it would assist the agencies in developing the final rule. (See the **Appendix** for discussion of the connectivity report.)

A key conclusion in the science report that was also emphasized by the SAB review is that streams and wetlands fall along a gradient of connectivity that can be described in terms of frequency; duration; magnitude; timing; and rates of change of water, material, and biotic fluxes to downstream waters. However, science cannot in all cases provide “bright lines” to interpret and implement policy. In the preamble to the final rule, EPA and the Corps acknowledge this point.

... the agencies’ interpretive task in this rule ... requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies’ task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern the administration of the Act, including brighter line boundaries where feasible and appropriate.¹²

¹² Final Rule, p. 37057.

Overview of the Revised Rule

The final rule announced on May 27 retains much of the structure of the agencies' existing definition of "waters of the United States." Like the 2003 and 2008 guidance and the 2014 proposal, it identifies categories of waters that are and are not jurisdictional, as well as categories of waters that require a case-specific evaluation. The final rule revises parts of the 2014 proposed rule; the text box, below, lists the key changes in the final rule.

Key Changes in the Final Rule from the Proposed Rule

In the preamble to the final rule, EPA and the Corps observe that—

many ... commenters and stakeholders urged EPA to improve upon the April 2014 proposal, by providing more bright line boundaries and simplifying definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities. (Prepublication Final Rule, p. 14)

To that end, the final rule revises parts of the proposal.

- Adjacent waters—the final rule establishes distance limits, based on waters that are defined as "neighboring," which is an aspect of "adjacent."
- Tributaries—the final rule removes wetlands and other waters that typically lack a bed and bank and an ordinary high water mark from the definition of "tributary" and moves such waters to "adjacent waters."
- The final rule identifies two sets of waters for purposes of conducting a case-specific significant nexus analysis to determine if CWA jurisdiction applies, narrowing the scope of waters that could be assessed under a case-specific significant nexus analysis compared with the proposed rule. First are five specific subcategories of waters (prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands). Second are waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or ordinary high water mark of a jurisdictional water.
- The final rule redefines excluded ditches.
- The final rule refines proposed exclusions (e.g., artificial lakes and ponds, certain water-filled depressions).
- The final rule adds exclusions for features that were not previously excluded (e.g., stormwater management structures and systems, water distributary and wastewater recycling structures, groundwater recharge basins, puddles).

Waters That Are Categorically Jurisdictional

Under the first section of the revised regulation, the following six categories of waters would be jurisdictional by rule without additional or case-specific analysis:

- Waters susceptible to interstate commerce, known as traditional navigable waters (no change from existing rules or the 2014 proposal);
- All interstate waters, including interstate wetlands (no change from existing rules or the 2014 proposal);
- The territorial seas (no change from existing rules or 2014 the proposal);
- Tributaries of the above waters if they meet the definition of "tributary" (these waters are jurisdictional under existing rules, but the term "tributary" is newly defined in the proposed and final rule);

- Impoundments of the above waters or a tributary, as defined in the rule (no change from existing rules or the 2014 proposal); and
- All waters, including wetlands, ponds, lakes, oxbows, and similar waters, that are adjacent to a water identified in the above categories (these are considered jurisdictional under the final rule because the agencies conclude that they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas; the final rule provides a revised definition that for the first time sets limits on what will be considered "adjacent").

The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction of waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy stated in the 2006 *Rapanos* case. He said, "Mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."¹³ However, as EPA and the Corps observed in the proposed and final rules, significant nexus is not itself a scientific term, but rather a determination made by the agencies in light of the law, science, and the agencies' experience and expertise. Functions that might demonstrate significant nexus include sediment trapping and retention of flood waters. In the rule, the agencies note that a hydrologic connection is not necessary to demonstrate significant nexus, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping is another such function).

In the final rule, the agencies responded to comments that had requested some limits on the definition of adjacent waters. Under the rule, a water that is adjacent to a jurisdictional water is itself jurisdictional if it meets the related definition of "neighboring" (see **Table 1**). The final rule establishes maximum distances, or specific boundaries from jurisdictional waters, for purposes of defining "neighboring:"

1. all waters located in whole or in part within 100 feet of the ordinary high water mark (OHWM)¹⁴ of a jurisdictional water;
2. all waters located in whole or in part within the 100-year floodplain¹⁵ that are not more than 1,500 feet from the OHWM of a jurisdictional water;
3. all waters located in whole or in part within 1,500 feet of the high tide line of a jurisdictional water and within 1,500 feet of the OHWM of the Great Lakes.

The entire water is "neighboring" if a portion of it is located within these defined boundaries. Also, for purposes of adjacency, an open water such as a pond includes any wetlands within or abutting its ordinary high water mark.

Under existing regulations, tributaries have been jurisdictional without qualification and were not defined. In the final rule, a tributary can be natural or constructed, but it must have both a bed and bank¹⁶ and ordinary high water mark to be categorically jurisdictional. A tributary as defined by

¹³ 547 U.S. at 784-785.

¹⁴ Ordinary high water mark (OHWM) generally defines the lateral limits of a water. The term is defined in the final rule; see **Table 1**.

¹⁵ The 100-year floodplain is the land that is predicted to flood during a 100-year storm, that is, a storm which has a 1% chance of occurring in any given year.

¹⁶ In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the (continued...)

the rule does not lose its jurisdictional status even if there is one or more natural breaks (e.g., a debris pile) or constructed/man-made breaks (e.g., a bridge or dam).

Waters Requiring Significant Nexus Analysis

Beyond the categories of waters that would be categorically jurisdictional under the rule are waters that will be jurisdictional based on a determination that there is a significant nexus to a jurisdictional downstream water. Under existing rules, the regulatory term “other waters” applies to wetlands and non-wetland waters that do not fall into the category of waters that are susceptible to interstate commerce (traditional navigable waters), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of these four categories. Existing regulations contain a non-exclusive list of “other waters,” such as intrastate lakes, mudflats, prairie potholes, and playa lakes (see **Table 1**). Headwaters, which constitute most “other waters,” supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas.

EPA and the Corps recognize that the Supreme Court decisions in *SWANCC* and *Rapanos* put limitations on the scope of waters that may be determined to be jurisdictional under the CWA. Much of the controversy since the Court’s rulings has focused on uncertainty as to what degree “other waters” are jurisdictional, either by definition/rule, or as determined on a case-by-case basis to evaluate significant nexus to a jurisdictional water. In his opinion in the *Rapanos* case, Justice Kennedy concluded that wetlands have the requisite significant nexus to a jurisdictional water if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹⁷

Since *SWANCC*, intrastate, non-navigable waterbodies (often referred to as geographically isolated waters) for which the sole basis for asserting jurisdiction is interstate commerce are excluded from jurisdiction, unless Corps and EPA Headquarters jointly approve case-specific assertion of jurisdiction. Under the 2003 and 2008 guidance, which will be replaced by the new rule, all other “other waters” have required a case-by-case evaluation to determine if a significant nexus exists, thus providing a finding of CWA jurisdiction. There likewise has been uncertainty as to what degree “other waters” that are not excluded from jurisdiction are similarly situated and thus may be aggregated or combined for a significant nexus determination, as described by Justice Kennedy in *Rapanos*.

In the proposed rule, “other waters,” including wetlands, that are adjacent to a jurisdictional water were categorically jurisdictional. Non-adjacent “other waters” and wetlands would continue to require a case-by-case determination of significant nexus. Also, the proposed rule allowed broader aggregation of “other waters” that are similarly situated than under the existing guidance,¹⁸ which could result in more “other waters” being found to be jurisdictional following a significant nexus evaluation.

(...continued)

OHWM.

¹⁷ 547 U.S. at 780.

¹⁸ Under the proposed rule, “other waters” could be aggregated for a significant nexus determination if they perform similar functions and are located sufficiently close together to be evaluated as a single landscape unit in the same watershed with regard to their effect on a jurisdictional downstream water.

Some in the regulated community urged EPA and the Corps to provide metrics, such as quantifiable flow rates or minimum number of functions for “other waters,” to establish a significant nexus to jurisdictional waters. The agencies declined to do so in the proposed rule, saying that absolute standards would not allow sufficient flexibility to account for variability of conditions and the varied functions that different waters provide.

The agencies acknowledged that there may be more than one way to determine which “other waters” are jurisdictional, and they requested comment on alternate approaches, combinations of approaches, scientific and technical data, case law, and other information that would clarify which “other waters” should be considered categorically jurisdictional or following a case-specific significant nexus determination. In addition, they asked for public comment on whether to conclude by rule that certain types of “other waters”—prairie potholes, pocosins, and perhaps other categories of waters—have a significant nexus and are *per se* jurisdictional. These waters would not require a case-by-case analysis.

The final rule no longer refers to “other waters,” but it establishes two defined sets of additional waters that will be a “water of the United States” if they are determined to have a significant nexus to a jurisdictional water. Under the rule, only these waters will require case-specific evaluation, as others are either categorically jurisdictional or categorically excluded from jurisdiction.

First are five subcategories of waters previously considered “other waters”: prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. Historically under existing rules (which the new rule will replace), these were “other waters” and were jurisdictional if their use, degradation, or destruction could affect interstate or foreign commerce. Since 2008, some waters in these categories (e.g., vernal pools, pocosins) that are adjacent to a tributary system have been subject to case-specific significant nexus evaluation to determine if jurisdiction applies. According to the Corps, broadly speaking, when a significant nexus evaluation has been completed under the 2008 guidance on any type of aquatic resource, a high percentage of those evaluations resulted in a finding of jurisdiction.¹⁹

In the final rule, based on reviewing the science concerning these types of waters, the agencies concluded that waters within the five subcategories are “similarly situated” in areas of the country where they are located (following Justice Kennedy’s opinion). Under the rule, they will be jurisdictional if a significant nexus to downstream waters is found, based on case-specific evaluation in combination with waters from the same subcategory in the same watershed. While these subcategories of waters are not jurisdictional as a class under the final rule—as some environmental advocates would prefer—the rule allows for case-specific analysis that may find them to be a “water of the United States”²⁰ and is likely to find them jurisdictional in most cases, according to EPA.²¹

The second set of additional waters that require a significant nexus evaluation under the final rule are waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or OHWM

¹⁹ U.S. Army Corps of Engineers, personal communication, June 5, 2015.

²⁰ Also under the final rule, if a water in any of these subcategories meets the rule’s definition of “adjacent,” it is jurisdictional without requiring a significant nexus determination.

²¹ Annie Snider, “In Major Shift, new Rule Excludes Some Wetlands, Ponds,” *E&E News*, May 28, 2015.

of a jurisdictional water. However, because waters located in the 100-year floodplain and within 1,500 feet of the OHWM of a jurisdictional water are “adjacent” under the new rule, they are categorically jurisdictional. Thus, this second set of waters requiring a significant nexus analysis really applies to waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas that are between 1,500 feet and 4,000 feet of the OHWM of a jurisdictional water.

As noted previously, one of the agencies’ goals in developing the new rule was to clarify its requirements and lessen the number of instances requiring a time-consuming analysis to determine if CWA jurisdiction applies. The final rule provides two specific categories or subcategories of waters that will need a significant nexus evaluation, which is more limited than under current field practice and the existing EPA-Corps guidance documents. Under the final rule, waters other than these two types are either categorically jurisdictional or categorically excluded from jurisdiction.

Exclusions and Definitions

The second section of the final rule excludes specified waters from the definition of “waters of the United States.” The listed waters and features are not jurisdictional even if they would otherwise be included within categories that are jurisdictional. The exclusions are:

- Waste treatment systems, including treatment ponds or lagoons that are designed to meet CWA requirements (no substantive change from existing rules or the 2014 proposal);
- Prior converted cropland (no change from existing rules or the 2014 proposal);
- A list of features that have been excluded by long-standing practice and guidance and would now be excluded by rule, such as artificially irrigated areas that would revert to dry land should application of irrigation water to the area cease; artificial reflecting pools or swimming pools created in dry land; and puddles (see **Table 1** for the full list);
- Groundwater (traditionally not regulated under the CWA and expressly excluded under the rule);
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land (new provision in the final rule responding to concerns that the rule would adversely affect the ability of municipalities to operate and maintain stormwater systems, including rain gardens and green infrastructure);
- Constructed detention and retention basins created in dry land used for wastewater recycling, as well as groundwater recharge basins and percolation ponds built for wastewater recycling (new in the final rule, in response to public comments); and
- Three types of ditches: ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or that do not drain wetlands, regardless of whether or not the wetland is a jurisdictional water; and ditches that do not flow, either directly or through another water, to a traditional navigable water, interstate water, impoundment, or the territorial seas, regardless of whether the flow is ephemeral, intermittent, or perennial. The treatment of ditches was

one of the largest controversies of the proposed rule (see “Concerns of Agriculture and Local Governments”). Under existing rules and long-standing practice, many but not all ditches have been jurisdictional. The proposed rule for the first time attempted to define which ditches are and are not protected under the CWA, but the proposal was confusing and widely criticized. Under the final rule, a ditch may be a “water of the United States” only if it meets the definition of “tributary” and is not otherwise excluded under this provision.

The final rule makes no change to and does not affect existing statutory and regulatory exclusions: exemptions for normal farming, ranching, and silviculture activities such as plowing, seeding, and cultivation (CWA §404(f)); exemptions for permitting of agricultural stormwater discharges and return flows from irrigated agriculture; or exemptions for water transfers that do not introduce pollutants into a waterbody. Nor would it directly change permitting processes.

Definitions of key terms are included in the third section of the rule. Because definitions often are critical to interpreting statutory law and regulations, some stakeholder groups criticized the proposed rule, suggesting that the definitions would enable broader assertion of CWA jurisdiction than is consistent with law and science. Many argued that several of the defined terms in the proposal were confusing, and further that the proposed rule failed to define terms such as “upland,” “gullies,” and “rills,” which they believed needed to be clarified.

The agencies responded in several ways (See **Table 1**):

- In some cases, a particular term that was controversial with public commenters is not used in the final rule, therefore no definition is needed (e.g., “upland”).
- In some cases, the term is clarified in the preamble to the rule (e.g., “ephemeral, intermittent, and perennial,” “bed and banks,” “dry land,” and “puddle”).
- In some cases, the rule was modified to clarify the term (e.g., “significant nexus”).
- In some cases, the agencies declined to add a definition if they concluded that doing so might lead to more confusion (e.g., “ditch”).
- Two terms defined in other Corps regulations are carried forward into the final rule, without change, at the request of commenters (“ordinary high water mark” and “high tide line”).
- Finally, the agencies declined to define some terms that might have a narrow or geographic-specific application that would not be appropriate for a national rule.

Definitions of two terms in the proposed rule (“riparian area” and “floodplain”) are omitted from the final rule, although they are defined in the preamble to the new rule. Both terms had been criticized by commenters for vagueness or ambiguity. Many requested that a specific floodplain interval or other clear limitation be established. In the final rule, the agencies reference the “100-year floodplain,” in part because the Federal Emergency Management Agency (FEMA) and Natural Resources Conservation Service (NRCS) have mapped large portions of these areas in the United States, producing maps that are publicly available, well known, and well understood. Also,

the agencies concluded that the use of “riparian area” was unnecessarily complicated and that, as a general matter, waters in a riparian area will also be in the 100-year floodplain.²²

Impacts of the Proposed Rule

Overall, EPA and the Corps say that their intent in the Clean Water rule was to clarify their jurisdiction, in light of the Supreme Court’s ruling, not to expand it. Nevertheless, the agencies acknowledge that the rule would increase the *categorical* assertion of CWA jurisdiction, when compared to a baseline of current practices under the 2003 and 2008 EPA-Corps guidance. This results in part from the agencies’ expressly declaring some types of waters categorically jurisdictional and not requiring case-specific evaluation of them (such as all waters adjacent to a jurisdictional water).

In changing the regulatory definition of “waters of the United States,” there may be instances in which the CWA applies categorically for the first time, and there also may be instances in which the CWA no longer applies (i.e., as a result of exemptions and exclusions). The agencies intend that the rule will result in less ambiguity about whether the CWA applies than under existing regulations, legal rulings, and guidance.

The agencies believe that the rule does not protect any new types of waters that have not been protected historically (that is, beyond the existing regulations, which the new rule will replace) and that it does not exceed the CWA’s coverage. That is, while it would enlarge *categorical* jurisdiction beyond that under the 2003 and 2008 EPA-Corps guidance, which the agencies believe was narrower than is justified by science and the law, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court’s current reading of jurisdiction.

The agencies’ categorical assertion of waters that are jurisdictional, compared to current practice, does not identify specific waters that will be found to be jurisdictional—i.e., a particular stream or pond—but the rule attempts to draw more of a bright line of CWA jurisdiction than in the past. Moreover, the agencies made a number of changes in the final rule to provide more certainty and clarity, including “bright lines” of jurisdictional demarcation in several parts of the rule.

In an Economic Analysis document accompanying the final rule, the agencies estimate that the new rule will result in positive jurisdictional assertion over 2.84%–4.65% more U.S. waters, compared with current field practice.²³ However, compared with the agencies’ existing regulations, the final rule reflects a reduction in waters protected by the CWA, according to EPA and the Corps.

According to the analysis, costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the rule, but the rule itself does not impose direct costs. Indirect costs would result from additional permit application expenses (for CWA Section 404

²² Final Rule, p. 37082. The rule does not address changes that might result from future revisions to or updating of FEMA and NRCS maps.

²³ U.S. Environmental Protection Agency and U.S. Department of the Army, *Economic Analysis of the EPA-Army Corps Clean Water Rule*, May 2015, <http://www2.epa.gov/cleanwaterrule/final-clean-water-rule-economic-analysis>, p. 53. Hereinafter, Economic Analysis.

permitting; stormwater permitting for construction and development activities; and permitting of pesticide discharges and confined animal feeding operations [CAFOs] for discharges to waters that would now be determined jurisdictional) and additional requirements for oil storage and production facilities needing to develop and implement spill prevention, control and countermeasure (SPCC) plans. Federal and state governments would likely experience about \$1 million annually in additional costs to administer and process permits. Other costs would likely include compensatory mitigation requirements for permit impacts (if applicable), affecting land developers and state and local governments. The economic analysis considered two scenarios for analyzing impacts of the rule. The agencies estimate that indirect costs associated with the final rule range from \$158 million to \$307 million per year under a “low end” estimate and \$237 million to \$465 million per year under a “high end” estimate.²⁴

The Section 404 program would see the greatest potential impact as a result of revised assertion of CWA jurisdiction. Most of the projected costs are likely to affect landowners and development companies, state and local governments investing in infrastructure, and industries involved in resource extraction.

The agencies believe that indirect benefits accruing from the proposed rule include the value of ecosystem services provided by the waters and wetlands protected as a result of CWA requirements, such as habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection. Other benefits would include government savings on enforcement expenses, because the rule is intended to provide greater regulatory certainty, thus reducing the need for government enforcement. Business and government may also achieve savings from reduced uncertainty concerning where CWA jurisdiction applies, they believe. In all, the agencies estimate that benefits of the final rule range from \$339 million to \$350 million per year under a “low end” estimate and \$555 million to \$572 million under a “high end” estimate. However, they note that there is uncertainty and there are limitations associated with the results, due to data and information gaps, as well as analytic challenges. The analysis does not quantify all possible costs and benefits, and values are meant to be illustrative, not definitive.²⁵ Overall, they conclude that benefits would exceed costs.

Concerns of Agriculture and Local Governments

The agriculture sector has been vigorous in criticizing and challenging EPA regulatory actions that may affect the sector’s operations, making potential impacts of the proposed rule on agriculture a likely focus of controversy. Even before release of the proposed rule, one of the sector’s concerns about a new “waters of the United States” rule has been whether it would modify existing statutory provisions that exempt “normal farming and ranching” practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. As described above, the final rule makes no change and does not affect these exemptions, which are self-implementing. An EPA fact sheet discusses the continued exclusions and exemptions.²⁶ Another of agriculture’s concerns was

²⁴ See the Economic Analysis for explanation and details.

²⁵ Ibid., p. v.

²⁶ See http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf. Comments submitted to the docket for the interpretive rule (Docket ID No. EPA-HQ-OW-2013-0820) are available at <http://www.regulations.gov>.

the proposed rule's exclusion of some ditches; many said that the proposal was confusing and could be interpreted as extending CWA jurisdiction to agricultural drainage ditches.

Simultaneous with announcing the Clean Water Rule in March 2014, EPA and the Corps issued an interpretive rule that identified 56 conservation practices approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) that qualify for exemption under the CWA Section 404(f)(1)(A) exclusion of "normal farming and ranching" activities from Section 404 permit requirements and do not require determination whether the discharge involves a "water of the United States." Essentially, the interpretive rule was intended to provide guidance to determine activities that qualify for 404(f)(1)(A) exemptions. The 56 practices, which are a subset of all NRCS conservation practices, are practices such as stream crossings and wetland restoration that take place in aquatic, riparian, or wetland environments. Through this interpretive rule, the agencies intended to resolve uncertainties about "normal farming" activities that are exempt from permitting when these conservation practices are used. In other words, effective immediately, producers who utilize any of the 56 identified practices according to NRCS technical standards would not need to seek a determination of CWA jurisdiction nor seek a CWA permit. The three agencies also signed a Memorandum of Understanding detailing implementation of the interpretive rule and identifying a process for reviewing and updating the list of qualifying NRCS conservation practices. Although the interpretive rule became effective immediately, EPA and the Corps accepted public comment until July 7, 2014.²⁷

The interpretive rule was intended to clarify agricultural practices that are exempt from CWA Section 404 permitting. Nevertheless, there was confusion about many issues, including NRCS's role in providing technical assistance to farmers with respect to 404 permitting, and the apparent requirement that these practices had to meet NRCS technical standards to qualify for the exemption. Public comments submitted on the interpretive rule were uniformly critical—including comments submitted by agriculture stakeholder groups, environmental groups, and some state environmental agencies. Agriculture groups argued that it was procedurally flawed, because it would have substantive impact on farmers, and thus should have been subject to notice-and-comment rulemaking procedures under the Administrative Procedure Act. Many also argued that the interpretive rule narrowed the CWA 404(f)(1)(A) statutory exemptions, because the practices listed in the rule already were excluded from Section 404. Under the interpretive rule, farmers would have to comply with NRCS standards in order to qualify for exemption, resulting in a disincentive to conservation, they said. On the other hand, environmental groups and some state environmental agencies were critical of the interpretive rule for different reasons. They contended that it would exempt activities from permitting that are not truly associated with ongoing farming and that the rule was thus too broad. Some of the listed practices, such as stream crossings, can have significant harmful impacts on water quality and result in violations of state water quality standards, they said.

EPA and Corps officials acknowledged that the 2014 interpretive rule did not appear to have had the intended benefits of clarifying agricultural exemptions and exempting, not contracting, the number of exempted activities, and they said that the agencies and U.S. Department of

²⁷ Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices," 79 *Federal Register* 22276, April 21, 2014. The list of practices, the Memorandum of Understanding, and the interpretive rule are available at <http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm>. USDA had no formal role in developing the Corps-EPA proposed rule, but it was among the federal agencies commenting on it during interagency review.

Agriculture (USDA) were weighing alternatives to the rule. However, before the agencies proposed or took action on the interpretive rule, in the FY2015 omnibus appropriations act, passed in December 2014 (H.R. 83/P.L. 113-235), Congress included a provision directing EPA and the Corps to withdraw it (see "Conclusion" below). On January 29, 2015, the agencies signed a memorandum withdrawing the interpretive rule, effective immediately.²⁸ Following Congress's action in December, the EPA Administrator indicated that the agency would work with USDA to provide certainty to the regulated community, in a way that provides value both to the government and the agriculture community. No further actions have been announced.

Local Government Concerns

Some local governments also criticized the proposed "waters of the United States" rule. In particular, the National Association of Counties (NACo) argued that counties and other local governments would be affected by the proposed rule in the arena of ditches. NACo pointed out that local governments own and maintain public infrastructure including roadside ditches, flood control channels, and stormwater management structures. Because the proposed rule would have defined some ditches as "waters of the United States" if they meet certain conditions, NACo contended that the proposal potentially increases the number of county-owned ditches under federal jurisdiction. Permit requirements are not an issue, NACo says, but permitting can be time-consuming and expensive.

EPA and Corps officials believed that exclusion of most ditches in the proposed rule actually would decrease federal jurisdiction over ditches. But the issue remained controversial and was addressed with modifications in the final rule. The agencies believe that the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches, as well as ditches on agricultural lands.²⁹

Conclusion

The EPA Administrator stated at a congressional hearing in 2014 that it generally takes about one year to finalize a rule. Complex and controversial rules often take much longer from proposal to promulgation. This rule to define "waters of the United States" was finalized 14 months after the proposed rule was announced. It takes effect 60 days after publication in the *Federal Register*.

Once the final rule takes effect, legal challenges are likely, possibly delaying implementation of any rule for years. New regulations may clarify many current questions, but they are unlikely to please all of the competing interests, as one environmental advocate observed.

However, a rulemaking would only benefit wetlands if it did not reduce the jurisdiction offered by current regulations and if the Administration remained faithful to sound science. If politics were to trump science in the rulemaking process, the likelihood of such a protective rule would not be promising. Also, rules are subject to legal challenge and can be tied up in court for years before they are implemented.³⁰

²⁸ Environmental Protection Agency and Department of Defense, "Notice of Withdrawal," 80 *Federal Register* 6705, February 6, 2015.

²⁹ Final Rule, p. 37097.

³⁰ James Murphy, "Rapanos v. United States: Wading Through Murky Waters," *National Wetlands Newsletter*, vol. 28, (continued...)

Another consideration is possible action by Congress, even though a final rule has been announced. Congressional interest in the rule has been strong since the proposed rule was announced in March 2014. Hearings were held during the 113th Congress and have continued in the 114th Congress; bills to bar the agencies from finalizing the proposed rule or otherwise alter the agencies' course regarding the rule have been introduced. (For information, see CRS Report R43943, *EPA and the Army Corps' "Waters of the United States" Rule: Congressional Response and Options*, by Claudia Copeland.)

Many critics in Congress and elsewhere urged that the proposed Clean Water Rule be withdrawn, or that the agencies propose a supplemental rule, subject to another round of public comments. EPA and Corps officials pointed out that doing so would leave in place the status quo—with determinations of CWA jurisdiction being made by 38 Corps districts pursuant to existing regulations, coupled with non-binding agency guidance, and many of these determinations involving time-consuming case-specific evaluation.

Some industry and agriculture groups that had criticized the status quo in the past said more recently that they preferred it to the 2014 proposed rule, which they believed was ambiguous and overly broad. EPA and Corps officials believe that the final rule responds to those criticisms. The agencies' intention has been to clarify the rules and make jurisdictional determinations more predictable, less ambiguous, and more timely. Based on press reports of stakeholders' early reactions to the final rule, some believe that the agencies largely succeeded in that objective, while others believe that they did not.³¹ Legal challenges to the rule are considered inevitable and will test whether the agencies' interpretation of CWA jurisdiction is consistent with the Supreme Court's recent rulings.

(...continued)

no. 5, September-October 2006, p. 19.

³¹ See, for example, Amana H. Saiyid, "Obama Says Water Jurisdiction Rule Provides Clarity, Certainty; Critics Claim Overreach," *Daily Environment Report*, May 28, 2015, p. A-1. Also see releases from organizations such as the American Farm Bureau Federation, "Final 'Waters of the U.S.' rule: No, No, No! No Clarity, No Certainty, No Limits on Agency Power," June 11, 2015 (http://www.fb.org/index.php?action=newsroom.news_article&id=311); and the National Association of Counties, "NACo Voices Concern on Final 'Waters of the U.S.' Rule," June 8, 2015 (<http://www.naco.org/legislation/WW/Lists/Posts/Post.aspx?ID=1037>).

Table I. Comparison of “Definition of Waters of the United States” Regulatory Language

Existing Regulatory Language, 2014 Proposed Rule, and Revised Language in Final Rule Announced May 27, 2015

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
(a) The term <i>waters of the United States</i> means	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i> and its implementing regulations, subject to the exclusions in subsection (b) of this section, the term “waters of the United States” means:	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i> and its implementing regulations, subject to the exclusions in subsection (b) of this section, the term “waters of the United States” means:	
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	These waters are often referred to as “traditional navigable waters” (TNWs), which include but are not limited to the “navigable waters of the United States” within the meaning of Section 10 of the Rivers and Harbors Act of 1899. No change from the existing rule or 2014 proposal.
(2) All interstate waters including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	These waters include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and others that have a significant nexus to interstate waters. No change from the existing rule or 2014 proposal. Interstate waters would continue to be “waters of the United States” even if they are not navigable in fact and do not connect to such waters.
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign	(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1)	(7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in paragraphs (i) through (v) of this paragraph are similarly situated and shall	In the existing rule, there is a non-exclusive list of the types of “other waters” which may be found to be “waters of the U.S.” The existing description is omitted under the final rule as unnecessary and confusing because it has been incorrectly

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
<p>commerce including any such waters:</p> <p>(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or</p> <p>(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or</p> <p>(iii) Which are or could be used for industrial purpose by industries in interstate commerce;</p>	through (3) of this section.	<p>be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.</p> <p>(i) <i>Prairie potholes</i>. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.</p> <p>(ii) <i>Carolina bays and Delmarva bays</i>. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.</p> <p>(iii) <i>Pocosins</i>. Pocosins are evergreen shrub- and tree-dominated wetlands found predominantly along the Central Atlantic coastal plain.</p> <p>(iv) <i>Western vernal pools</i>. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.</p> <p>(v) <i>Texas coastal prairie wetlands</i>. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of</p>	<p>read as an exclusive list.</p> <p>Under the final rule, the five subcategories of waters listed in this paragraph are not jurisdictional as a single category or class, but the agencies have determined that they are similarly situated because they perform similar functions and are located sufficiently close to each other to function together in affecting downstream waters. Therefore, EPA and the Corps believe that it is reasonable that these waters be evaluated in combination (i.e., prairie potholes with prairie potholes) for purposes of a case-specific significant nexus. They may be evaluated either individually or as a group of waters in a region, meaning the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry.</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
		<p>depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.</p> <p>(8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water, and no case-specific significant nexus is required.</p>	<p>For these waters, the agencies have not made a determination that the waters are “similarly situated” (unlike the waters described in paragraph (a)(7)). As a result, a significant nexus analysis for these waters will include a case-specific assessment of whether there are any similarly situated waters, as well as whether the water, alone or in combination with any waters determined to be similarly situated, has a significant nexus to a traditional navigable water, interstate water, or territorial seas.</p> <p>In a change from the proposed rule, the final rule sets a distance threshold for case-specific evaluation of these waters for significant nexus. In addition to distance, aquatic functions will play a prominent role in determining whether specific waters covered by this paragraph have a significant nexus.</p>
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;	(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;	(4) All impoundments of waters otherwise identified as waters of the United States under this section;	<p>Impoundments of a traditional navigable water, interstate water, the territorial seas, or a tributary are jurisdictional by rule.</p> <p>As a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. That is,</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;	<p>damming or impounding a water of the United States does not make the water non-jurisdictional.</p> <p>Tributaries, as defined in the final rule, of a traditional navigable water, interstate water, the territorial seas, or an impoundment would be jurisdictional by rule and do not require a case-specific significant nexus analysis.</p> <p>Unless excluded under subsection (b) of the rule, any water that meets the rule's definition of tributary is a water of the United States. Waters that meet the rule's definition of tributary remain tributaries even if there is a manmade or natural break at some point along the connection to the traditional navigable water, interstate water, or the territorial sea, so long as bed and banks and an ordinary high water mark are present upstream of the break.</p> <p>"Tributary" is defined below. It includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary.</p>
(6) The territorial seas;	(3) The territorial seas;	(3) The territorial seas;	<p>This term establishes the seaward limit of "waters of the United States." Jurisdictional by rule; no change from the existing rule. The term generally refers to the part of the ocean immediately adjacent to shoreline and extending seaward up to 12 miles.</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.	(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and	(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;	All waters adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary would be jurisdictional by rule. Under the rule, an adjacent water includes wetlands within or abutting its ordinary high water mark. Waters separated by a berm or other similar feature remain “adjacent.”
	(b) The following are not “waters of the United States”	(b) The following are not “waters of the United States”	
(8) Waters of the United States do not include prior converted cropland. ^c Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.	No change proposed.
Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition) are not waters of the United States. ^d	(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.	(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.	The agencies do not believe that omitting the parenthetical reference to 40 C.F.R. 423.11(m) is a change in substance to the waste treatment exclusion or how it is applied.
	(3) Ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial flow.	(3) The following ditches: (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.	Under the final rule, a ditch may be a “water of the United States” only if it meets the definition of “tributary” and is not excluded under this subparagraph.
	(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1)	(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (iii) Ditches that do not flow, either	The final rule codifies and clarifies long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction.

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
	through (4) of this section.	directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.	<p>A ditch that relocates a stream is not an excluded ditch, and a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected.</p> <p>If a ditch has been cut to carry intermittent or perennial flow from a wetland, the ditch is serving as a conduit for transferring flow from a wetland to a downstream water. Thus, the ditch has changed the wetland's hydrologic regime, and the segment of the ditch that physically intersects the wetland would be considered jurisdictional.</p> <p>The final rule confirms long-standing policy that ditches may function as point sources that discharge pollutants, thus subject to CWA Section 402.</p>
	<p>(5) The following features:</p> <p>(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;</p> <p>(ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;</p> <p>(iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land;</p> <p>(iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;</p>	<p>(4) The following features:</p> <p>(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;</p> <p>(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;</p> <p>(iii) Artificial reflecting pools or swimming pools created in dry land;</p> <p>(iv) Small ornamental waters created in dry land;</p> <p>(v) Water-filled depressions created in</p>	<p>The final rule codifies long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. These waters would not be jurisdictional by rule. The final rule is revised to omit terms that were confusing in the proposal (e.g., "upland") and clarify others (e.g., "water-filled depressions").</p> <p>The list of excluded features is illustrative, not exhaustive.</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
	<p>(v) water-filled depressions created incidental to construction activity;</p> <p>(vi) groundwater, including groundwater drained through subsurface drainage systems; and</p> <p>(vii) gullies and rills and non-wetland swales.</p>	<p>dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;</p> <p>(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and</p> <p>(vii) Puddles.</p> <p>(5) Groundwater, including groundwater drained through subsurface drainage systems.</p> <p>(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.</p> <p>(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.</p>	<p>The exclusion does not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds.</p> <p>The exclusion is intended to address engineered stormwater control structures in municipal or urban environments.</p> <p>It is intended to exclude the diverse range of stormwater control features that are currently in place, such as rain gardens, low impact development and flood control systems, and may be developed in the future.</p> <p>This exclusion codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.</p>
	(c) Definitions—	(c) Definitions— In this section, the following definitions apply:	

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
(b) The term <i>wetlands</i> means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	(6) Wetlands: The term <i>wetlands</i> means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	(4) <i>Wetlands.</i> The term <i>wetlands</i> means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that, under normal circumstances, do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	No change. Wetlands are ecosystems that often occur at the edge of aquatic (water, fresh or salty) or terrestrial (upland) systems. Wetlands typically represent transitional zones between aquatic and upland systems.
(c) The term <i>adjacent</i> means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”	(1) Adjacent: The term <i>adjacent</i> means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”	(1) <i>Adjacent.</i> The term <i>adjacent</i> means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such waters. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.	The rule includes wetlands and other waters that meet the definition of adjacent, including “neighboring,” which is defined separately. Only waters, not land, are adjacent. Within the definition of “adjacent,” the terms bordering and contiguous are well understood, and the agencies will continue to interpret and implement those terms consistent with current policy and practice.
(d) The term <i>high tide line</i> means the line of intersection of the land with the water’s surface at the maximum height	No change proposed	(7) <i>High tide line.</i> The term <i>high tide line</i> means the line of intersection of the land with the water’s surface at the maximum	

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.		height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.	
(e) The term <i>ordinary high water mark</i> means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.	No change proposed	(6) <i>Ordinary high water mark</i> . The term <i>ordinary high water mark</i> means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.	“Ordinary high water mark” sets the boundary of adjacent non-wetland waters (e.g., open waters such as lakes and ponds). Physical indicators of ordinary high water mark can be created by perennial, intermittent, and ephemeral flows.
	(2) Neighboring : The term <i>neighboring</i> , for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of this section, or waters with a surface or shallow subsurface hydrologic connection to such a	(2) <i>Neighboring</i> . The term <i>neighboring</i> means: (i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within	“Neighboring” is the key determinant of whether a water is “adjacent,” and thus jurisdictional by rule. Where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary’s ordinary high water mark are jurisdictional because

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
	jurisdictional water.	<p>100 feet of the ordinary high water mark;</p> <p>(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;</p> <p>(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.</p>	<p>they are “neighboring” to the tributary, regardless of the wetland’s position relative to each other.</p> <p>Waters within the 100-year floodplain that are located more than 1,500 feet and up to 4,000 feet from the ordinary high water mark, or high tide line, are subject to case-specific significant nexus analysis under paragraph (a)(8).</p>
	<p>(3) Riparian area: The term <i>riparian area</i> means an area bordering a water where surface or subsurface hydrology influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.</p>		<p>Omitted in the final rule because the agencies determined that the use of the riparian area was unnecessarily complicated and that as a general matter, waters within the riparian area will be within the 100-year floodplain.</p>
	<p>(4) Floodplain: The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to</p>		<p>Omitted in the final rule, which uses reference to 100-year floodplain in order to more clearly identify the outer limit of “neighboring.”</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
	high water flows.		
	<p>(5) Tributary: The term <i>tributary</i> means a waterbody physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 C.F.R. §328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams) or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made waterbody and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.</p>	<p>(3) <i>Tributary</i> and <i>tributaries</i>. The terms <i>tributary</i> and <i>tributaries</i> each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the</p>	<p>This term has not previously been defined in any regulation or preamble.</p> <p>Bed and banks and ordinary high water mark (OHWM) are features that generally are physical indicators of flow. OHWM generally defines the lateral limits of a water. In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM.</p> <p>Man-altered and man-made tributaries perform many of the same functions as natural tributaries and provide connectivity between streams and downstream rivers.</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
		definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.	
	<p>(7) Significant nexus: The term <i>significant nexus</i> means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a “water of the U.S.” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.</p>	<p>(8) <i>Significant nexus.</i> The term <i>significant nexus</i> means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph.^c A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:</p>	<p>In the final rule, the agencies list specific functions relevant to significant nexus evaluation to add clarity and transparency. A water does not need to perform all functions. If a water performs a single function that has significant impact on a downstream water, that is a significant nexus.</p> <p>Under the final rule, only waters covered by subparagraph (a)(7) or (a)(8) require case-specific analysis.</p>

Existing Regulatory Language ^a	Proposed Regulatory Language	Revised Regulatory Language	Comments ^b
		(i) Sediment trapping, (ii) Nutrient recycling, (iii) Pollutant trapping, transformation, filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vi) Contribution of flow, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle-dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.	

Source: Prepared by CRS.

Notes: The proposed rule that was announced on March 25, 2014, was published in the *Federal Register* on April 21, 2014 (79 *Federal Register* 22188-22274). The final revised rule was announced jointly by EPA and the Army Corps on May 27, 2015, and was published in the *Federal Register* on June 29: Department of the Army, Corps of Engineers, and Environmental Protection Agency, “Clean Water Rule: Definition of ‘Waters of the United States,’ Final Rule,” 80 *Federal Register* 37054-37127, June 29, 2015.

- a. 33 C.F.R. 328.3, 40 C.F.R. 122.2, 40 C.F.R. 230.3, and 40 C.F.R. 232.2 (definition of “waters of the United States”). The term “navigable waters” is defined at 40 C.F.R. 110.1 (Discharge of Oil); 40 C.F.R. 112.2 (Oil Pollution Prevention); 40 C.F.R. 116.3 (Designation of Hazardous Substance); 40 C.F.R. 117.1(i) (Determination of Reportable Quantities for Hazardous Substances); 40 C.F.R. 300.5 and Appendix E 1.5 to Part 300 (National Oil and Hazardous Substances Pollution Contingency Plan); and 40 C.F.R. 302.3 (Designation, Reportable Quantities, and Notification).
- b. Comments in this table are drawn from the preamble and text of the final rule.
- c. The term “prior converted cropland” is included in the U.S. Department of Agriculture’s administrative definition of the term “wetland” (see 7 C.F.R. 12.2).
- d. A definition of “waste treatment system” is found in EPA regulations (35 C.F.R. 35.905): “Complete waste treatment system. A complete waste treatment system consists of all of the treatment works necessary to meet the requirements of title III of the Act, involved in (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the

ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities.”

- e. Probably should be “(i) through (ix) of this paragraph.”

Appendix. EPA's Connectivity Report and Review by the Science Advisory Board

In September 2013, EPA released a draft report that reviews and synthesizes the peer-reviewed scientific literature on the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. As described below, after review and revision, this report was finalized in January 2015. The purpose of the review, according to EPA, was to summarize current understanding about these connections, the factors that influence them, and mechanisms by which connected waters affect the function or condition of downstream waters. The focus of the draft report, which was prepared by EPA's Office of Research and Development, was on small or temporary non-tidal streams, wetlands, and open waters. Based on the reviewed literature, it made certain findings.

- All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.
- Wetlands and open waters in riparian areas and floodplains also are physically, chemically, and biologically connected with rivers and serve an important role in the integrity of downstream waters. In these types of wetlands, water-borne materials can be transported from the wetland to the river network and vice versa (e.g., water from a stream flows into and affects the wetland).
- Wetlands and open waters where water only flows from the wetland or water to a river network, (i.e., non-floodplain waters and wetlands that lack surface water inlets) such as many prairie potholes, vernal pools, and playa lakes, provide numerous functions that can benefit downstream water quality and integrity. However, because such wetlands occur on a gradient of connectivity, it is difficult to generalize, from the literature alone, about their effects on downstream waters or to generalize about the degree of connectivity (absolute or relative).

EPA asked its Science Advisory Board (SAB) to review the draft report and to comment on whether its conclusions and findings are supported by the available science.³² The EPA draft report is not intended as a policy document—it does not reference either the Scalia plurality or Kennedy tests in *Rapanos*, nor does it address legal standards for CWA jurisdiction. Nevertheless, the report is important to EPA and the Corps because, when finalized, it will provide a scientific basis needed to clarify CWA jurisdiction and, thus, to inform the “waters of the United States” rulemaking.³³ The SAB convened a special panel of scientists to review the draft synthesis document. This ad hoc panel held meetings and teleconferences from late 2013 through mid-2014 and prepared a report with recommendations.

³² The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (42 U.S.C. 4365) to provide independent scientific and technical advice to the EPA Administrator on the technical basis for agency positions and regulations.

³³ See U.S. Environmental Protection Agency, “Clean Water Act Definition of ‘Waters of the United States,’” <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

In its report,³⁴ the SAB ad hoc panel found strong support for the first two of EPA's major conclusions in the synthesis document and concluded that it is a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters. In particular, the panel agreed with EPA's conclusions that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters. Further, the panel agreed with EPA that streams and wetlands in floodplain settings are physically, chemically, and/or biologically connected to downstream navigable waters.

The ad hoc panel found that the peer-reviewed literature supports EPA's conclusions in the synthesis report that connectivity occurs along a gradient or continuum between fully connected and completely isolated, with a transition in between that varies case-by-case. However, the panel concluded that the EPA report often refers to connectivity as though it is a binary property (connected versus not connected). Instead, the panel found that there are four dimensions to connectivity (longitudinal, lateral, vertical, and temporal). It is technically more accurate to state that the consequences to downstream waters are determined by variation in the frequency, duration, predictability, and magnitude of connections and that relatively low levels of connectivity can be meaningful in terms of impacts.

The ad hoc panel disagreed with EPA's third major conclusion, that it is difficult to generalize from currently available literature the degree of connectivity or the downstream effects of non-floodplain waters and wetlands that are not connected to a river network through surface or shallow subsurface water. The SAB panel found that "the scientific literature supports a more definitive statement that reflects how numerous functions of non-floodplain wetlands sustain the physical, chemical, and/or biological integrity of downstream waters, although the degree of connectivity can vary widely."³⁵ The report would be strengthened, the ad hoc panel said, if it framed the discussion of connectivity gradients and their consequences as a function of the magnitude, duration, and frequency of connectivity pathways among wetlands and downstream waters and if it quantified each connection, to the degree possible, while identifying research and data gaps. The panel found that at sufficiently large spatial and temporal scales, all waters and wetlands are connected. More important are the degree of connection (e.g., frequency, duration) and the extent to which those connections affect the chemical, physical, and biological integrity of downstream waters. Within non-floodplain wetlands, the degree of connectivity and implications for integrity of downstream waters vary considerably.

The EPA Report suggests that determining the connectedness of each non-floodplain wetland must be done on a case-by-case basis. The SAB suggests that the vast majority of non-floodplain wetlands can be classified with respect to some degree of hydrologic, chemical or biological connections to downstream waters; however, some hydrologically and spatially disconnected wetlands may need to be considered on a case-by-case basis. The challenge for the EPA is to describe the hierarchy of decisions and the tools necessary to assess the degree of connection necessary to warrant case-by-case analysis.³⁶

³⁴ Science Advisory Board, "SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Draft Report," August 11, 2014, 105 pp., [http://yosemite.epa.gov/sab/SABPRODUCT.NSF/81e39f4c09954fcb85256ead006be86e/212BB1480331835285257D350041A1C0/\\$File/SAB+Connectivity+Panel+Draft+Report_8_11_14_%28quality+review+draft%29.pdf](http://yosemite.epa.gov/sab/SABPRODUCT.NSF/81e39f4c09954fcb85256ead006be86e/212BB1480331835285257D350041A1C0/$File/SAB+Connectivity+Panel+Draft+Report_8_11_14_%28quality+review+draft%29.pdf).

³⁵ Ibid., pp. 1, 6.

³⁶ Ibid., p. 56.

The full, chartered SAB reviewed the ad hoc panel's report in September 2014. SAB members said that the panel's review of the draft EPA study was technically accurate and clear and that it accurately established linkages between streams, wetlands, and downstream waters. The SAB members asked for several minor revisions to the ad hoc panel's report, which were reflected in an October 17, 2014, letter to the EPA Administrator with its findings and recommendations regarding the synthesis document.³⁷

Based on the SAB review, EPA's scientists revised the draft scientific assessment report and released a final report in January 2015.³⁸ As revised, the report endorses the SAB recommendation in full by interpreting the literature on connectivity of streams to downstream waters as reflecting a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections. In the final report, EPA says that connectivity of streams and wetlands to downstream waters occurs along a continuum, and that variation in the degree of connectivity influences the range of functions provided by streams and wetlands. The final report no longer concludes that there is insufficient science to find that there are connections between non-floodplain wetlands and downstream waters, suggesting that case-specific analysis may not be needed for all such waters to determine that CWA jurisdiction applies.

SAB Review of the Proposed "Waters of the U.S." Rule

In addition to advising the EPA Administrator on the "connectivity" report, the chartered SAB agreed to review the adequacy of the scientific and technical basis of the proposed "waters of the United States" rule. As input to the SAB, members of the ad hoc panel that reviewed the "connectivity" report subsequently reviewed the proposed rule. (Unlike their formal review of the "connectivity" report, the panel did not seek consensus on their views of the scientific basis of the proposed CWA rule.) The ad hoc panel sought to bring their scientific expertise to questions of law and policy in the proposed rule, but at the same time, members' comments highlighted some difficulties in doing so.

Members of the ad hoc panel found general agreement that, based on available science, tributaries and adjacent waters and wetlands are appropriately jurisdictional under the proposed rule. They generally agreed that from a scientist's perspective, key terms in the proposed rule need clarification and better definition, including "significant," "similarly situated," "floodplain," and "adjacent." The definition of "adjacent" is important, for example, because where "adjacent" is determined then determines the beginning of "other waters" that require case-by-case evaluation of jurisdiction. Several said that the proposed definition of "tributary" should be broader, that is, that it should specify a bed and bank (as proposed) and *in some cases* an ordinary high water mark (but not in all cases, as proposed in the rule). Several referred to the panel's review of the "connectivity" report and said that the rule should equally reflect the importance of chemical and biological connections between waters, as well as hydrological connections, in determining significant nexus, as the panel's report did. Similarly, several noted the emphasis in the panel's

³⁷ The October 17, 2014, letter and SAB final peer review of the draft "connectivity" report is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/WebReportsLastFiveBOARD/AF1A28537854F8AB85257D74005003D2/\\$File/EPA-SAB-15-001+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebReportsLastFiveBOARD/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf).

³⁸ Environmental Protection Agency, Office of Research and Development, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14-475F, January 2015, <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414>.

report on connections resulting from groundwater pathways—shallow subsurface, shallow or deep groundwater—in questioning the categorical exclusion of federal jurisdiction over groundwater in the proposed rule.³⁹ Likewise, some on the panel said that the distinction between ditches that would and would not be jurisdictional under the proposed rule is unclear and may not be adequately supported by the science, although they recognized that the agencies may have policy reasons for including some ditches as jurisdictional and excluding others.

The full chartered SAB also considered the ad hoc panel's review of the proposed "waters of the United States" rule in September, and it approved an advisory letter to be sent to the EPA Administrator.⁴⁰ The letter also supports case-by-case consideration of most "other waters" as "waters of the United States," but it finds that there is adequate scientific evidence to support a determination that certain types of waters in particular U.S. regions (e.g., prairie potholes, Texas coastal prairie wetlands) could be categorically considered waters of the United States, thus not requiring case-specific analysis. In the letter, the SAB urged EPA to reconsider the definition of tributaries, which the proposed rule defines as having a bed, a bank, and an ordinary high water mark, because in the SAB's judgment, not all tributaries have ordinary high water marks. Finally, the letter disagrees with certain categorical exclusions in the proposed rule, saying that science does not justify excluding waters such as groundwater, ditches with only intermittent or ephemeral flow, gullies, rills, and non-wetland swales, because in many cases they can be connected to jurisdictional waters or can be conduits for moving water between jurisdictional waters.

³⁹ In addition to uncertainty over the scope of CWA jurisdiction in general, courts are split on the question of whether EPA and the Corps may assert jurisdiction over groundwater connected to navigable waters. The statutory language is ambiguous when discussing groundwater. See Anna Makowski, "Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act's Jurisdictional Scope of Groundwater Pollution," *Oregon Law Review*, vol. 91 (2012), pp. 495-526.

⁴⁰ The text of the SAB letter concerning the proposed rule is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf).

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Federal Laws Table of Contents

Federal Laws	
PILT: 31 USC Ch. 69: Payment for Entitlement Land.....	
SRS: 16 USC Ch. 90: Secure Rural Schools and Community Self Determination.....	
LWCF: 16 USC Ch. 1, Subchapter LXIX, Part B: Land and Water Conservation Fund	
Clean Water Rule: Definition of “Waters of the United States”	
33 USC Ch. 26, Subchapter I: Research and Related Programs	

31 USC Ch. 69: PAYMENT FOR ENTITLEMENT LAND**From Title 31—MONEY AND FINANCE****SUBTITLE V—GENERAL ASSISTANCE ADMINISTRATION****CHAPTER 69—PAYMENT FOR ENTITLEMENT LAND**

Sec.

6901.

Definitions.

6902.

Authority and eligibility.

6903.

Payments.

6904.

Additional payments.

6905.

Redwood National Park and the Lake Tahoe Basin.

6906.

Funding.

6907.

State legislation requiring reallocation or redistribution of payments to smaller units of general purpose government.

AMENDMENTS

2008—Pub. L. 110–343, [div. C, title VI, §601\(c\)\(2\)](#), [Oct. 3, 2008](#), 122 Stat. 3911, added item 6906 and struck out former item 6906 "Authorization of appropriations".

1994—Pub. L. 103–272, [§4\(f\)\(1\)\(U\)\(i\)](#), [July 5, 1994](#), 108 Stat. 1362, added item 6907.

§6901. Definitions

In this chapter—

(1) "entitlement land" means land owned by the United States Government—

(A) that is in the National Park System or the National Forest System, including wilderness areas and lands described in section 2 of the Act of June 22, 1948 (16 U.S.C. 577d), and section 1 of the Act of June 22, 1956 (16 U.S.C. 577d–1);

(B) the Secretary of the Interior administers through the Bureau of Land Management;

(C) dedicated to the use of the Government for water resource development projects;

(D) on which are located semi-active or inactive installations (except industrial installations) that the Secretary of the Army keeps for mobilization and for reserve component training;

(E) that is a dredge disposal area under the jurisdiction of the Secretary of the Army;

(F) that is located in the vicinity of Purgatory River Canyon and Pinon Canyon, Colorado, and acquired after December 23, 1981, by the United States Government to expand the Fort Carson military installation;

(G) that is a reserve area (as defined in section 401(g)(3) of the Act of June 15, 1935 (16 U.S.C. 715s(g)(3))); or

(H) acquired by the Secretary of the Interior or the Secretary of Agriculture under section 5 of the Southern Nevada Public Land Management Act of 1998 that is not otherwise described in subparagraphs (A) through (G).

(2)(A) "unit of general local government" means—

(i) a county (or parish), township, borough, or city (other than in Alaska) where the city is independent of any other unit of general local government, that—

(I) is within the class or classes of such political subdivision in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and

(II) is a unit of general government, as determined by the Secretary of the Interior on the basis of the same principles as were used by the Secretary of Commerce on January 1, 1983, for general statistical purposes;

(ii) any area in Alaska that is within the boundaries of a census area used by the Secretary of Commerce in the decennial census, but that is not included within the boundary of a governmental entity described under clause (i);

(iii) the District of Columbia;

(iv) the Commonwealth of Puerto Rico;

(v) Guam; and

(vi) the Virgin Islands.

(B) the term "governmental services" includes, but is not limited to, those services that relate to public safety, the environment, housing, social services, transportation, and governmental administration.

(Pub. L. 97–258, [Sept. 13, 1982](#), 96 Stat. 1031; Pub. L. 98–63, [title I, July 30, 1983](#), 97 Stat. 323; Pub. L. 100–446, [title I, Sept. 27, 1988](#), 102 Stat. 1775; Pub. L. 103–272, [§4\(f\)\(3\), July 5, 1994](#), 108 Stat. 1364; Pub. L. 104–333, [div. I, title X, §1033\(a\), Nov. 12, 1996](#), 110 Stat. 4239; Pub. L. 105–83, [title III, §350, Nov. 14, 1997](#), 111 Stat. 1607; Pub. L. 105–263, [§5\(d\), Oct. 19, 1998](#), 112 Stat. 2348.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
6901(1) (A)–(F)	31:1606(a)(1)–(3), (5), (b). 31:1606(a)(4). 31:1606(a)(6).	Oct. 20, 1976, Pub. L. 94–565, §6(a)(1)–(3), (5), (b), (c) , 90 Stat. 2665; Dec. 23, 1981, Pub. L. 97–99, §912(a)(2) , 95 Stat. 1387. Oct. 20, 1976, Pub. L. 94–565, §6(a)(4) , 90 Stat. 2665; restated Oct. 17, 1978, Pub. L. 95–469, §3(1) , 92 Stat. 1321; Dec. 23, 1981, Pub. L. 97–99, §912(a)(1) , 95 Stat. 1387. Oct. 20, 1976, Pub. L. 94–565, 90 Stat. 2662, §6(a)(6) ; added Dec. 23, 1981, Pub. L. 97–99, §912(a)(3) , 95 Stat. 1387.
6901(1)(G)	16:715s(h)(1).	June 15, 1935, ch. 261 , 49 Stat. 378, §401(h)(1) ; added Oct. 17, 1978, Pub. L. 95–469, §1(a)(4) , 92 Stat. 1321.
6901(2)	31:1606(c).	

In clause (1), before subclause (A), the text of 31:1606(b) is omitted as unnecessary because of the restatement of the source provisions. In subclause (A), the word "and" is substituted for "within each, or any combination thereof" to eliminate unnecessary words. The words "but not limited to" are omitted as surplus. In subclause (D), the words "effective October 1, 1978" are omitted as executed. The words "Secretary of the Army" are substituted for "Army" for consistency. In subclause (E), the words "owned by the United States" are omitted as surplus. The words "Secretary of the Army" are substituted for "Army Corps of Engineers" because of 10:3012. In subclause (F), the word "Government" is added for clarity. In subclause (G), the words "In administering sections 1601 to 1607 of title 31" are omitted as unnecessary. The words "for fiscal years occurring after September 30, 1978" are omitted as executed. Subclause (G) is substituted for 16:715s(h)(1) because of the restatement.

In clause (2), before subclause (A), the word "general" is added for consistency in the title. In subclause (A), the word "parish" is omitted as unnecessary because of 1:2. The word "city" is substituted for "municipality" for consistency in the subtitle. The words "State of" are omitted as surplus. The words "political subdivision of a State" are substituted for "unit of government below the State" for consistency. The words "the basis of" are omitted as surplus. The word "basis" is substituted for "principle" for consistency in the subtitle. The words "Secretary of Commerce" are substituted for "Bureau of the Census", and the words "general purpose political subdivision of a State" are substituted for "unit of general government", for consistency. In subclause (B), the words "Such term also includes" are omitted as unnecessary. Subclause (D) is added because of section 502 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union

with the United States of America.

REFERENCES IN TEXT

Section 5 of the Southern Nevada Public Land Management Act of 1998, referred to in par. (1)(H), is section 5 of Pub. L. 105–263, [Oct. 19, 1998](#), 112 Stat. 2347, subsec. (d) of which amended this section. Subsecs. (a) to (c) of section 5, which related to acquisition of certain environmentally sensitive land, are not classified to the Code.

AMENDMENTS

1998—Par. (1)(H). Pub. L. 105–263 added subpar. (H).

1997—Par. (2)(A)(i). Pub. L. 105–83 inserted "(other than in Alaska)" after "borough, or city".

1996—Par. (2). Pub. L. 104–333 amended par. (2) generally. Prior to amendment, par. (2) read as follows: " 'unit of general local government' means:

"(A) a county (or parish), township, borough, or city where the city is independent of any other unit of general local government, that: (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term 'governmental services' includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation, and governmental administration;

"(B) the District of Columbia;

"(C) the Commonwealth of Puerto Rico;

"(D) Guam; and

"(E) the Virgin Islands."

1994—Par. (2)(A). Pub. L. 103–272 amended Pub. L. 100–446. See 1988 Amendment note below.

1988—Par. (2)(A). Pub. L. 100–446, as amended by Pub. L. 103–272, struck out "existing in Alaska on October 20, 1976" after "township, borough".

1983—Par. (2). Pub. L. 98–63 amended par. (2) generally, substituting in subpar. (A) "a county (or parish), township, borough existing in Alaska on October 20, 1976, or city where the city is independent of any other unit of general local government, that: (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term 'governmental services' includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation, and governmental administration" for "a county, city, township, borough existing in Alaska on October 20, 1976, or other political subdivision of a State that the Secretary of the Interior, on the same basis that the Secretary of Commerce uses for general statistical purposes, decides is a general purpose political subdivision of a State"; including the District of Columbia in definition; and excluding the Commonwealth of the Northern Mariana Islands from definition.

EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103–272, [§4\(f\)\(3\), July 5, 1994](#), 108 Stat. 1364, provided that the amendment made by that section is effective Sept. 27, 1988.

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105–263, [§1, Oct. 19, 1998](#), 112 Stat. 2343, provided that: "This Act [amending this section and section 460ccc–1 of Title 16, Conservation] may be cited as the 'Southern Nevada Public Land Management Act of 1998'."

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–397, [§1, Oct. 22, 1994](#), 108 Stat. 4156, provided that: "This Act [amending sections 6902 and 6903 of this title and enacting provisions set out as notes under sections 6902 and 6903 of this title] may be cited as the 'Payments In Lieu of Taxes Act'."

§6902. Authority and Eligibility ¹

(a)(1) Except as provided in paragraph (2), the Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located as set forth in this chapter. A unit of general local government may use the payment for any governmental purpose.

(2) For each unit of general local government described in section 6901(2)(A)(ii), the Secretary of the Interior shall make a payment for each fiscal year to the State of Alaska for entitlement land located within such unit as set forth in this chapter. The State of Alaska shall distribute such payment to home rule cities and general law cities (as such cities are defined by the State) located within the boundaries of the unit of general local government for which the payment was received. Such cities may use monies received under this paragraph for any governmental purpose.

(b) A unit of general local government may not receive a payment for land for which payment under this Act ² otherwise may be received if the land was owned or administered by a State or unit of general local government and was exempt from real estate taxes when the land was conveyed to the United States except that a unit of general local government may receive a payment for—

(1) land a State or unit of general local government acquires from a private party to donate to the United States within 8 years of acquisition;

(2) land acquired by a State through an exchange with the United States if such land was entitlement land as defined by this chapter; or

(3) land in Utah acquired by the United States for Federal land, royalties, or other assets if, at the time of such acquisition, a unit of general local government was entitled under applicable State law to receive payments in lieu of taxes from the State of Utah for such land: *Provided, however,* That no payment under this paragraph shall exceed the payment that would have been made under State law if such land had not been acquired.

(Pub. L. 97–258, [Sept. 13, 1982](#), 96 Stat. 1032; Pub. L. 103–93, [§10\(b\)](#), [Oct. 1, 1993](#), 107 Stat. 999; Pub. L. 103–397, [§4](#), [Oct. 22, 1994](#), 108 Stat. 4157; Pub. L. 104–333, [div. I, title X, §1033\(b\)](#), [Nov. 12, 1996](#), 110 Stat. 4240.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
6902(a)	31:1601.	Oct. 20, 1976, Pub. L. 94–565, §§1, 5(a), (b) , 90 Stat. 2662, 2665 .
6902(b)	31:1605(c).	Oct. 20, 1976, Pub. L. 94–565, 90 Stat. 2662, §5(c) ; added Oct. 17, 1978, Pub. L. 95–469, §3(2) , 92 Stat. 1321.
6902(c)	31:1605(a).	
6902(d)	31:1605(b).	

In subsection (a), the words "Effective for fiscal years beginning on and after October 1, 1976" are omitted as executed. The words "(as defined in section 1606 of this title)" are omitted because of the restatement. The text of 31:1601(last sentence) is omitted as unnecessary.

In subsection (b), the word "or" is substituted for "and/or" for consistency. The words "except that, beginning in fiscal year 1979" are omitted as executed. The words "of such land" are omitted as surplus. The word "Federal" is omitted as unnecessary. The words "and which is or was so donated . . . thereof by the State or unit of local government" are omitted as surplus.

In subsection (c), the citation in parentheses for the Act of May 24, 1939, is included only for information purposes.

In subsection (d), the words "county or" are omitted as unnecessary because a county is a unit of general local government under section 6901 of the revised title.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–333 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located, as set forth in this chapter. A unit of general local government may use the payment for any governmental purpose."

1994—Pub. L. 103–397 amended section generally. Prior to amendment, section read as follows:

"(a) The Secretary of the Interior shall make a payment for each fiscal year to each unit of general

local government in which entitlement land is located. A unit may use the payment for any governmental purpose.

"(b) A unit of general local government may not receive a payment for land for which payment under this chapter otherwise may be received if the land was owned or administered by a State or unit and was exempt from real estate taxes when the land was conveyed to the United States Government. This subsection does not apply to payments for land a State or unit acquires from a private party to donate to the Government within 8 years of acquisition, nor does this subsection apply to payments for lands in Utah acquired by the United States if at the time of such acquisition units, under applicable State law, were entitled to receive payments from the State for such lands, but in such case no payment under this chapter with respect to such acquired lands shall exceed the payment that would have been made under State law if such lands had not been acquired.

"(c) A unit of general local government receiving payment for a fiscal year for land under the Act of August 28, 1937 (43 U.S.C. 1181a et seq.), or the Act of May 24, 1939 (ch. 144, 53 Stat. 753), may not receive a payment under this chapter for the land for that fiscal year. This chapter does not apply to either Act.

"(d) If the total payment to a unit of general local government for a fiscal year would be less than \$100, the Secretary may not make the payment."

1993—Subsec. (b). Pub. L. 103–93 substituted "acquisition, nor does this subsection apply to payments for lands in Utah acquired by the United States if at the time of such acquisition units, under applicable State law, were entitled to receive payments from the State for such lands, but in such case no payment under this chapter with respect to such acquired lands shall exceed the payment that would have been made under State law if such lands had not been acquired" for "acquisition".

EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103–397, §5(a), Oct. 22, 1994, 108 Stat. 4158, provided that:

"(1) IN GENERAL.—Except as provided in paragraph (2), this Act [amending this section and section 6903 of this title and enacting provisions set out as notes under sections 6901 and 6903 of this title] and the amendments made by this Act shall become effective on October 1, 1994.

"(2) LIMITATION.—The amendment made by section 2(b)(2) [amending section 6903 of this title] shall become effective on October 1, 1998."

¹ So in original. Probably should not be capitalized.

² So in original. Probably should be "this chapter".

§6903. Payments

(a) In this section—

(1) "payment law" means—

(A) the Act of June 20, 1910 (ch. 310, 36 Stat. 557);

(B) section 33 of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012);

(C) the Act of May 23, 1908 (16 U.S.C. 500) or the Secure Rural Schools and Community Self-Determination Act of 2000;

(D) section 5 of the Act of June 22, 1948 (16 U.S.C. 577g, 577g–1);

(E) section 401(c)(2) of the Act of June 15, 1935 (16 U.S.C. 715s(c)(2));

(F) section 17 of the Federal Power Act (16 U.S.C. 810);

(G) section 35 of the Act of February 25, 1920 (30 U.S.C. 191);

(H) section 6 of the Mineral Leasing Act for Acquired Lands (30 U.S.C. 355);

(I) section 3 of the Act of July 31, 1947 (30 U.S.C. 603); and

(J) section 10 of the Act of June 28, 1934 (known as the Taylor Grazing Act) (43 U.S.C. 315i).

(2) population shall be determined on the same basis that the Secretary of Commerce determines resident population for general statistical purposes.

(3) a unit of general local government may not be credited with a population of more than 50,000.

(b)(1) A payment under section 6902 of this title is equal to the greater of—

(A) 93 cents during fiscal year 1995, \$1.11 during fiscal year 1996, \$1.29 during fiscal year 1997, \$1.47 during fiscal year 1998, and \$1.65 during fiscal year 1999 and thereafter, for each acre of entitlement land located within a unit of general local government (but not more than the limitation determined under subsection (c) of this section) reduced (but not below 0) by amounts the unit received in the prior fiscal year under a payment law; or

(B) 12 cents during fiscal year 1995, 15 cents during fiscal year 1996, 17 cents during fiscal year 1997, 20 cents during fiscal year 1998, and 22 cents during fiscal year 1999 and thereafter, for each acre of entitlement land located in the unit (but not more than the limitation determined under subsection (c) of this section).

(2) The chief executive officer of a State shall submit to the Secretary of the Interior a statement on the amounts of payments the State transfers to each unit of general local government in the State out of amounts received under a payment law.

(c)(1) The limitation for a unit of general local government with a population of not more than 4,999 is the highest dollar amount specified in paragraph (2).

(2) The limitation for a unit of general local government with a population of at least 5,000 is the following amount (rounding the population off to the nearest thousand):

If the population equals—	the limitation is equal to the population times—
5,000	\$110.00
6,000	103.00
7,000	97.00
8,000	90.00
9,000	84.00
10,000	77.00
11,000	75.00
12,000	73.00
13,000	70.00
14,000	68.00
15,000	66.00
16,000	65.00
17,000	64.00
18,000	63.00
19,000	62.00
20,000	61.00
21,000	60.00
22,000	59.00
23,000	59.00
24,000	58.00
25,000	57.00
26,000	56.00
27,000	56.00
28,000	56.00
29,000	55.00
30,000	55.00
31,000	54.00
32,000	54.00
33,000	53.00
34,000	53.00
35,000	52.00
36,000	52.00
37,000	51.00
38,000	51.00
39,000	50.00
40,000	50.00

41,000	49.00
42,000	48.00
43,000	48.00
44,000	47.00
45,000	47.00
46,000	46.00
47,000	46.00
48,000	45.00
49,000	45.00
50,000	44.00.

(d) On October 1 of each year after the date of enactment of the Payment in Lieu of Taxes Act, the Secretary of the Interior shall adjust each dollar amount specified in subsections (b) and (c) to reflect changes in the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor, for the 12 months ending the preceding June 30.

(Pub. L. 97–258, [Sept. 13, 1982](#), 96 Stat. 1032; Pub. L. 98–63, [title I, July 30, 1983](#), 97 Stat. 324; Pub. L. 103–397, [§§2, 3, 5\(b\), Oct. 22, 1994](#), 108 Stat. 4156–4158; Pub. L. 106–393, [§4, Oct. 30, 2000](#), 114 Stat. 1610.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
6903(a)(1)	16:715s(h)(2). 31:1604.	June 15, 1935, ch. 261 , 49 Stat. 378, §401(h) (2); added Oct. 17, 1978, Pub. L. 95–469, §1(a)(4) , 92 Stat. 1321. Oct. 20, 1976, Pub. L. 94–565, §§2, 4 , 90 Stat. 2662, 2664 .
6903(a)(2)	31:1602(c).	
6903(a)(3)	31:1602(b)(2)(last sentence).	
6903(a)(4)	31:1602(d).	
6903(b)(1)	31:1602(a)(1st sentence).	
6903(b)(2)	31:1602(a)(last sentence).	
6903(c)	31:1602(b)(1), (2)(1st sentence).	

In subsection (a)(1), before subclause (A), the word "payment" is added for clarity. Subclause (E) is substituted for 16:715s(h)(2) because of the restatement. In clause (2), the words "Secretary of Commerce" are substituted for "Bureau of the Census" for consistency. In clause (4), the words "the jurisdiction of" are omitted as surplus. The word "deemed" is substituted for "treated" for consistency.

In subsections (b) and (c), the word "population" before "limitation" is omitted as unnecessary.

In subsection (b)(1), before clause (A), the words "The amount of . . . made for any fiscal year to a unit of local government . . . the following amounts" are omitted as surplus. In clauses (A) and (B), the words "the boundaries of" are omitted as surplus. In clause (A), the words "aggregate . . . of payments, if any" are omitted as surplus. The words "a payment law" are substituted for "all of the provisions specified in section 1604 of this title" because of the restatement.

In subsection (b)(2), the words "chief executive officer" are substituted for "Governor (or his delegate)" for consistency in the revised title and with other titles of the United States Code. The words "a payment law" are substituted for "a provision specified in section 1604 of this title" because of the restatement of 31:1604 in subsection (a).

In subsection (c)(1), the words "amount equal to" and "within the jurisdiction of such unit of local government" are omitted as surplus.

In subsection (c)(2), the words "computed under the . . . table" are omitted as unnecessary. The words "the limitation is equal to the population times" are substituted for "Payment shall not exceed the amount computed by multiplying such population by" for clarity and consistency.

REFERENCES IN TEXT

Act of June 20, 1910 (ch. 310, 36 Stat. 557), referred to in subsec. (a)(1)(A), is not classified to the Code.

The Secure Rural Schools and Community Self-Determination Act of 2000, referred to in subsec. (a)(1)(C), is Pub. L. 106–393, [Oct. 30, 2000](#), 114 Stat. 1607, which is classified principally to chapter 90 (§7101 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of Title 16 and Tables.

The date of enactment of the Payment in Lieu of Taxes Act, referred to in subsec. (d), probably means the date of enactment of the Payments In Lieu of Taxes Act, Pub. L. 103–397, which was approved Oct. 22, 1994.

AMENDMENTS

2000—Subsec. (a)(1)(C). Pub. L. 106–393 inserted "or the Secure Rural Schools and Community Self-Determination Act of 2000" before semicolon at end.

1994—Subsec. (b)(1)(A). Pub. L. 103–397, §2(a)(1), substituted "93 cents during fiscal year 1995, \$1.11 during fiscal year 1996, \$1.29 during fiscal year 1997, \$1.47 during fiscal year 1998, and \$1.65 during fiscal year 1999 and thereafter, for each acre of entitlement land" for "75 cents for each acre of entitlement land".

Subsec. (b)(1)(B). Pub. L. 103–397, §2(a)(2), substituted "12 cents during fiscal year 1995, 15 cents during fiscal year 1996, 17 cents during fiscal year 1997, 20 cents during fiscal year 1998, and 22 cents during fiscal year 1999 and thereafter, for each acre of entitlement land" for "10 cents for each acre of entitlement land".

Subsec. (c)(1). Pub. L. 103–397, §2(b)(1), substituted "the highest dollar amount specified in paragraph (2)" for "\$50 times the population".

Subsec. (c)(2). Pub. L. 103–397, §2(b)(2), amended table generally by augmenting dollar amounts by which population totals must be multiplied in order to equal the limitation from \$39.25 to \$98.00 under prior table to \$44.00 to \$110.00.

Pub. L. 103–397, §5(b)(4), amended table generally for fiscal year 1998 by augmenting dollar amounts by which population totals must be multiplied in order to equal the limitation from \$34.50 to \$86.00 under prior table to \$39.25 to \$98.00.

Pub. L. 103–397, §5(b)(3), amended table generally for fiscal year 1997 by augmenting dollar amounts by which population totals must be multiplied in order to equal the limitation from \$29.50 to \$74.00 under prior table to \$34.50 to \$86.00.

Pub. L. 103–397, §5(b)(2), amended table generally for fiscal year 1996 by augmenting dollar amounts by which population totals must be multiplied in order to equal the limitation from \$24.75 to \$62.00 under prior table to \$29.50 to \$74.00.

Pub. L. 103–397, §5(b)(1), amended table generally for fiscal year 1995 by augmenting dollar amounts by which population totals must be multiplied in order to equal the limitation from \$20.00 to \$50.00 under prior table to \$24.75 to \$62.00.

Subsec. (d). Pub. L. 103–397, §3, added subsec. (d).

1983—Subsec. (a)(4). Pub. L. 98–63 struck out par. (4) which provided that if any part of a small unit was located within another unit, entitlement land within both units was deemed to be located within the smaller unit.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by sections 2(a), (b)(1), and 3 of Pub. L. 103–397 effective Oct. 1, 1994, and amendment by section 2(b)(2) of Pub. L. 103–397 effective Oct. 1, 1998, see section 5(a) of Pub. L. 103–397, set out as a note under section 6902 of this title.

Pub. L. 103–397, [§5\(b\)\(1\)](#), [Oct. 22, 1994](#), 108 Stat. 4158, provided for the amendment of the table at the end of subsec. (c)(2) of this section during fiscal year 1995.

Pub. L. 103–397, [§5\(b\)\(2\)](#), [Oct. 22, 1994](#), 108 Stat. 4159, provided for the amendment of the table at the end of subsec. (c)(2) of this section during fiscal year 1996.

Pub. L. 103–397, [§5\(b\)\(3\)](#), [Oct. 22, 1994](#), 108 Stat. 4159, provided for the amendment of the table at the end of subsec. (c)(2) of this section during fiscal year 1997.

Pub. L. 103–397, [§5\(b\)\(4\)](#), [Oct. 22, 1994](#), 108 Stat. 4160, provided for the amendment of the table at the end of subsec. (c)(2) of this section during fiscal year 1998.

PAYMENTS MADE PRIOR TO JANUARY 1, 1983

Pub. L. 98–63, [title I](#), [July 30, 1983](#), 97 Stat. 324, provided in part that: "The United States shall not be subject to any cause of action or any liability for distribution of payments made prior to January 1,

1983, under the Act of October 20, 1976 (90 Stat. 2662), as amended [Pub. L. 94–565, see 31 U.S.C. 6901 et seq.], or regulations pursuant thereto."

§6904. Additional payments

(a) In addition to payments the Secretary of the Interior makes under section 6902 of this title, the Secretary shall make a payment for each fiscal year to a unit of general local government collecting and distributing real property taxes (including a unit in Alaska outside the boundaries of an organized borough) in which is located an interest in land that—

- (1) the United States Government acquires for—
 - (A) the National Park System; or
 - (B) the National Forest Wilderness Areas; and

(2) was subject to local real property taxes within the 5-year period before the interest is acquired.

(b) The Secretary shall make payments only for the 5 fiscal years after the fiscal year in which the interest in land is acquired. Under guidelines the Secretary prescribes, the unit of general local government receiving the payment from the Secretary shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest. A unit receiving a distribution may use a payment for any governmental purpose.

(c) Each yearly payment by the Secretary under this section is equal to one percent of the fair market value of the interest in land on the date the Government acquires the interest. However, a payment may not be more than the amount of real property taxes levied on the property during the last fiscal year before the fiscal year in which the interest is acquired. A decision on fair market value under this section may not include an increase in the value of an interest because the land is rezoned when the rezoning causes the increase after the date of enactment of a law authorizing the acquisition of an interest under subsection (a) of this section.

(d) The Secretary may prescribe regulations under which payments may be made to units of general local government when subsections (a) and (b) of this section will not carry out the purpose of subsections (a) and (b).

(Pub. L. 97–258, [Sept. 13, 1982](#), 96 Stat. 1033.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
6904(a)	31:1603(a)(1st, 3d sentences). 31:1603(e).	Oct. 20, 1976, Pub. L. 94–565, §3(a)–(d) , 90 Stat. 2663. Oct. 20, 1976, Pub. L. 94–565, 90 Stat. 2662, §3(e) ; added Oct. 17, 1978, Pub. L. 95–469, §3(3) , 92 Stat. 1322.
6904(b)	31:1603(a)(2d sentence), (b), (d).	
6904(c)	31:1603(c).	
6904(d)	31:1603(a)(last sentence).	

In the section, the words "land or" are omitted as being included in "interest in land".

In subsection (a), before clause (1), the words "the Secretary of the Interior makes" are added for clarity. The words "unit of general local government collecting and distributing real property taxes (including a unit in Alaska outside the boundaries of an organized borough)" are substituted for "county" and 31:1603(a)(3d sentence) and (e) to eliminate unnecessary words. The words "the jurisdiction of" are omitted as surplus. In subclause (A), the words "for the Redwood National Park pursuant to subchapter VII of chapter 1 of title 16" are omitted as executed because the Redwood National Park is now part of the National Park System.

In subsection (b), the words "The Secretary shall make payments only for the 5 fiscal years after the fiscal year in which the interest in land is acquired" are substituted for 31:1603(b)(1st sentence) and (d) to eliminate unnecessary words. The words "affected" and "for addition to either such systems" are omitted as surplus. The words "receiving a distribution" are added for clarity.

In subsection (c), the words "The amount of . . . made . . . fiscal . . . to any unit of local government and affected school districts" are omitted as surplus. The words "by the Secretary" are added for clarity. The words "made for any fiscal year to a unit of local government under subsection (a) of this

section", "assessed and", "full", and "for addition to the National Park System or National Forest Wilderness Areas" are omitted as surplus.

§6905. Redwood National Park and the Lake Tahoe Basin

(a) The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which an interest in land owned by the United States Government in the Redwood National Park is located. A unit may use the payment for any governmental purpose. The payment shall be made as provided in section 6903 of this title and shall include an amount payable under section 6903.

(b)(1) In addition to payments the Secretary makes under subsection (a) of this section, the Secretary shall make a payment for each fiscal year to each unit of general local government in which is located an interest in land—

(A) owned by the Government in the Redwood National Park; or

(B) acquired in the Lake Tahoe Basin under the Act of December 23, 1980 (Public Law 96–586, 94 Stat. 3383).

(2) The payment shall be made as provided in section 6904 of this title and shall include an amount payable under section 6904. However, an amount computed but not paid because of the first sentence of subsection (b) and the 2d sentence of subsection (c) of section 6904 shall be carried forward and applied to future years in which the payment would not otherwise equal the amount of real property taxes assessed and levied on the land during the last fiscal year before the fiscal year in which the interest was acquired until the amount is applied completely.

(3) The unit of general local government may use the payment for any governmental purpose.

(4) The Redwoods Community College District is a school district under section 6904(b) of this title.

(Pub. L. 97–258, [Sept. 13, 1982](#), 96 Stat. 1034.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
6905(a)	16:79o(a), (b).	Mar. 27, 1978, Pub. L. 95–250, §106 , 92 Stat. 171.
6905(b)(1)– (3)	(uncodified).	Dec. 23, 1980, Pub. L. 96–586, §2(i) , 94 Stat. 3383.
6905(b)(4)	16:79o(c). 16:79o(d).	

In subsection (a), the words "Notwithstanding any contrary provision of sections 1601 to 1607 of title 31" are omitted as unnecessary because of the restatement. The word "general" is added for consistency in the revised title and with other titles of the United States Code. The words "an interest in" are added for consistency because of the source provisions restated in the revised section. The word "Government" is added for consistency in the revised title and with other titles of the Code. The text of 16:79o(a)(last sentence) is omitted as unnecessary.

In subsection (b)(1)–(3), the source provisions are combined for clarity and because of the restatement.

In subsection (b)(2), the words "portion of the total", "full", and "land or" are omitted as surplus. The words "for addition to Redwood National Park" are omitted as unnecessary because of the restatement.

In subsection (b)(4), the word "affected" is omitted as surplus.

REFERENCES IN TEXT

The provisions of Act of December 23, 1980 (Public Law 96–586, 94 Stat. 3383) which relate to the acquisition of the Lake Tahoe Basin, referred to in subsec. (b)(1)(B), are not classified to the Code.

§6906. Funding

For each of fiscal years 2008 through 2014—

(1) each county or other eligible unit of local government shall be entitled to payment under this chapter; and

(2) sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1035; Pub. L. 110–343, div. C, title VI, §601(c)(1), Oct. 3, 2008, 122 Stat. 3911; Pub. L. 112–141, div. F, title I, §100111, July 6, 2012, 126 Stat. 906; Pub. L. 113–79, title XII, §12312, Feb. 7, 2014, 128 Stat. 992.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
6906	31:1607.	Oct. 20, 1976, Pub. L. 94–565, §7, 90 Stat. 2665.

The words "to the Secretary of the Interior" are added for clarity. The words "*Provided, That,* notwithstanding any other provision of this chapter" and "in advance" are omitted as unnecessary.

AMENDMENTS

2014—Pub. L. 113–79 substituted "2014" for "2013" in introductory provisions.

2012—Pub. L. 112–141 substituted "2013" for "2012" in introductory provisions.

2008—Pub. L. 110–343 amended section generally. Prior to amendment, section read as follows: "Necessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter. Amounts are available only as provided in appropriation laws."

§6907. State legislation requiring reallocation or redistribution of payments to smaller units of general purpose government

(a) Notwithstanding any other provision of this chapter, a State may enact legislation which requires that any payments which would be made to units of general local government pursuant to this chapter be reallocated and redistributed in whole or part to other smaller units of general purpose government which (1) are located within the boundaries of the larger unit of general local government, (2) provide general governmental services and (3) contain entitlement lands within their boundaries. Such reallocation or redistribution shall generally reflect the level of services provided by, and the number of entitlement acres within, the smaller unit of general local government.

(b) Upon enactment of legislation by a State, described in subsection (a), the Secretary shall make one payment to such State equaling the aggregate amount of payments which he otherwise would have made to units of general local government within such State pursuant to this chapter. It shall be the responsibility of such State to make any further distribution of the payment pursuant to subsection (a). Such redistribution shall be made within 30 days after receipt of such payment. No payment, or portion thereof, made by the Secretary shall be used by any State for the administration of this subsection or subsection (a).

(c) Appropriations made for payments in lieu of taxes for a fiscal year may be used to correct underpayments in the previous fiscal year to achieve equity among all qualified recipients.

(Added Pub. L. 98–63, title I, July 30, 1983, 97 Stat. 324; amended Pub. L. 103–272, §4(f)(1)(U)(ii), July 5, 1994, 108 Stat. 1362.)

AMENDMENTS

1994—Pub. L. 103–272 inserted section catchline.

<p>16 USC Ch. 90: SECURE RURAL SCHOOLS AND COMMUNITY SELF-DETERMINATION</p> <p>From Title 16—CONSERVATION</p>

CHAPTER 90—SECURE RURAL SCHOOLS AND COMMUNITY SELF-DETERMINATION

Sec.
7101.
Purposes.
7102.
Definitions.

SUBCHAPTER I—SECURE PAYMENTS FOR STATES AND COUNTIES CONTAINING FEDERAL LAND

7111.
Secure payments for States containing Federal land.
7112.
Payments to States and counties.
7113.
Transition payments to States.

SUBCHAPTER II—SPECIAL PROJECTS ON FEDERAL LAND

7121.
Definitions.
7122.
General limitation on use of project funds.
7123.
Submission of project proposals.
7124.
Evaluation and approval of projects by Secretary concerned.
7125.
Resource advisory committees.
7126.
Use of project funds.
7127.
Availability of project funds.
7128.
Termination of authority.

SUBCHAPTER III—COUNTY FUNDS

7141.
Definitions.
7142.
Use.
7143.
Certification.
7144.
Termination of authority.

SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

7151.
Regulations.
7152.
Authorization of appropriations.

7153.

Treatment of funds and revenues.

§7101. Purposes

The purposes of this chapter are—

(1) to stabilize and transition payments to counties to provide funding for schools and roads that supplements other available funds;

(2) to make additional investments in, and create additional employment opportunities through, projects that—

- (A)(i) improve the maintenance of existing infrastructure;
- (ii) implement stewardship objectives that enhance forest ecosystems; and
- (iii) restore and improve land health and water quality;
- (B) enjoy broad-based support; and
- (C) have objectives that may include—
 - (i) road, trail, and infrastructure maintenance or obliteration;
 - (ii) soil productivity improvement;
 - (iii) improvements in forest ecosystem health;
 - (iv) watershed restoration and maintenance;
 - (v) the restoration, maintenance, and improvement of wildlife and fish habitat;
 - (vi) the control of noxious and exotic weeds; and
 - (vii) the reestablishment of native species; and

(3) to improve cooperative relationships among—

- (A) the people that use and care for Federal land; and
- (B) the agencies that manage the Federal land.

(Pub. L. 106–393, §2, as added Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3893.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 106–393, *Oct. 30, 2000*, 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

PRIOR PROVISIONS

A prior section 2 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3893.

SHORT TITLE

Pub. L. 106–393, §1, as added by Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3893, provided that: "This Act [enacting this chapter, amending section 191 of Title 30, Mineral Lands and Mining, and section 6903 of Title 31, Money and Finance, enacting provisions set out as notes under sections 181 and 191 of Title 30, and repealing provisions set out as notes under section 500 of this title and section 1181f of Title 43, Public Lands] may be cited as the 'Secure Rural Schools and Community Self-Determination Act of 2000'."

§7102. Definitions

In this chapter:

(1) Adjusted share

The term "adjusted share" means the number equal to the quotient obtained by dividing—

- (A) the number equal to the quotient obtained by dividing—
 - (i) the base share for the eligible county; by
 - (ii) the income adjustment for the eligible county; by

(B) the number equal to the sum of the quotients obtained under subparagraph (A) and paragraph (8)(A) for all eligible counties.

(2) Base share

The term "base share" means the number equal to the average of—

(A) the quotient obtained by dividing—

- (i) the number of acres of Federal land described in paragraph (7)(A) in each eligible county; by
- (ii) the total number acres ¹ of Federal land in all eligible counties in all eligible States; and

(B) the quotient obtained by dividing—

- (i) the amount equal to the average of the 3 highest 25-percent payments and safety net payments made to each eligible State for each eligible county during the eligibility period; by
- (ii) the amount equal to the sum of the amounts calculated under clause (i) and paragraph (9)(B)(i) for all eligible counties in all eligible States during the eligibility period.

(3) County payment

The term "county payment" means the payment for an eligible county calculated under section 7111(b) of this title.

(4) Eligible county

The term "eligible county" means any county that—

- (A) contains Federal land (as defined in paragraph (7)); and
- (B) elects to receive a share of the State payment or the county payment under section 7112(b) of this title.

(5) Eligibility period

The term "eligibility period" means fiscal year 1986 through fiscal year 1999.

(6) Eligible State

The term "eligible State" means a State or territory of the United States that received a 25-percent payment for 1 or more fiscal years of the eligibility period.

(7) Federal land

The term "Federal land" means—

(A) land within the National Forest System, as defined in section 1609(a) of this title exclusive of the National Grasslands and land utilization projects designated as National Grasslands administered pursuant to the Act of July 22, 1937 (7 U.S.C. 1010–1012); and

(B) such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant land as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site land valuable for timber, that shall be managed, except as provided in the former section 3 of the Act of August 28, 1937 (50 Stat. 875; 43 U.S.C. 1181c), for permanent forest production.

(8) 50-percent adjusted share

The term "50-percent adjusted share" means the number equal to the quotient obtained by dividing—

(A) the number equal to the quotient obtained by dividing—

- (i) the 50-percent base share for the eligible county; by
- (ii) the income adjustment for the eligible county; by

(B) the number equal to the sum of the quotients obtained under subparagraph (A) and paragraph (1)(A) for all eligible counties.

(9) 50-percent base share

The term "50-percent base share" means the number equal to the average of—

(A) the quotient obtained by dividing—

- (i) the number of acres of Federal land described in paragraph (7)(B) in each eligible county; by
- (ii) the total number acres ¹ of Federal land in all eligible counties in all eligible States; and

(B) the quotient obtained by dividing—

- (i) the amount equal to the average of the 3 highest 50-percent payments made to each eligible county during the eligibility period; by
- (ii) the amount equal to the sum of the amounts calculated under clause (i) and paragraph (2)(B)(i) for

all eligible counties in all eligible States during the eligibility period.

(10) 50-percent payment

The term "50-percent payment" means the payment that is the sum of the 50-percent share otherwise paid to a county pursuant to title II of the Act of August 28, 1937 (chapter 876; 50 Stat. 875; 43 U.S.C. 1181f), and the payment made to a county pursuant to the Act of May 24, 1939 (chapter 144; 53 Stat. 753; 43 U.S.C. 1181f–1 et seq.).

(11) Full funding amount

The term "full funding amount" means—

- (A) \$500,000,000 for fiscal year 2008;
- (B) for each of fiscal years 2009 through 2011, the amount that is equal to 90 percent of the full funding amount for the preceding fiscal year; and
- (C) for fiscal year 2012 and each fiscal year thereafter, the amount that is equal to 95 percent of the full funding amount for the preceding fiscal year.

(12) Income adjustment

The term "income adjustment" means the square of the quotient obtained by dividing—

- (A) the per capita personal income for each eligible county; by
- (B) the median per capita personal income of all eligible counties.

(13) Per capita personal income

The term "per capita personal income" means the most recent per capita personal income data, as determined by the Bureau of Economic Analysis.

(14) Safety net payments

The term "safety net payments" means the special payment amounts paid to States and counties required by section 13982 or 13983 ² of the Omnibus Budget Reconciliation Act of 1993 (Public Law 103–66; 16 U.S.C. 500 note; 43 U.S.C. 1181f note).

(15) Secretary concerned

The term "Secretary concerned" means—

- (A) the Secretary of Agriculture or the designee of the Secretary of Agriculture with respect to the Federal land described in paragraph (7)(A); and
- (B) the Secretary of the Interior or the designee of the Secretary of the Interior with respect to the Federal land described in paragraph (7)(B).

(16) State payment

The term "State payment" means the payment for an eligible State calculated under section 7111(a) of this title.

(17) 25-percent payment

The term "25-percent payment" means the payment to States required by the sixth paragraph under the heading of "FOREST SERVICE" in the Act of May 23, 1908 (35 Stat. 260; 16 U.S.C. 500), and section 13 of the Act of March 1, 1911 (36 Stat. 963; 16 U.S.C. 500).

(Pub. L. 106–393, §3, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3894; amended Pub. L. 112–141, div. F, title I, §100101(a)(1), July 6, 2012, 126 Stat. 905.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 106–393, [Oct. 30, 2000](#), 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

The Act of July 22, 1937, referred to in par. (7)(A), is act [July 22, 1937, ch. 517](#), 50 Stat. 522, known as the Bankhead-Jones Farm Tenant Act, which is classified generally to chapter 33 (§1000 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1000 of Title 7 and Tables.

Act of August 28, 1937, referred to in par. (10), is act [Aug. 28, 1937, ch. 876](#), 50 Stat. 874. Section 3 of the Act was classified to section 1181c of Title 43, Public Lands, prior to repeal by Pub. L. 94–579, [title VII, §702, Oct. 21, 1976](#), 90 Stat. 2787. Title II of the Act enacted section 1181f of Title 43 and repealed section 1174 of Title 43. For complete classification of this Act to the Code, see Tables.

The Act of May 24, 1939, referred to in par. (10), is act [May 24, 1939, ch. 144](#), 53 Stat. 753, which

enacted sections 1181f–1 to 1181f–4 of Title 43, Public Lands, and provisions set out as a note under section 1181f–1 of Title 43. For complete classification of this Act to the Code, see Tables.

Sections 13982 and 13983 of the Omnibus Budget Reconciliation Act of 1993, referred to in par. (14), are sections 13982 and 13983 of Pub. L. 103–66, which were set out as notes under section 500 of this title and section 1181f of Title 43, Public Lands, respectively, prior to repeal by Pub. L. 106–393, title IV, §404, Oct. 30, 2000, 114 Stat. 1623.

PRIOR PROVISIONS

A prior section 3 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2012—Par. (11). Pub. L. 112–141 substituted "each of fiscal years 2009 through 2011" for "fiscal year 2009 and each fiscal year thereafter" in subpar. (B) and added subpar. (C).

¹ So in original. Probably should be preceded by "of".

² See References in Text note below.

SUBCHAPTER I—SECURE PAYMENTS FOR STATES AND COUNTIES CONTAINING FEDERAL LAND

§7111. Secure payments for States containing Federal land

(a) State payment

For each of fiscal years 2008 through 2015, the Secretary of Agriculture shall calculate for each eligible State an amount equal to the sum of the products obtained by multiplying—

- (1) the adjusted share for each eligible county within the eligible State; by
- (2) the full funding amount for the fiscal year.

(b) County payment

For each of fiscal years 2008 through 2015, the Secretary of the Interior shall calculate for each eligible county that received a 50-percent payment during the eligibility period an amount equal to the product obtained by multiplying—

- (1) the 50-percent adjusted share for the eligible county; by
- (2) the full funding amount for the fiscal year.

(c) Special rule for fiscal year 2014 payments

(1) State payment

If an eligible county in a State that will receive a share of the State payment for fiscal year 2014 has already received, or will receive, a share of the 25-percent payment for fiscal year 2014 distributed to the State before April 16, 2015, the amount of the State payment shall be reduced by the amount of that eligible county's share of the 25-percent payment.

(2) County payment

If an eligible county that will receive a county payment for fiscal year 2014 has already received a 50-percent payment for that fiscal year, the amount of the county payment shall be reduced by the amount of the 50-percent payment.

(Pub. L. 106–393, title I, §101, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3896; amended Pub. L. 112–141, div. F, title I, §100101(a)(2), July 6, 2012, 126 Stat. 905; Pub. L. 113–40, §10(a)(1)(A), Oct. 2, 2013, 127 Stat. 544; Pub. L. 114–10, title V, §524(a)(1), (3), Apr. 16, 2015, 129 Stat. 178, 179.)

PRIOR PROVISIONS

A prior section 101 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2015—Subsecs. (a), (b). Pub. L. 114–10, §524(a)(1), substituted "2015" for "2013" in introductory provisions.

Subsec. (c). Pub. L. 114–10, §524(a)(3), added subsec. (c).

2013—Subsecs. (a), (b). Pub. L. 113–40 substituted "2013" for "2012" in introductory provisions.

2012—Subsecs. (a), (b). Pub. L. 112–141 substituted "2012" for "2011" in introductory provisions.

§7112. Payments to States and counties

(a) Payment amounts

Except as provided in section 7113 of this title, the Secretary of the Treasury shall pay to—

(1) a State or territory of the United States an amount equal to the sum of the amounts elected under subsection (b) by each county within the State or territory for—

- (A) if the county is eligible for the 25-percent payment, the share of the 25-percent payment; or
- (B) the share of the State payment of the eligible county; and

(2) a county an amount equal to the amount elected under subsection (b) by each county for—

- (A) if the county is eligible for the 50-percent payment, the 50-percent payment; or
- (B) the county payment for the eligible county.

(b) Election to receive payment amount

(1) Election; submission of results

(A) In general

The election to receive a share of the State payment, the county payment, a share of the State payment and the county payment, a share of the 25-percent payment, the 50-percent payment, or a share of the 25-percent payment and the 50-percent payment, as applicable, shall be made at the discretion of each affected county by August 1, 2013 (or as soon thereafter as the Secretary concerned determines is practicable), and August 1 of each second fiscal year thereafter, in accordance with paragraph (2), and transmitted to the Secretary concerned by the Governor of each eligible State.

(B) Failure to transmit

If an election for an affected county is not transmitted to the Secretary concerned by the date specified under subparagraph (A), the affected county shall be considered to have elected to receive a share of the State payment, the county payment, or a share of the State payment and the county payment, as applicable.

(C) Effect of late payment for fiscal years 2014 and 2015

The election otherwise required by subparagraph (A) shall not apply for fiscal year 2014 or 2015.

(2) Duration of election

(A) In general

A county election to receive a share of the 25-percent payment or 50-percent payment, as applicable, shall be effective for 2 fiscal years. If such two-fiscal year period included fiscal year 2013, the county election to receive a share of the 25-percent payment or 50-percent payment, as applicable, also shall be effective for fiscal years 2014 and 2015.

(B) Full funding amount

If a county elects to receive a share of the State payment or the county payment in 2013, the election shall be effective for all subsequent fiscal years through fiscal year 2015.

(3) Source of payment amounts

The payment to an eligible State or eligible county under this section for a fiscal year shall be derived from—

- (A) any amounts that are appropriated to carry out this chapter;
- (B) any revenues, fees, penalties, or miscellaneous receipts, exclusive of deposits to any relevant trust fund, special account, or permanent operating funds, received by the Federal Government from activities by the Bureau of Land Management or the Forest Service on the applicable Federal land; and
- (C) to the extent of any shortfall, out of any amounts in the Treasury of the United States not otherwise appropriated.

(c) Distribution and expenditure of payments**(1) Distribution method**

A State that receives a payment under subsection (a) for Federal land described in section 7102(7)(A) of this title shall distribute the appropriate payment amount among the appropriate counties in the State in accordance with—

- (A) the Act of May 23, 1908 (16 U.S.C. 500); and
- (B) section 13 of the Act of March 1, 1911 (36 Stat. 963; 16 U.S.C. 500).

(2) Expenditure purposes

Subject to subsection (d), payments received by a State under subsection (a) and distributed to counties in accordance with paragraph (1) shall be expended as required by the laws referred to in paragraph (1).

(d) Expenditure rules for eligible counties**(1) Allocations****(A) Use of portion in same manner as 25-percent payment or 50-percent payment, as applicable**

Except as provided in subparagraph (D), if an eligible county elects to receive its share of the State payment or the county payment, not less than 80 percent, but not more than 85 percent, of the funds shall be expended in the same manner in which the 25-percent payments or 50-percent payment, as applicable, are required to be expended.

(B) Election as to use of balance

Except as provided in subparagraph (C), an eligible county shall elect to do 1 or more of the following with the balance of any funds not expended pursuant to subparagraph (A):

- (i) Reserve any portion of the balance for projects in accordance with subchapter II.
- (ii) Reserve not more than 7 percent of the total share for the eligible county of the State payment or the county payment for projects in accordance with subchapter III.
- (iii) Return the portion of the balance not reserved under clauses (i) and (ii) to the Treasury of the United States.

(C) Counties with modest distributions

In the case of each eligible county to which more than \$100,000, but less than \$350,000, is distributed for any fiscal year pursuant to either or both of paragraphs (1)(B) and (2)(B) of subsection (a), the eligible county, with respect to the balance of any funds not expended pursuant to subparagraph (A) for that fiscal year, shall—

- (i) reserve any portion of the balance for—
 - (I) carrying out projects under subchapter II;
 - (II) carrying out projects under subchapter III; or
 - (III) a combination of the purposes described in subclauses (I) and (II); or

(ii) return the portion of the balance not reserved under clause (i) to the Treasury of the United States.

(D) Counties with minor distributions

In the case of each eligible county to which less than \$100,000 is distributed for any fiscal year pursuant to either or both of paragraphs (1)(B) and (2)(B) of subsection (a), the eligible county may elect to expend all the funds in the same manner in which the 25-percent payments or 50-percent payments, as applicable, are required to be expended.

(E) Effect of late payment for fiscal year 2014

The election made by an eligible county under subparagraph (B), (C), or (D) for fiscal year 2013, or deemed to be made by the county under paragraph (3)(B) for that fiscal year, shall be effective for fiscal years 2014 and 2015.

(2) Distribution of funds**(A) In general**

Funds reserved by an eligible county under subparagraph (B)(i) or (C)(i) of paragraph (1) for carrying out projects under subchapter II shall be deposited in a special account in the Treasury of the United States.

(B) Availability

Amounts deposited under subparagraph (A) shall—

- (i) be available for expenditure by the Secretary concerned, without further appropriation; and

(ii) remain available until expended in accordance with subchapter II.

(3) Election

(A) Notification

The Governor of each eligible State shall notify the Secretary concerned of an election by an eligible county under this subsection not later than September 30, 2012, and each September 30 thereafter for each succeeding fiscal year.

(B) Failure to elect

If the Governor of an eligible State fails to notify the Secretary concerned of the election for an eligible county by the date specified in subparagraph (A)—

(i) the eligible county shall be considered to have elected to expend 80 percent of the funds in accordance with paragraph (1)(A); and

(ii) the remainder shall be available to the Secretary concerned to carry out projects in the eligible county to further the purpose described in section 7122(b) of this title.

(C) Effect of late payment for fiscal year 2014

This paragraph does not apply for fiscal years 2014 and 2015.

(e) Time for payment

The payments required under this section for a fiscal year shall be made as soon as practicable after the end of that fiscal year.

(Pub. L. 106–393, title I, §102, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3896; amended Pub. L. 112–141, div. F, title I, §100101(a)(2), (3), July 6, 2012, 126 Stat. 905; Pub. L. 113–40, §10(a)(1)(B), Oct. 2, 2013, 127 Stat. 545; Pub. L. 114–10, title V, §524(b), Apr. 16, 2015, 129 Stat. 179.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b)(3)(A), was in the original "this Act", meaning Pub. L. 106–393, Oct. 30, 2000, 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

PRIOR PROVISIONS

A prior section 102 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2015—Subsec. (b)(1)(C). Pub. L. 114–10, §524(b)(1), added subpar. (C).

Subsec. (b)(2)(A). Pub. L. 114–10, §524(b)(2)(A), inserted at end "If such two-fiscal year period included fiscal year 2013, the county election to receive a share of the 25-percent payment or 50-percent payment, as applicable, also shall be effective for fiscal years 2014 and 2015."

Subsec. (b)(2)(B). Pub. L. 114–10, §524(b)(2)(B), substituted "2015" for "2013" the second place appearing.

Subsec. (d)(1)(E). Pub. L. 114–10, §524(b)(3)(A), added subpar. (E).

Subsec. (d)(3)(C). Pub. L. 114–10, §524(b)(3)(B), added subpar. (C).

2013—Subsec. (b)(1)(A). Pub. L. 113–40, §10(a)(1)(B)(i), substituted "2013" for "2012".

Subsec. (b)(2)(B). Pub. L. 113–40, §10(a)(1)(B)(ii), substituted "2013" for "2012" in two places.

2012—Subsec. (b)(1)(A). Pub. L. 112–141, §100101(a)(3)(A), substituted "2012" for "2008".

Subsec. (b)(2)(B). Pub. L. 112–141, §100101(a)(3)(B), inserted "in 2012" before ", the election".

Pub. L. 112–141, §100101(a)(2), substituted "fiscal year 2012" for "fiscal year 2011".

Subsec. (d)(1)(A). Pub. L. 112–141, §100101(a)(3)(C)(i), substituted "subparagraph (D)" for "paragraph (3)(B)".

Subsec. (d)(1)(D). Pub. L. 112–141, §100101(a)(3)(C)(ii)(II), redesignated subsec. (d)(3)(B) as subpar. (D).

Subsec. (d)(3)(A). Pub. L. 112–141, §100101(a)(3)(C)(ii)(I), added subpar. (A) and struck out former subpar. (A) which related to notification of the Secretary of an election and failure to make an election.

Subsec. (d)(3)(B). Pub. L. 112–141, §100101(a)(3)(C)(ii)(III), added subpar. (B). Former subpar. (B) redesignated subsec. (d)(1)(D).

§7113. Transition payments to States

(a) Definitions

In this section:

(1) Adjusted amount

The term "adjusted amount" means, with respect to a covered State—

(A) for fiscal year 2008, 90 percent of—

(i) the sum of the amounts paid for fiscal year 2006 under section 102(a)(2) ¹ (as in effect on September 29, 2006) for the eligible counties in the covered State that have elected under section 7112(b) of this title to receive a share of the State payment for fiscal year 2008; and

(ii) the sum of the amounts paid for fiscal year 2006 under section 103(a)(2) ¹ (as in effect on September 29, 2006) for the eligible counties in the State of Oregon that have elected under section 7112(b) of this title to receive the county payment for fiscal year 2008;

(B) for fiscal year 2009, 81 percent of—

(i) the sum of the amounts paid for fiscal year 2006 under section 102(a)(2) ¹ (as in effect on September 29, 2006) for the eligible counties in the covered State that have elected under section 7112(b) of this title to receive a share of the State payment for fiscal year 2009; and

(ii) the sum of the amounts paid for fiscal year 2006 under section 103(a)(2) ¹ (as in effect on September 29, 2006) for the eligible counties in the State of Oregon that have elected under section 7112(b) of this title to receive the county payment for fiscal year 2009; and

(C) for fiscal year 2010, 73 percent of—

(i) the sum of the amounts paid for fiscal year 2006 under section 102(a)(2) ¹ (as in effect on September 29, 2006) for the eligible counties in the covered State that have elected under section 7112(b) of this title to receive a share of the State payment for fiscal year 2010; and

(ii) the sum of the amounts paid for fiscal year 2006 under section 103(a)(2) ¹ (as in effect on September 29, 2006) for the eligible counties in the State of Oregon that have elected under section 7112(b) of this title to receive the county payment for fiscal year 2010.

(2) Covered State

The term "covered State" means each of the States of California, Louisiana, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, and Washington.

(b) Transition payments

For each of fiscal years 2008 through 2010, in lieu of the payment amounts that otherwise would have been made under paragraphs (1)(B) and (2)(B) of section 7112(a) of this title, the Secretary of the Treasury shall pay the adjusted amount to each covered State and the eligible counties within the covered State, as applicable.

(c) Distribution of adjusted amount

Except as provided in subsection (d), it is the intent of Congress that the method of distributing the payments under subsection (b) among the counties in the covered States for each of fiscal years 2008 through 2010 be in the same proportion that the payments were distributed to the eligible counties in fiscal year 2006.

(d) Distribution of payments in California

The following payments shall be distributed among the eligible counties in the State of California in the same proportion that payments under section 102(a)(2) ¹ (as in effect on September 29, 2006) were distributed to the eligible counties for fiscal year 2006:

(1) Payments to the State of California under subsection (b).

(2) The shares of the eligible counties of the State payment for California under section 7112 of this title for each of fiscal years 2011 through 2015.

(e) Treatment of payments

For purposes of this chapter, any payment made under subsection (b) shall be considered to be a payment

made under section 7112(a) of this title.

(Pub. L. 106–393, title I, §103, as added Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3899; amended Pub. L. 112–141, *div. F, title I, §100101(a)(4), July 6, 2012*, 126 Stat. 906; Pub. L. 113–40, §10(a)(1)(C), *Oct. 2, 2013*, 127 Stat. 545; Pub. L. 114–10, *title V, §524(a)(4), Apr. 16, 2015*, 129 Stat. 179.)

REFERENCES IN TEXT

Sections 102(a)(2) and 103(a)(2) (as in effect on September 29, 2006), referred to in subsecs. (a) (1) and (d), mean former sections 102(a)(2) and 103(a)(2), respectively, of Pub. L. 106–393, which were set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3893. See Prior Provisions notes set out below and under section 7112 of this title.

This chapter, referred to in subsec. (e), was in the original "this Act", meaning Pub. L. 106–393, *Oct. 30, 2000*, 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

PRIOR PROVISIONS

A prior section 103 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3893.

AMENDMENTS

2015—Subsec. (d)(2). Pub. L. 114–10 substituted "2015" for "2013".

2013—Subsec. (d)(2). Pub. L. 113–40 substituted "through 2013" for "and 2012".

2012—Subsec. (d)(2). Pub. L. 112–141 substituted "each of fiscal years 2011 and 2012" for "fiscal year 2011".

¹ See References in Text note below.

SUBCHAPTER II—SPECIAL PROJECTS ON FEDERAL LAND

§7121. Definitions

In this subchapter:

(1) Participating county

The term "participating county" means an eligible county that elects under section 7112(d) of this title to expend a portion of the Federal funds received under section 7112 of this title in accordance with this subchapter.

(2) Project funds

The term "project funds" means all funds an eligible county elects under section 7112(d) of this title to reserve for expenditure in accordance with this subchapter.

(3) Resource advisory committee

The term "resource advisory committee" means—

(A) an advisory committee established by the Secretary concerned under section 7125 of this title; or

(B) an advisory committee determined by the Secretary concerned to meet the requirements of section 7125 of this title.

(4) Resource management plan

The term "resource management plan" means—

(A) a land use plan prepared by the Bureau of Land Management for units of the Federal land described in section 7102(7)(B) of this title pursuant to section 1712 of title 43; or

(B) a land and resource management plan prepared by the Forest Service for units of the National Forest System pursuant to section 1604 of this title.

(Pub. L. 106–393, title II, §201, as added Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat.

3900.)

PRIOR PROVISIONS

A prior section 201 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3893.

§7122. General limitation on use of project funds

(a) Limitation

Project funds shall be expended solely on projects that meet the requirements of this subchapter.

(b) Authorized uses

Project funds may be used by the Secretary concerned for the purpose of entering into and implementing cooperative agreements with willing Federal agencies, State and local governments, private and nonprofit entities, and landowners for protection, restoration, and enhancement of fish and wildlife habitat, and other resource objectives consistent with the purposes of this chapter on Federal land and on non-Federal land where projects would benefit the resources on Federal land.

(c) Administrative expenses

A resource advisory committee may, in accordance with section 7123 of this title, propose to use not more than 10 percent of the project funds of an eligible county for any fiscal year for administrative expenses associated with operating the resource advisory committee under this subchapter.

(Pub. L. 106–393, title II, §202, as added Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3901; amended Pub. L. 112–141, [div. F, title I, §100101\(a\)\(5\), July 6, 2012](#), 126 Stat. 906.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 106–393, [Oct. 30, 2000](#), 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

PRIOR PROVISIONS

A prior section 202 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3893.

AMENDMENTS

2012—Subsec. (c). Pub. L. 112–141 added subsec. (c).

§7123. Submission of project proposals

(a) Submission of project proposals to Secretary concerned

(1) Projects funded using project funds

Not later than September 30 of each fiscal year (or a later date specified by the Secretary concerned for the fiscal year), each resource advisory committee shall submit to the Secretary concerned a description of any projects that the resource advisory committee proposes the Secretary undertake using any project funds reserved by eligible counties in the area in which the resource advisory committee has geographic jurisdiction.

(2) Projects funded using other funds

A resource advisory committee may submit to the Secretary concerned a description of any projects that the committee proposes the Secretary undertake using funds from State or local governments, or from the private sector, other than project funds and funds appropriated and otherwise available to do similar work.

(3) Joint projects

Participating counties or other persons may propose to pool project funds or other funds, described in paragraph (2), and jointly propose a project or group of projects to a resource advisory committee established under section 7125 of this title.

(b) Required description of projects

In submitting proposed projects to the Secretary concerned under subsection (a), a resource advisory committee shall include in the description of each proposed project the following information:

- (1) The purpose of the project and a description of how the project will meet the purposes of this subchapter.
- (2) The anticipated duration of the project.
- (3) The anticipated cost of the project.
- (4) The proposed source of funding for the project, whether project funds or other funds.
- (5)(A) Expected outcomes, including how the project will meet or exceed desired ecological conditions, maintenance objectives, or stewardship objectives.
- (B) An estimate of the amount of any timber, forage, and other commodities and other economic activity, including jobs generated, if any, anticipated as part of the project.
- (6) A detailed monitoring plan, including funding needs and sources, that—
 - (A) tracks and identifies the positive or negative impacts of the project, implementation,¹ and provides for validation monitoring; and
 - (B) includes an assessment of the following:
 - (i) Whether or not the project met or exceeded desired ecological conditions; created local employment or training opportunities, including summer youth jobs programs such as the Youth Conservation Corps where appropriate.
 - (ii) Whether the project improved the use of, or added value to, any products removed from land consistent with the purposes of this subchapter.
- (7) An assessment that the project is to be in the public interest.

(c) Authorized projects

Projects proposed under subsection (a) shall be consistent with section 7101 of this title.

(Pub. L. 106–393, title II, §203, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3901; amended Pub. L. 112–141, div. F, title I, §100101(a)(2), July 6, 2012, 126 Stat. 905; Pub. L. 113–40, §10(a)(2)(A), Oct. 2, 2013, 127 Stat. 545; Pub. L. 114–10, title V, §524(c)(1), Apr. 16, 2015, 129 Stat. 180.)

PRIOR PROVISIONS

A prior section 203 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2015—Subsec. (a)(1). Pub. L. 114–10 substituted "September 30 of each fiscal year (or a later date specified by the Secretary concerned for the fiscal year)" for "September 30 for fiscal year 2008 (or as soon thereafter as the Secretary concerned determines is practicable), and each September 30 thereafter for each succeeding fiscal year through fiscal year 2013".

2013—Subsec. (a)(1). Pub. L. 113–40 substituted "2013" for "2012".

2012—Subsec. (a)(1). Pub. L. 112–141 substituted "2012" for "2011".

¹ So in original.

§7124. Evaluation and approval of projects by Secretary concerned**(a) Conditions for approval of proposed project**

The Secretary concerned may make a decision to approve a project submitted by a resource advisory committee under section 7123 of this title only if the proposed project satisfies each of the following conditions:

- (1) The project complies with all applicable Federal laws (including regulations).
- (2) The project is consistent with the applicable resource management plan and with any watershed or subsequent plan developed pursuant to the resource management plan and approved by the Secretary concerned.
- (3) The project has been approved by the resource advisory committee in accordance with section 7125 of this title, including the procedures issued under subsection (e) of that section.
- (4) A project description has been submitted by the resource advisory committee to the Secretary

concerned in accordance with section 7123 of this title.

(5) The project will improve the maintenance of existing infrastructure, implement stewardship objectives that enhance forest ecosystems, and restore and improve land health and water quality.

(b) Environmental reviews

(1) Request for payment by county

The Secretary concerned may request the resource advisory committee submitting a proposed project to agree to the use of project funds to pay for any environmental review, consultation, or compliance with applicable environmental laws required in connection with the project.

(2) Conduct of environmental review

If a payment is requested under paragraph (1) and the resource advisory committee agrees to the expenditure of funds for this purpose, the Secretary concerned shall conduct environmental review, consultation, or other compliance responsibilities in accordance with Federal laws (including regulations).

(3) Effect of refusal to pay

(A) In general

If a resource advisory committee does not agree to the expenditure of funds under paragraph (1), the project shall be deemed withdrawn from further consideration by the Secretary concerned pursuant to this subchapter.

(B) Effect of withdrawal

A withdrawal under subparagraph (A) shall be deemed to be a rejection of the project for purposes of section 7127(c) of this title.

(c) Decisions of Secretary concerned

(1) Rejection of projects

(A) In general

A decision by the Secretary concerned to reject a proposed project shall be at the sole discretion of the Secretary concerned.

(B) No administrative appeal or judicial review

Notwithstanding any other provision of law, a decision by the Secretary concerned to reject a proposed project shall not be subject to administrative appeal or judicial review.

(C) Notice of rejection

Not later than 30 days after the date on which the Secretary concerned makes the rejection decision, the Secretary concerned shall notify in writing the resource advisory committee that submitted the proposed project of the rejection and the reasons for rejection.

(2) Notice of project approval

The Secretary concerned shall publish in the Federal Register notice of each project approved under subsection (a) if the notice would be required had the project originated with the Secretary.

(d) Source and conduct of project

Once the Secretary concerned accepts a project for review under section 7123 of this title, the acceptance shall be deemed a Federal action for all purposes.

(e) Implementation of approved projects

(1) Cooperation

Notwithstanding chapter 63 of title 31, using project funds the Secretary concerned may enter into contracts, grants, and cooperative agreements with States and local governments, private and nonprofit entities, and landowners and other persons to assist the Secretary in carrying out an approved project.

(2) Best value contracting

(A) In general

For any project involving a contract authorized by paragraph (1) the Secretary concerned may elect a source for performance of the contract on a best value basis.

(B) Factors

The Secretary concerned shall determine best value based on such factors as—

(i) the technical demands and complexity of the work to be done;

- (ii)(I) the ecological objectives of the project; and
- (II) the sensitivity of the resources being treated;
- (iii) the past experience by the contractor with the type of work being done, using the type of equipment proposed for the project, and meeting or exceeding desired ecological conditions; and
- (iv) the commitment of the contractor to hiring highly qualified workers and local residents.

(3) Merchantable timber contracting pilot program

(A) Establishment

The Secretary concerned shall establish a pilot program to implement a certain percentage of approved projects involving the sale of merchantable timber using separate contracts for—

- (i) the harvesting or collection of merchantable timber; and
- (ii) the sale of the timber.

(B) Annual percentages

Under the pilot program, the Secretary concerned shall ensure that, on a nationwide basis, not less than the following percentage of all approved projects involving the sale of merchantable timber are implemented using separate contracts:

- (i) For fiscal year 2008, 35 percent.
- (ii) For fiscal year 2009, 45 percent.
- (iii) For fiscal year 2010 and fiscal years thereafter, 50 percent.

(C) Inclusion in pilot program

The decision whether to use separate contracts to implement a project involving the sale of merchantable timber shall be made by the Secretary concerned after the approval of the project under this subchapter.

(D) Assistance

(i) In general

The Secretary concerned may use funds from any appropriated account available to the Secretary for the Federal land to assist in the administration of projects conducted under the pilot program.

(ii) Maximum amount of assistance

The total amount obligated under this subparagraph may not exceed \$1,000,000 for any fiscal year during which the pilot program is in effect.

(E) Review and report

(i) Initial report

Not later than September 30, 2010, the Comptroller General shall submit to the Committees on Agriculture, Nutrition, and Forestry and Energy and Natural Resources of the Senate and the Committees on Agriculture and Natural Resources of the House of Representatives a report assessing the pilot program.

(ii) Annual report

The Secretary concerned shall submit to the Committees on Agriculture, Nutrition, and Forestry and Energy and Natural Resources of the Senate and the Committees on Agriculture and Natural Resources of the House of Representatives an annual report describing the results of the pilot program.

(f) Requirements for project funds

The Secretary shall ensure that at least 50 percent of all project funds be used for projects that are primarily dedicated—

- (1) to road maintenance, decommissioning, or obliteration; or
- (2) to restoration of streams and watersheds.

(Pub. L. 106–393, title II, §204, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3902; amended Pub. L. 112–141, div. F, title I, §100101(a)(6), July 6, 2012, 126 Stat. 906; Pub. L. 113–40, §10(a)(2)(B), Oct. 2, 2013, 127 Stat. 545; Pub. L. 114–10, title V, §524(c)(2), Apr. 16, 2015, 129 Stat. 180.)

PRIOR PROVISIONS

A prior section 204 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2015—Subsec. (e)(3)(B)(iii). Pub. L. 114–10 substituted "fiscal year 2010 and fiscal years thereafter" for "each of fiscal years 2010 through 2013".

2013—Subsec. (e)(3)(B)(iii). Pub. L. 113–40 substituted "2013" for "2012".

2012—Subsec. (e)(3)(B)(iii). Pub. L. 112–141 substituted "through 2012" for "and 2011".

§7125. Resource advisory committees

(a) Establishment and purpose of resource advisory committees

(1) Establishment

The Secretary concerned shall establish and maintain resource advisory committees to perform the duties in subsection (b), except as provided in paragraph (4).

(2) Purpose

The purpose of a resource advisory committee shall be—

(A) to improve collaborative relationships; and

(B) to provide advice and recommendations to the land management agencies consistent with the purposes of this subchapter.

(3) Access to resource advisory committees

To ensure that each unit of Federal land has access to a resource advisory committee, and that there is sufficient interest in participation on a committee to ensure that membership can be balanced in terms of the points of view represented and the functions to be performed, the Secretary concerned may,¹ establish resource advisory committees for part of, or 1 or more, units of Federal land.

(4) Existing advisory committees

(A) In general

An advisory committee that meets the requirements of this section, a resource advisory committee established before September 29, 2012, or an advisory committee determined by the Secretary concerned before September 29, 2012, to meet the requirements of this section may be deemed by the Secretary concerned to be a resource advisory committee for the purposes of this subchapter.

(B) Charter

A charter for a committee described in subparagraph (A) that was filed on or before September 29, 2012, shall be considered to be filed for purposes of this chapter.

(C) Bureau of land management advisory committees

The Secretary of the Interior may deem a resource advisory committee meeting the requirements of subpart 1784 of part 1780 of title 43, Code of Federal Regulations, as a resource advisory committee for the purposes of this subchapter.

(b) Duties

A resource advisory committee shall—

(1) review projects proposed under this subchapter by participating counties and other persons;

(2) propose projects and funding to the Secretary concerned under section 7123 of this title;

(3) provide early and continuous coordination with appropriate land management agency officials in recommending projects consistent with purposes of this chapter under this subchapter;

(4) provide frequent opportunities for citizens, organizations, tribes, land management agencies, and other interested parties to participate openly and meaningfully, beginning at the early stages of the project development process under this subchapter;

(5)(A) monitor projects that have been approved under section 7124 of this title; and

(B) advise the designated Federal official on the progress of the monitoring efforts under subparagraph (A); and

(6) make recommendations to the Secretary concerned for any appropriate changes or adjustments to the projects being monitored by the resource advisory committee.

(c) Appointment by the Secretary

(1) Appointment and term

(A) In general

The Secretary concerned,¹ shall appoint the members of resource advisory committees for a term of 4

years beginning on the date of appointment.

(B) Reappointment

The Secretary concerned may reappoint members to subsequent 4-year terms.

(2) Basic requirements

The Secretary concerned shall ensure that each resource advisory committee established meets the requirements of subsection (d).

(3) Initial appointment

Not later than 180 days after October 3, 2008, the Secretary concerned shall make initial appointments to the resource advisory committees.

(4) Vacancies

The Secretary concerned shall make appointments to fill vacancies on any resource advisory committee as soon as practicable after the vacancy has occurred.

(5) Compensation

Members of the resource advisory committees shall not receive any compensation.

(d) Composition of advisory committee

(1) Number

Each resource advisory committee shall be comprised of 15 members.

(2) Community interests represented

Committee members shall be representative of the interests of the following 3 categories:

(A) 5 persons that—

- (i) represent organized labor or non-timber forest product harvester groups;
- (ii) represent developed outdoor recreation, off highway vehicle users, or commercial recreation activities;
- (iii) represent—
 - (I) energy and mineral development interests; or
 - (II) commercial or recreational fishing interests;
- (iv) represent the commercial timber industry; or
- (v) hold Federal grazing or other land use permits, or represent nonindustrial private forest land owners, within the area for which the committee is organized.

(B) 5 persons that represent—

- (i) nationally recognized environmental organizations;
- (ii) regionally or locally recognized environmental organizations;
- (iii) dispersed recreational activities;
- (iv) archaeological and historical interests; or
- (v) nationally or regionally recognized wild horse and burro interest groups, wildlife or hunting organizations, or watershed associations.

(C) 5 persons that—

- (i) hold State elected office (or a designee);
- (ii) hold county or local elected office;
- (iii) represent American Indian tribes within or adjacent to the area for which the committee is organized;
- (iv) are school officials or teachers; or
- (v) represent the affected public at large.

(3) Balanced representation

In appointing committee members from the 3 categories in paragraph (2), the Secretary concerned shall provide for balanced and broad representation from within each category.

(4) Geographic distribution

The members of a resource advisory committee shall reside within the State in which the committee has jurisdiction and, to extent ²/₂ practicable, the Secretary concerned shall ensure local representation in each category in paragraph (2).

(5) Chairperson

A majority on each resource advisory committee shall select the chairperson of the committee.

(e) Approval procedures**(1) In general**

Subject to paragraph (3), each resource advisory committee shall establish procedures for proposing projects to the Secretary concerned under this subchapter.

(2) Quorum

A quorum must be present to constitute an official meeting of the committee.

(3) Approval by majority of members

A project may be proposed by a resource advisory committee to the Secretary concerned under section 7123(a) of this title, if the project has been approved by a majority of members of the committee from each of the 3 categories in subsection (d)(2).

(f) Other committee authorities and requirements**(1) Staff assistance**

A resource advisory committee may submit to the Secretary concerned a request for periodic staff assistance from Federal employees under the jurisdiction of the Secretary.

(2) Meetings

All meetings of a resource advisory committee shall be announced at least 1 week in advance in a local newspaper of record and shall be open to the public.

(3) Records

A resource advisory committee shall maintain records of the meetings of the committee and make the records available for public inspection.

(Pub. L. 106–393, title II, §205, as added Pub. L. 110–343, [div. C, title VI, §601\(a\)](#), [Oct. 3, 2008](#), 122 Stat. 3905; amended Pub. L. 112–141, [div. F, title I, §100101\(a\)\(7\)](#), [July 6, 2012](#), 126 Stat. 906; Pub. L. 113–40, [§10\(a\)\(2\)\(C\)](#), [Oct. 2, 2013](#), 127 Stat. 545.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(4)(B) and (b)(3), was in the original "this Act", meaning Pub. L. 106–393, [Oct. 30, 2000](#), 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

CODIFICATION

October 3, 2008, referred to in subsec. (c)(3), was in the original "the date of enactment of this Act", which was translated as meaning the date of enactment of Pub. L. 110–343, which enacted this section, to reflect the probable intent of Congress.

PRIOR PROVISIONS

A prior section 205 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\)](#), [Oct. 3, 2008](#), 122 Stat. 3893.

AMENDMENTS

2013—Subsec. (a)(4)(A), (B). Pub. L. 113–40 substituted "2012" for "2011" wherever appearing.

2012—Subsec. (a)(4)(A), (B). Pub. L. 112–141 substituted "2011" for "2006" wherever appearing.

¹ So in original. The comma probably should not appear.

² So in original. Probably should be preceded by "the".

§7126. Use of project funds

(a) Agreement regarding schedule and cost of project**(1) Agreement between parties**

The Secretary concerned may carry out a project submitted by a resource advisory committee under section 7123(a) of this title using project funds or other funds described in section 7123(a)(2) of this title, if, as soon as practicable after the issuance of a decision document for the project and the exhaustion of all administrative appeals and judicial review of the project decision, the Secretary concerned and the resource advisory committee enter into an agreement addressing, at a minimum, the following:

(A) The schedule for completing the project.

(B) The total cost of the project, including the level of agency overhead to be assessed against the project.

(C) For a multiyear project, the estimated cost of the project for each of the fiscal years in which it will be carried out.

(D) The remedies for failure of the Secretary concerned to comply with the terms of the agreement consistent with current Federal law.

(2) Limited use of Federal funds

The Secretary concerned may decide, at the sole discretion of the Secretary concerned, to cover the costs of a portion of an approved project using Federal funds appropriated or otherwise available to the Secretary for the same purposes as the project.

(b) Transfer of project funds**(1) Initial transfer required**

As soon as practicable after the agreement is reached under subsection (a) with regard to a project to be funded in whole or in part using project funds, or other funds described in section 7123(a)(2) of this title, the Secretary concerned shall transfer to the applicable unit of National Forest System land or Bureau of Land Management District an amount of project funds equal to—

(A) in the case of a project to be completed in a single fiscal year, the total amount specified in the agreement to be paid using project funds, or other funds described in section 7123(a)(2) of this title; or

(B) in the case of a multiyear project, the amount specified in the agreement to be paid using project funds, or other funds described in section 7123(a)(2) of this title for the first fiscal year.

(2) Condition on project commencement

The unit of National Forest System land or Bureau of Land Management District concerned,¹ shall not commence a project until the project funds, or other funds described in section 7123(a)(2) of this title required to be transferred under paragraph (1) for the project, have been made available by the Secretary concerned.

(3) Subsequent transfers for multiyear projects**(A) In general**

For the second and subsequent fiscal years of a multiyear project to be funded in whole or in part using project funds, the unit of National Forest System land or Bureau of Land Management District concerned shall use the amount of project funds required to continue the project in that fiscal year according to the agreement entered into under subsection (a).

(B) Suspension of work

The Secretary concerned shall suspend work on the project if the project funds required by the agreement in the second and subsequent fiscal years are not available.

(Pub. L. 106–393, title II, §206, as added Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3907.)

PRIOR PROVISIONS

A prior section 206 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, *div. C, title VI, §601(a), Oct. 3, 2008*, 122 Stat. 3893.

¹ So in original. The comma probably should not appear.

§7127. Availability of project funds

(a) Submission of proposed projects to obligate funds

By September 30 of each fiscal year (or a later date specified by the Secretary concerned for the fiscal year), a resource advisory committee shall submit to the Secretary concerned pursuant to section 7123(a)(1) of this title a sufficient number of project proposals that, if approved, would result in the obligation of at least the full amount of the project funds reserved by the participating county in the preceding fiscal year.

(b) Use or transfer of unobligated funds

Subject to section 7128 of this title, if a resource advisory committee fails to comply with subsection (a) for a fiscal year, any project funds reserved by the participating county in the preceding fiscal year and remaining unobligated shall be available for use as part of the project submissions in the next fiscal year.

(c) Effect of rejection of projects

Subject to section 7128 of this title, any project funds reserved by a participating county in the preceding fiscal year that are unobligated at the end of a fiscal year because the Secretary concerned has rejected one or more proposed projects shall be available for use as part of the project submissions in the next fiscal year.

(d) Effect of court orders**(1) In general**

If an approved project under this chapter is enjoined or prohibited by a Federal court, the Secretary concerned shall return the unobligated project funds related to the project to the participating county or counties that reserved the funds.

(2) Expenditure of funds

The returned funds shall be available for the county to expend in the same manner as the funds reserved by the county under subparagraph (B) or (C)(i) of section 7112(d)(1) of this title.

(Pub. L. 106–393, title II, §207, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3908; amended Pub. L. 112–141, div. F, title I, §100101(a)(2), July 6, 2012, 126 Stat. 905; Pub. L. 113–40, §10(a)(2)(D), Oct. 2, 2013, 127 Stat. 545; Pub. L. 114–10, title V, §524(c)(3), Apr. 16, 2015, 129 Stat. 180.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (d)(1), was in the original "this Act", meaning Pub. L. 106–393, Oct. 30, 2000, 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

PRIOR PROVISIONS

A prior section 207 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2015—Subsec. (a). Pub. L. 114–10 substituted "September 30 of each fiscal year (or a later date specified by the Secretary concerned for the fiscal year)" for "September 30, 2008 (or as soon thereafter as the Secretary concerned determines is practicable), and each September 30 thereafter for each succeeding fiscal year through fiscal year 2013".

2013—Subsec. (a). Pub. L. 113–40 substituted "2013" for "2012".

2012—Subsec. (a). Pub. L. 112–141 substituted "2012" for "2011".

§7128. Termination of authority**(a) In general**

The authority to initiate projects under this subchapter shall terminate on September 30, 2017.

(b) Deposits in Treasury

Any project funds not obligated by September 30, 2018, shall be deposited in the Treasury of the United States.

(Pub. L. 106–393, title II, §208, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3909; amended Pub. L. 112–141, div. F, title I, §100101(a)(2), (8), July 6, 2012, 126 Stat. 905, 906; Pub. L. 113–40, §10(a)(2)(E), Oct. 2, 2013, 127 Stat. 545; Pub. L. 114–10, title V, §524(c)(4), Apr. 16, 2015, 129 Stat.

180.)

PRIOR PROVISIONS

A prior section 208 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3893.

AMENDMENTS

2015—Subsec. (a). Pub. L. 114–10, §524(c)(4)(A), substituted "2017" for "2013".

Subsec. (b). Pub. L. 114–10, §524(c)(4)(B), substituted "2018" for "2014".

2013—Subsec. (a). Pub. L. 113–40, §10(a)(2)(E)(i), substituted "2013" for "2012".

Subsec. (b). Pub. L. 113–40, §10(a)(2)(E)(ii), substituted "2014" for "2013".

2012—Subsec. (a). Pub. L. 112–141, §100101(a)(2), substituted "2012" for "2011".

Subsec. (b). Pub. L. 112–141, §100101(a)(8), substituted "2013" for "2012".

SUBCHAPTER III—COUNTY FUNDS

§7141. Definitions

In this subchapter:

(1) County funds

The term "county funds" means all funds an eligible county elects under section 7112(d) of this title to reserve for expenditure in accordance with this subchapter.

(2) Participating county

The term "participating county" means an eligible county that elects under section 7112(d) of this title to expend a portion of the Federal funds received under section 7112 of this title in accordance with this subchapter.

(Pub. L. 106–393, title III, §301, as added Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3909.)

PRIOR PROVISIONS

A prior section 301 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3893.

§7142. Use

(a) Authorized uses

A participating county, including any applicable agencies of the participating county, shall use county funds, in accordance with this subchapter, only—

(1) to carry out activities under the Firewise Communities program to provide to homeowners in fire-sensitive ecosystems education on, and assistance with implementing, techniques in home siting, home construction, and home landscaping that can increase the protection of people and property from wildfires;

(2) to reimburse the participating county for search and rescue and other emergency services, including firefighting, that are—

- (A) performed on Federal land after the date on which the use was approved under subsection (b); and
- (B) paid for by the participating county; and

(3) to develop community wildfire protection plans in coordination with the appropriate Secretary concerned.

(b) Proposals

A participating county shall use county funds for a use described in subsection (a) only after a 45-day public comment period, at the beginning of which the participating county shall—

- (1) publish in any publications of local record a proposal that describes the proposed use of the county

funds; and

(2) submit the proposal to any resource advisory committee established under section 7125 of this title for the participating county.

(Pub. L. 106–393, title III, §302, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3909; amended Pub. L. 112–141, div. F, title I, §100101(a)(9), July 6, 2012, 126 Stat. 906.)

PRIOR PROVISIONS

A prior section 302 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

AMENDMENTS

2012—Subsec. (a)(2)(A). Pub. L. 112–141 inserted "and" at end.

§7143. Certification

(a) In general

Not later than February 1 of the year after the year in which any county funds were expended by a participating county, the appropriate official of the participating county shall submit to the Secretary concerned a certification that the county funds expended in the applicable year have been used for the uses authorized under section 7142(a) of this title, including a description of the amounts expended and the uses for which the amounts were expended.

(b) Review

The Secretary concerned shall review the certifications submitted under subsection (a) as the Secretary concerned determines to be appropriate.

(Pub. L. 106–393, title III, §303, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3910.)

PRIOR PROVISIONS

A prior section 303 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

§7144. Termination of authority

(a) In general

The authority to initiate projects under this subchapter terminates on September 30, 2017.

(b) Availability

Any county funds not obligated by September 30, 2018, shall be returned to the Treasury of the United States.

(Pub. L. 106–393, title III, §304, as added Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3910; amended Pub. L. 112–141, div. F, title I, §100101(a)(2), (10), July 6, 2012, 126 Stat. 905, 906; Pub. L. 113–40, §10(a)(3), Oct. 2, 2013, 127 Stat. 545; Pub. L. 114–10, title V, §524(d), Apr. 16, 2015, 129 Stat. 180.)

AMENDMENTS

2015—Subsec. (a). Pub. L. 114–10, §524(d)(1), substituted "2017" for "2013".

Subsec. (b). Pub. L. 114–10, §524(d)(2), substituted "2018" for "2014".

2013—Subsec. (a). Pub. L. 113–40, §10(a)(3)(A), substituted "2013" for "2012".

Subsec. (b). Pub. L. 113–40, §10(a)(3)(B), substituted "2014" for "2013".

2012—Subsec. (a). Pub. L. 112–141, §100101(a)(2), substituted "2012" for "2011".

Subsec. (b). Pub. L. 112–141, §100101(a)(10), substituted "2013" for "2012".

SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

§7151. Regulations

The Secretary of Agriculture and the Secretary of the Interior shall issue regulations to carry out the purposes of this chapter.

(Pub. L. 106–393, title IV, §401, as added Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3910.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 106–393, [Oct. 30, 2000](#), 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

PRIOR PROVISIONS

A prior section 401 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3893.

§7152. Authorization of appropriations

There are authorized to be appropriated such sums as are necessary to carry out this chapter.

(Pub. L. 106–393, title IV, §402, as added Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3910; amended Pub. L. 112–141, [div. F, title I, §100101\(a\)\(2\), July 6, 2012](#), 126 Stat. 905; Pub. L. 113–40, [§10\(a\)\(4\), Oct. 2, 2013](#), 127 Stat. 545; Pub. L. 114–10, [title V, §524\(e\), Apr. 16, 2015](#), 129 Stat. 180.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 106–393, [Oct. 30, 2000](#), 114 Stat. 1607, known as the Secure Rural Schools and Community Self-Determination Act of 2000, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

PRIOR PROVISIONS

A prior section 402 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to repeal by Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3893.

AMENDMENTS

2015—Pub. L. 114–10 struck out before period at end "for each of fiscal years 2008 through 2013".

2013—Pub. L. 113–40 substituted "2013" for "2012".

2012—Pub. L. 112–141 substituted "2012" for "2011".

§7153. Treatment of funds and revenues

(a) Relation to other appropriations

Funds made available under section 7152 of this title and funds made available to a Secretary concerned under section 7126 of this title shall be in addition to any other annual appropriations for the Forest Service and the Bureau of Land Management.

(b) Deposit of revenues and other funds

All revenues generated from projects pursuant to subchapter II, including any interest accrued from the revenues, shall be deposited in the Treasury of the United States.

(Pub. L. 106–393, title IV, §403, as added Pub. L. 110–343, [div. C, title VI, §601\(a\), Oct. 3, 2008](#), 122 Stat. 3910.)

PRIOR PROVISIONS

A prior section 403 of Pub. L. 106–393 was set out in a note under section 500 of this title prior to

repeal by Pub. L. 110–343, div. C, title VI, §601(a), Oct. 3, 2008, 122 Stat. 3893.

16 USC CHAPTER 1, SUBCHAPTER LXIX, Part B: Land and Water Conservation Fund**From Title 16—CONSERVATION**

CHAPTER 1—NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES
 SUBCHAPTER LXIX—OUTDOOR RECREATION PROGRAMS

PART B—LAND AND WATER CONSERVATION FUND**§460/-4. Transferred****CODIFICATION**

Section, Pub. L. 88-578, [title I, §1\(b\), Sept. 3, 1964](#), 78 Stat. 897, which stated purposes of Pub. L. 88-578, was transferred and is set out as a note under section 100101 of Title 54, National Park Service and Related Programs.

§460/-5. Repealed. Pub. L. 113-287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, [Pub. L. 88-578, title I, §2, Sept. 3, 1964](#), 78 Stat. 897; Pub. L. 89-72, [§11, July 9, 1965](#), 79 Stat. 218; Pub. L. 90-401, [§§1\(a\), 2, July 15, 1968](#), 82 Stat. 354, 355; Pub. L. 91-308, [§2, July 7, 1970](#), 84 Stat. 410; Pub. L. 91-485, [§1, Oct. 22, 1970](#), 84 Stat. 1084; Pub. L. 94-273, [§2\(7\), Apr. 21, 1976](#), 90 Stat. 375; Pub. L. 94-422, [title I, §101\(1\), Sept. 28, 1976](#), 90 Stat. 1313; Pub. L. 95-42, [§1\(1\), June 10, 1977](#), 91 Stat. 210; Pub. L. 100-203, [title V, §5201\(f\)\(1\), Dec. 22, 1987](#), 101 Stat. 1330-267, related to establishment of land and water conservation fund. See section 200302 of Title 54, National Park Service and Related Programs.

§460/-5a. Repealed. Pub. L. 100-203, title V, §5201(d)(1), Dec. 22, 1987, 101 Stat. 1330-266

Section, Pub. L. 96-514, [title I, §100, Dec. 12, 1980](#), 94 Stat. 2960, provided for revenues received from recreation fee collections by Federal agencies to be paid into the Land and Water Conservation Fund and to be available for appropriation for any and all authorized purposes.

RECREATION USE FEES COLLECTED AND DEPOSITED IN UNITED STATES TREASURY BY CORPS OF ENGINEERS

Pub. L. 97-88, [title I, §100, Dec. 4, 1981](#), 95 Stat. 1136, related to special recreation use fees collected by, and deposited in the Treasury by the Corps of Engineers, prior to repeal by Pub. L. 100-203, [title V, §5201\(d\)\(3\), Dec. 22, 1987](#), 101 Stat. 1330-267.

§460/-6. Repealed. Pub. L. 113-287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88-578, [title I, §3, Sept. 3, 1964](#), 78 Stat. 899; Pub. L. 100-203, [title V, §5201\(f\)\(2\), Dec. 22, 1987](#), 101 Stat. 1330-267, related to appropriations for expenditure of land and water conservation fund moneys. See section 200303 of Title 54, National Park Service and Related Programs.

§460/-6a. Repealed. Pub. L. 113-287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88-578, [title I, §4](#), as added Pub. L. 92-347, [§2, July 11, 1972](#), 86 Stat. 459; amended Pub. L. 93-81, [§§1, 2, Aug. 1, 1973](#), 87 Stat. 178, 179; Pub. L. 93-303, [§1, June 7, 1974](#), 88

Stat. 192; Pub. L. 96–344, §9, Sept. 8, 1980, 94 Stat. 1135; Pub. L. 100–203, title V, §5201(a)–(c), Dec. 22, 1987, 101 Stat. 1330–263, 1330–264; Pub. L. 103–66, title V, §5001(b), title X, §§10001, 10002, Aug. 10, 1993, 107 Stat. 379, 402, 403; Pub. L. 103–437, §6(p)(1), Nov. 2, 1994, 108 Stat. 4586; Pub. L. 104–66, title I, §1081(f), Dec. 21, 1995, 109 Stat. 721; Pub. L. 105–327, §1, Oct. 30, 1998, 112 Stat. 3055; Pub. L. 108–447, div. J, title VIII, §813(a), Dec. 8, 2004, 118 Stat. 3390; Pub. L. 109–54, title I, §132(a), (b), Aug. 2, 2005, 119 Stat. 526, related to admission and special recreation use fees. Subsecs. (a) to (h) and (i)(1)(A), (B), (2) to (4), which related to various fees and permits and reporting requirements, had been previously repealed. Subsecs. (i)(1)(C) and (j) to (n) were repealed and restated in section 100904 of Title 54, National Park Service and Related Programs.

§460/–6b. Repealed. Pub. L. 100–203, title V, §5201(d)(2), Dec. 22, 1987, 101 Stat. 1330–267

Section, Pub. L. 96–87, title IV, §402, Oct. 12, 1979, 93 Stat. 666; Pub. L. 96–487, title II, §202(3)(a), Dec. 2, 1980, 94 Stat. 2382, prohibited entrance or admission fees in excess of amounts in effect Jan. 1, 1979, at any unit of National Park System and user fees for transportation services and facilities in Denali National Park, Alaska.

§460/–6c. Admission, entrance, and recreation fees

(a) Definitions

As used in this section:

(1) Area of concentrated public use

The term "area of concentrated public use" means an area administered by the Secretary that meets each of the following criteria:

- (A) The area is managed primarily for outdoor recreation purposes.
- (B) Facilities and services necessary to accommodate heavy public use are provided in the area.
- (C) The area contains at least 1 major recreation attraction.
- (D) Public access to the area is provided in such a manner that admission fees can be efficiently collected at 1 or more centralized locations.

(2) Boat launching facility

The term "boat launching facility" includes any boat launching facility, regardless of whether specialized facilities or services, such as mechanical or hydraulic boat lifts or facilities, are provided.

(3) Campground

The term "campground" means any campground where a majority of the following amenities are provided, as determined by the Secretary:

- (A) Tent or trailer spaces.
- (B) Drinking water.
- (C) An access road.
- (D) Refuse containers.
- (E) Toilet facilities.
- (F) The personal collection of recreation use fees by an employee or agent of the Secretary.
- (G) Reasonable visitor protection.
- (H) If campfires are permitted in the campground, simple devices for containing the fires.

(4) Secretary

The term "Secretary" means the Secretary of Agriculture.

(b) Authority to impose fees

The Secretary may charge—

- (1) admission or entrance fees at national monuments, national volcanic monuments, national scenic areas, and areas of concentrated public use administered by the Secretary; and
- (2) recreation use fees at lands administered by the Secretary in connection with the use of specialized outdoor recreation sites, equipment, services, and facilities, including visitors' centers, picnic tables, boat launching facilities, and campgrounds.

(c) Amount of fees

The amount of the admission, entrance, and recreation fees authorized to be imposed under this section shall be determined by the Secretary.

(Pub. L. 103–66, [title I](#), [§1401](#), [Aug. 10, 1993](#), 107 Stat. 331.)

CODIFICATION

Section was enacted as part of the Agricultural Reconciliation Act of 1993 and as part of the Omnibus Budget Reconciliation Act of 1993, and not as part of the Land and Water Conservation Fund Act of 1965.

§460/–6d. Commercial filming

(a) Commercial filming fee

(1) In general

The Secretary of the Interior or the Secretary of Agriculture (hereafter individually referred to as the "Secretary" with respect to land (except land in a System unit as defined in section 100102 of title 54) under their respective jurisdictions) shall require a permit and shall establish a reasonable fee for commercial filming activities or similar projects on Federal land administered by the Secretary. The fee shall provide a fair return to the United States and shall be based on the following criteria:

- (A) The number of days the filming activity or similar project takes place on Federal land under the Secretary's jurisdiction.
- (B) The size of the film crew present on Federal land under the Secretary's jurisdiction.
- (C) The amount and type of equipment present.

(2) Other factors

The Secretary may include other factors in determining an appropriate fee as the Secretary considers necessary.

(b) Recovery of costs

The Secretary shall collect any costs incurred as a result of filming activities or similar project, including administrative and personnel costs. All costs recovered shall be in addition to the fee assessed in subsection (a).

(c) Still photography

(1) In general

Except as provided in paragraph (2), the Secretary shall not require a permit nor assess a fee for still photography on land administered by the Secretary if such photography takes place where members of the public are generally allowed. The Secretary may require a permit, fee, or both, if such photography takes place at other locations where members of the public are generally not allowed, or where additional administrative costs are likely.

(2) Exception

The Secretary shall require and shall establish a reasonable fee for still photography that uses models or props which are not a part of the site's natural or cultural resources or administrative facilities.

(d) Protection of resources

The Secretary shall not permit any filming, still photography or other related activity if the Secretary determines that—

- (1) there is a likelihood of resource damage;
- (2) there would be an unreasonable disruption of the public's use and enjoyment of the site; or
- (3) the activity poses health or safety risks to the public.

(e) Use of proceeds

(1) Fees

All fees collected under this section shall be available for expenditure by the Secretary, without further appropriation and shall remain available until expended.

(2) Costs

All costs recovered under this section shall be available for expenditure by the Secretary, without further appropriation, at the site where the costs are collected and shall remain available until expended.

(f) Processing of permit applications

The Secretary shall establish a process to ensure that the Secretary responds in a timely manner to permit applicants for commercial filming, still photography, or other activity.

(Pub. L. 106–206, §1, May 26, 2000, 114 Stat. 314; Pub. L. 113–287, §§4(c), 7, Dec. 19, 2014, 128 Stat. 3261, 3272.)

REPEALS

Section repealed by Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272, insofar as applicable to the National Park System. See section 100905 of Title 54, National Park Service and Related Programs.

CODIFICATION

Section was not enacted as part of the Land and Water Conservation Fund Act of 1965.

AMENDMENTS

2014—Pub. L. 113–287, §4(c), amended section generally. Prior to amendment, section related to commercial filming with respect to lands under the jurisdiction of the Secretaries of the Interior and Agriculture.

§460I–7. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §5, formerly §4, Sept. 3, 1964, 78 Stat. 900; Pub. L. 90–401, §3, July 15, 1968, 82 Stat. 355; renumbered §5, Pub. L. 92–347, §2, July 11, 1972, 86 Stat. 459; amended Pub. L. 94–273, §3(4), Apr. 21, 1976, 90 Stat. 376; Pub. L. 94–422, title I, §101(2), Sept. 28, 1976, 90 Stat. 1314; Pub. L. 95–42, §1(2), June 10, 1977, 91 Stat. 210, related to allocation of land and water conservation fund for State and Federal purposes. See section 200304 of Title 54, National Park Service and Related Programs.

A prior section 5 of Pub. L. 88–578 was renumbered section 6 and was classified to section 460I–8 of this title prior to repeal by Pub. L. 113–287.

§460I–8. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §6, formerly §5, Sept. 3, 1964, 78 Stat. 900; renumbered §6, Pub. L. 92–347, §2, July 11, 1972, 86 Stat. 459; amended Pub. L. 93–303, §2, June 7, 1974, 88 Stat. 194; Pub. L. 94–422, title I, §101(3), Sept. 28, 1976, 90 Stat. 1314; Pub. L. 95–625, title VI, §606, Nov. 10, 1978, 92 Stat. 3519; Pub. L. 99–645, title III, §303, Nov. 10, 1986, 100 Stat. 3587; Pub. L. 103–322, title IV, §40133, Sept. 13, 1994, 108 Stat. 1918; Pub. L. 103–437, §6(p)(2), Nov. 2, 1994, 108 Stat. 4586; Pub. L. 104–333, div. I, title VIII, §814(d)(1)(H), Nov. 12, 1996, 110 Stat. 4196, related to financial assistance to States. See sections 200301(2) and 200305 of Title 54, National Park Service and Related Programs.

A prior section 6 of Pub. L. 88–578 was renumbered section 7 and was classified to section 460I–9 of this title prior to repeal by Pub. L. 113–287.

§460I–9. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §7, formerly §6, Sept. 3, 1964, 78 Stat. 903; Pub. L. 90–401, §1(c), July 15, 1968, 82 Stat. 355; renumbered §7, Pub. L. 92–347, §2, July 11, 1972, 86 Stat. 459; amended Pub. L. 93–205, §13(c), Dec. 28, 1973, 87 Stat. 902; Pub. L. 94–422, title I, §101(4), Sept. 28, 1976, 90 Stat. 1317; Pub. L. 95–42, §1(3)–(5), June 10, 1977, 91 Stat. 210, 211; Pub. L. 96–203, §2, Mar. 10, 1980, 94 Stat. 81; Pub. L. 99–645, title III, §302, Nov. 10, 1986, 100 Stat. 3587; Pub. L. 103–437, §6(p)(3), Nov. 2, 1994, 108 Stat. 4586; Pub. L. 104–333, div. I, title VIII, §814(b), (d)(2)(C), Nov. 12, 1996, 110 Stat. 4194, 4196; Pub. L. 106–176, title I, §§120(b), 129, Mar. 10, 2000, 114 Stat. 28, 30, related to allocation of land and water conservation fund moneys for Federal purposes. See sections 100506(c) and 200306 of Title 54, National Park Service and Related Programs.

A prior section 7 of Pub. L. 88–578 was renumbered section 8 and was classified to section 460I–10 of this title prior to repeal by Pub. L. 113–287.

§460I–10. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, [title I, §8, formerly §7, Sept. 3, 1964](#), 78 Stat. 903; renumbered §8, Pub. L. 92–347, [§2, July 11, 1972](#), 86 Stat. 459; amended Pub. L. 94–422, [title I, §101\(5\), Sept. 28, 1976](#), 90 Stat. 1318, related to availability of land and water conservation fund for publicity purposes. See section 200307 of Title 54, National Park Service and Related Programs.

A prior section 8 of Pub. L. 88–578 was renumbered section 9 and was classified to section 460I–10a of this title prior to repeal by Pub. L. 113–287.

§460I–10a. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §9, formerly §8, as added Pub. L. 90–401, [§4, July 15, 1968](#), 82 Stat. 355; amended Pub. L. 91–308, [§3, July 7, 1970](#), 84 Stat. 410; renumbered §9, Pub. L. 92–347, [§2, July 11, 1972](#), 86 Stat. 459, and amended Pub. L. 93–303, [§3, June 7, 1974](#), 88 Stat. 194, related to contracts for acquisition of lands and waters. See section 200308 of Title 54, National Park Service and Related Programs.

A prior section 9 of Pub. L. 88–578 was renumbered section 10 and was classified to section 460I–10b of this title prior to repeal by Pub. L. 113–287.

§460I–10b. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §10, formerly §9, as added Pub. L. 90–401, [§4, July 15, 1968](#), 82 Stat. 355; renumbered §10, Pub. L. 92–347, [§2, July 11, 1972](#), 86 Stat. 459, related to contracts for options to acquire lands and waters in national park system. See section 200309 of Title 54, National Park Service and Related Programs.

A prior section 10 of Pub. L. 88–578 was renumbered section 11 and was classified to section 460I–10c of this title prior to repeal by Pub. L. 113–287.

§460I–10c. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, [title I, §11, formerly §2\(a\) \(in part\), Sept. 3, 1964](#), 78 Stat. 899; renumbered §10, Pub. L. 90–401, [§1\(a\), July 15, 1968](#), 82 Stat. 354; renumbered §11, Pub. L. 92–347, [§2, July 11, 1972](#), 86 Stat. 459, repealed provisions prohibiting collection of recreation fees or user charges.

§460I–10d. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §12, as added Pub. L. 94–422, [title I, §101\(6\), Sept. 28, 1976](#), 90 Stat. 1318, required review and report on the needs, problems, and opportunities associated with urban recreation in highly populated regions.

§460I–10e. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, title I, §13, as added Pub. L. 104–333, [div. I, title X, §1021\(b\), Nov. 12, 1996](#), 110 Stat. 4210; amended Pub. L. 105–83, [title V, §505, Nov. 14, 1997](#), 111 Stat. 1617; Pub. L. 106–176, [title I, §123\(b\), Mar. 10, 2000](#), 114 Stat. 29, related to an advisory commission on water-based recreation.

§460I–11. Repealed. Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272

Section, Pub. L. 88–578, [title II, §201, Sept. 3, 1964](#), 78 Stat. 904; Pub. L. 91–605, [title III, §302, Dec.](#)

31, 1970, 84 Stat. 1743; Pub. L. 94–273, §3(4), Apr. 21, 1976, 90 Stat. 376; Pub. L. 94–280, title III, §302, May 5, 1976, 90 Stat. 456; Pub. L. 95–599, title V, §503(b), Nov. 6, 1978, 92 Stat. 2757; Pub. L. 97–424, title V, §531(c), Jan. 6, 1983, 96 Stat. 2191; Pub. L. 99–514, §2, title XVIII, §1875(e), Oct. 22, 1986, 100 Stat. 2095, 2897; Pub. L. 100–17, title V, §503(c), Apr. 2, 1987, 101 Stat. 258; Pub. L. 101–508, title XI, §11211(g)(2), Nov. 5, 1990, 104 Stat. 1388–427; Pub. L. 102–240, title VIII, §8002(d)(2)(B), Dec. 18, 1991, 105 Stat. 2204; Pub. L. 105–178, title IX, §9002(c)(2)(B), June 9, 1998, 112 Stat. 500; Pub. L. 109–59, title XI, §11101(c)(2)(B), Aug. 10, 2005, 119 Stat. 1944; Pub. L. 112–30, title I, §142(e)(2)(B), Sept. 16, 2011, 125 Stat. 356; Pub. L. 112–102, title IV, §402(e)(2)(B), Mar. 30, 2012, 126 Stat. 282; Pub. L. 112–140, title IV, §402(d)(2)(B), June 29, 2012, 126 Stat. 403; Pub. L. 112–141, div. D, title I, §40102(e)(2)(B), July 6, 2012, 126 Stat. 845, related to transfers to and from land and water conservation fund. See section 200310 of Title 54, National Park Service and Related Programs.



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Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, *et al.*

Clean Water Rule: Definition of “Waters of the United States”; Final Rule

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 328****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401****[EPA-HQ-OW-2011-0880; FRL-9927-20-OW]****RIN 2040-AF30****Clean Water Rule: Definition of “Waters of the United States”**

AGENCY: U.S. Army Corps of Engineers, Department of the Army, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA or the Act), in light of the statute, science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States (Rapanos)*, and the agencies' experience and technical expertise. This final rule reflects consideration of the extensive public comments received on the proposed rule. The rule will ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of “waters of the United States” protected under the Act.

DATES: This rule is effective on August 28, 2015. In accordance with 40 CFR part 23, this regulation shall be considered issued for purposes of judicial review at 1 p.m. Eastern time on July 13, 2015.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202-566-2428; email address: CWAwaters@epa.gov v. Ms. Stacey Jensen, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number 202-761-5856; email address: USACE_CWA_Rule@usace.army.mil.

SUPPLEMENTARY INFORMATION: This final rule does not establish any regulatory

requirements. Instead, it is a definitional rule that clarifies the scope of “waters of the United States” consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and response programs, all rely on the definition of “waters of the United States.” Entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution and destruction.

State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as “waters of the United States” under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

Table of Contents

- I. General Information
 - A. How can I get copies of this document and related information?
 - B. Under what legal authority is this rule issued?
- II. Executive Summary
- III. Significant Nexus Determinations
 - A. The Significant Nexus Standard
 - B. Science Report
 - C. Significant Nexus Conclusions
 - 1. Scope of Significant Nexus Analysis
 - 2. Categories of Waters Determined to Have a Significant Nexus

- 3. Case-Specific Significant Nexus Determinations
- IV. Definition of “Waters of the United States”
 - A. Summary of Rule
 - B. Traditional Navigable Waters
 - C. Interstate Waters
 - D. Territorial Seas
 - E. Impoundments
 - F. Tributaries
 - G. Adjacent Waters
 - H. Case-Specific “Waters of the United States”
 - I. Waters and Features That Are Not “Waters of the United States”
- V. Economic Impacts
- VI. Related Acts of Congress, Executive Orders, and Agency Initiatives
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
 - K. Congressional Review Act
 - L. Environmental Documentation
 - M. Judicial Review

I. General Information**A. How can I get copies of this document and related information?**

1. *Docket.* An official public docket for this action has been established under Docket Id. No. EPA-HQ-OW-2011-0880. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The official public docket also includes a Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule, and the Response to Comments document. Although a part of the official docket, the public docket does not include Confidential Business Information or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m.

to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. **Electronic Access.** You may access this **Federal Register** document electronically under the “**Federal Register**” listings at <http://www.regulations.gov>. An electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at <http://www.regulations.gov> to view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. Under what legal authority is this rule issued?

The authority for this rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, including sections 301, 304, 311, 401, 402, 404 and 501.

II. Executive Summary

In this final rule, the agencies clarify the scope of “waters of the United States” that are protected under the Clean Water Act (CWA), based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience in implementing the statute. This rule makes the process of identifying waters¹ protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” section 101(a), and to complement statutes that protect the navigability of waters, such as the Rivers and Harbors Act. 33 U.S.C. 401,

403, 404, 407. The CWA is the nation’s single most important statute for protecting America’s clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies’ technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements only apply with respect to discharges of pollutants to the covered water. In the absence of a discharge of a pollutant, the CWA does not impose permitting restrictions on the use of such water.

Additionally, Congress has exempted certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of “waters of the United States” to make it clear that this rule does not add any additional permitting requirements on agriculture. The rule also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from

NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1); CWA section 402(l)(2); CWA section 502(14); 40 CFR 122.3(f); 40 CFR 122.2.

Finally, even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of covered ephemeral and intermittent tributaries jurisdictional under this rule to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The jurisdictional scope of the CWA is “navigable waters,” defined in section 502(7) of the statute as “waters of the United States, including the territorial seas.” The term “navigable waters” is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program,² the water quality standards and total maximum daily load programs (TMDL) under section 303, and the section 401 state water quality certification process. However, while there is only one CWA definition of “waters of the United States,” there may be other statutory factors that define the reach of a particular CWA program or provision.³

² While section 311 uses the phrase “navigable waters of the United States,” EPA has interpreted it to have the same breadth as the phrase “navigable waters” used elsewhere in section 311, and in other sections of the CWA. See *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324–25 (6th Cir. 1974). In 2002, EPA revised its regulatory definition of “waters of the United States” in 40 CFR part 112 to ensure that the language of the rule was consistent with the regulatory language of other CWA programs. *Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities*, 67 FR 47042, July 17, 2002. A district court vacated the rule for failure to comply with the Administrative Procedure Act, and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F. Supp. 2d 165 (D. D.C. 2008). However, EPA interprets “navigable waters of the United States” in CWA section 311(b), in the pre-2002 regulations, and in the 2002 rule to have the same meaning as “navigable waters” in CWA section 502(7).

³ For example, the CWA section 402 (33 U.S.C. 1342) program regulates discharges of pollutants

¹ The agencies use the term “water” and “waters” in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems, identifiable by the water contained in these aquatic systems or by their chemical, physical, and biological indicators. The agencies use the terms “waters” and “water bodies” interchangeably in this preamble.

Existing regulations (last codified in 1986) define “waters of the United States” as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 122.2.⁴

However, the Supreme Court has issued three decisions that provide critical context and guidance in determining the appropriate scope of “waters of the United States” covered by the CWA. In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” *Id.* at 134. The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation’s waters “incorporated a broad, systemic view of the goal of maintaining and improving water quality. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’ In keeping with these views, Congress chose to define the waters covered by the Act broadly.” *Id.* at 132–33 (citing Senate Report No. 92–414, p. 77 (1972)).

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the

exercise of federal regulatory authority under the CWA. Although the *SWANCC* decision did not call into question earlier decisions upholding the CWA’s coverage of wetlands or other waters “adjacent” to traditional navigable waters, it created uncertainty with regard to the jurisdiction of other waters and wetlands that, in many instances, may play an important role in protecting the integrity of the nation’s waters. The majority opinion in *SWANCC* introduced the concept that it was a “significant nexus” that informed the Court’s reading of CWA jurisdiction over waters that are not navigable in fact.

Five years later, in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), all Members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. In addition, Justice Kennedy’s opinion indicated that the critical factor in determining the CWA’s coverage is whether a water has a “significant nexus” to downstream traditional navigable waters such that the water is important to protecting the chemical, physical, or biological integrity of the navigable water, referring back to the Court’s decision in *SWANCC*. Justice Kennedy’s concurrence in *Rapanos* stated that to constitute a “water of the United States” covered by the CWA, “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC*, 531 U.S. at 167, 172). Justice Kennedy concluded that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780.

In this rule, the agencies interpret the scope of the “waters of the United States” for the CWA using the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience as support. In particular, the agencies looked to the objective of the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and the scientific consensus on the strength of the effects of upstream tributaries and adjacent waters, including wetlands, on downstream traditional navigable waters, interstate waters, and the

territorial seas. An important element of the agencies’ interpretation of the CWA is the significant nexus standard. This significant nexus standard was first informed by the ecological and hydrological connections the Supreme Court noted in *Riverside Bayview*, developed and established by the Supreme Court in *SWANCC*, and further refined in Justice Kennedy’s opinion in *Rapanos*. The agencies also utilized the plurality standard in *Rapanos* by establishing boundaries on the scope of “waters of the United States” and in support of the exclusions from the definition of “waters of the United States.” The analysis used by the agencies has been supported by all nine of the United States Courts of Appeals that have considered the issue.

The agencies assess the significance of the nexus in terms of the CWA’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” When the effects are speculative or insubstantial, the “significant nexus” would not be present. The science demonstrates that the protection of upstream waters is critical to maintaining the integrity of the downstream waters. The upstream waters identified in the rule as jurisdictional function as integral parts of the aquatic environment, and if these waters are polluted or destroyed, there is a significant effect downstream.

In response to the Supreme Court opinions, the agencies issued guidance in 2003 (post-*SWANCC*) and 2008 (post-*Rapanos*). However, these two guidance documents did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a “significant nexus” exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts’ concurrence in *Rapanos* underscores

from “point sources” to “waters of the United States,” whether these pollutants reach jurisdictional waters directly or indirectly. The plurality opinion in *Rapanos* noted that “there is no reason to suppose that our construction today significantly affects the enforcement of § 1342. . . . The Act does not forbid the ‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’” 547 U.S. at 743.

⁴ There are numerous regulations that utilize the definition of “waters of the United States” and each is codified consistent with its place in a particular section of the Code of Federal Regulations. For simplicity, throughout the preamble the agencies refer to the rule as organized into (a), (b), (c) provisions and intend the reference to encompass the appropriate cites in each section of the Code of Federal Regulations. For example, a reference to (a)(1) is a reference to all instances in the CFR identified as subject to this rule that state “All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”

the importance of this rulemaking effort.⁵ In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The agencies proposed a rule clarifying the scope of waters of the United States April 21, 2014 (79 FR 22188), and solicited comments for over 200 days. This final rule reflects the over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule, as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others. The agencies sought comment on a number of approaches to specific jurisdictional questions, and many of these commenters and stakeholders urged EPA to improve upon the April 2014 proposal, by providing more bright line boundaries and simplifying definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities.

The agencies' interpretation of the CWA's scope in this final rule is guided by the best available peer-reviewed science—particularly as that science informs the determinations as to which waters have a “significant nexus” with traditional navigable waters, interstate waters, or the territorial seas.

The relevant science on the relationship and downstream effects of waters has advanced considerably in recent years. A comprehensive report prepared by the EPA's Office of Research and Development entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”⁶

(hereafter the Science Report) synthesizes the peer-reviewed science.

The Science Report provides much of the technical basis for this rule. The Science Report is based on a review of more than 1,200 peer-reviewed publications. EPA's Science Advisory Board (SAB) conducted a comprehensive technical review of the Science Report and reviewed the adequacy of the scientific and technical basis of the proposed rule. The Science Report and the SAB review confirmed that:

- Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.
- These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.
- The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their functions considered over time.

The Science Report and the SAB review also confirmed that:

- Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.
- Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.
- Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.

Although these conclusions play a critical role in informing the agencies' interpretation of the CWA's scope, the agencies' interpretive task in this rule—determining which waters have a “significant nexus”—requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional

navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate.

Major Rule Provisions

In this final rule, the agencies define “waters of the United States” to include eight categories of jurisdictional waters. The rule maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice. The rule reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule recognizes jurisdiction for three basic categories: Waters that are jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional.

Decisions about waters in each of these categories are based on the law, peer-reviewed science, and the agencies' technical expertise, and were informed by public comments. This rule replaces existing procedures that often depend on individual, time-consuming, and inconsistent analyses of the relationship between a particular stream, wetland, lake, or other water with downstream waters. The agencies have greatly reduced the extent of waters subject to this individual review by carefully incorporating the scientific literature and by utilizing agency expertise and experience to characterize the nature and strength of the chemical, physical, and biological connections between upstream and downstream waters. The result of applying this scientific analysis is that the agencies can more effectively focus the rule on identifying waters that are clearly covered by the CWA and those that are clearly not covered, making the rule easier to understand, consistent, and environmentally more protective.

The jurisdictional categories reflect the current state of the best available science, and are based upon the law and Supreme Court decisions. The agencies will continue a transparent review of the science, and learn from on-going

⁵ Chief Justice Roberts' concurrence in *Rapanos* emphasized that “[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.” *Id.* at 758. Chief Justice Roberts made clear that, if the agencies had undertaken such a rulemaking, “the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.” *Id.* (Emphasis in original.)

⁶ U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the*

Scientific Evidence (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, (2015)). <http://www.epa.gov/ncea>.

experience and expertise as the agencies implement the rule. If evolving science and the agencies' experience lead to a need for action to alter the jurisdictional categories, any such action will be conducted as part of a rule-making process.

The first three types of jurisdictional waters, traditional navigable waters, interstate waters, and the territorial seas, are jurisdictional by rule in all cases. The fourth type of water, impoundments of jurisdictional waters, is also jurisdictional by rule in all cases. The next two types of waters, "tributaries" and "adjacent" waters, are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. For waters that are jurisdictional by rule, no additional analysis is required.

The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region. Justice Kennedy acknowledged the agencies could establish more specific regulations or establish a significant nexus on a case-by-case basis, *Rapanos* at 782, and for these waters the agencies will continue to assess significant nexus on a case-specific basis.

The major elements of the final rule are briefly summarized here.

Traditional Navigable Waters, Interstate Waters, Territorial Seas, and Impoundments of Jurisdictional Waters

Consistent with existing regulations and the April 2014 proposed rule, the final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule.

Tributaries

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. The rule concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the rule are headwater streams that play an

important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters.

The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency, and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. "Tributaries," as defined, are jurisdictional by rule.

The rule only covers as tributaries those waters that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard. The agencies identify these functions in the definition of "significant nexus" at paragraph (c)(5). Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries or, in certain circumstances drain wetlands, or that science clearly demonstrates are functioning as a tributary. These jurisdictional waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation. Further, the rule explicitly excludes from the definition of "waters of the United States" erosional features, including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark.

Adjacent Waters

The agencies determined that "adjacent waters," as defined in the rule, have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters. Under this final rule, "adjacent" means bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are "adjacent" to that stream or river. "Adjacent waters" include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. However, it is important to note that "adjacent waters" do not include waters that are subject to

established normal farming, silviculture, and ranching activities as those terms are used in Section 404(f) of the CWA.

The final rule establishes a definition of "neighboring" for purposes of determining adjacency. In the rule, the agencies identify three circumstances under which waters would be "neighboring" and therefore "waters of the United States":

(1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, as defined in the rule.

(2) Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the rule ("floodplain waters").

(3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.

The agencies emphasize that the rule has defined as "adjacent waters" those waters that currently available science demonstrates possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters. The agencies also emphasize that the rule does not cover "adjacent waters" that are otherwise excluded. Further, the agencies recognize the establishment of bright line boundaries in the rule for adjacency does not in any way restrict states from considering state specific information and concerns, as well as emerging science to evaluate the need to more broadly protect their waters under state law. The CWA establishes both national and state roles to ensure that states specific circumstances are properly considered to complement and reinforce actions taken at the national level.

"Adjacent" waters as defined are jurisdictional by rule. The agencies recognize that there are individual waters outside of the "neighboring" boundaries stated above where the science may demonstrate through a case-specific analysis that there exists a significant nexus to a downstream traditional navigable water, interstate water, or the territorial seas. However, these waters are not determined jurisdictional by rule and will be evaluated through a case-specific analysis. The strength of the science and

the significance of the nexus will be established on a case-specific basis as described below.

Case-Specific Significant Nexus

The rule identifies particular waters that are not jurisdictional by rule but are subject to case-specific analysis to determine if a significant nexus exists and the water is a “water of the United States.” This category of case-specific waters is based upon available science and the law, and in response to public comments that encouraged the agencies to ensure more consistent determinations and reduce the complexity of conducting jurisdictional determinations. Consistent with the significant nexus standard articulated in the Supreme Court opinions, waters are “waters of the United States” if they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters where waters function together.

In this final rule, the agencies have identified by rule, five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters. These five types of waters are Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. Consistent with Justice Kennedy’s opinion in *Rapanos*, the agencies determined that such waters should be analyzed “in combination” (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

The final rule also provides that waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule. The science available today does not establish that waters beyond those

defined as “adjacent” should be jurisdictional as a category under the CWA, but the agencies’ experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters.

In circumstances where waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark are subject to a case-specific significant nexus analysis and such waters may be evaluated as “similarly situated,” it must be first demonstrated that these waters function alike and are sufficiently close to function together in affecting downstream waters. The significant nexus analysis must then be conducted based on consideration of the functions provided by those waters in combination in the point of entry watershed. A “similarly situated” analysis is conducted where it is determined that there is a likelihood that there are waters that function together to affect downstream water integrity. To provide greater clarity and transparency in determining what functions will be considered in determining what constitutes a significant nexus, the final rule lists specific functions that the agencies will consider.

In establishing both the 100-year floodplain and the 4,000 foot bright line boundaries for these case-specific significant nexus determinations in the rule, the agencies are carefully applying the available science. Consistent with the CWA, the agencies will work with the states in connection with the prevention, reduction and elimination of pollution from state waters. The agencies will work with states to more closely evaluate state-specific circumstances that may be present within their borders and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters.

Exclusions

All existing exclusions from the definition of “waters of the United States” are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time.

Prior converted cropland and waste treatment systems have been excluded

from the definition of “waters of the United States” definition since 1992 and 1979 respectively, and continue to be excluded. Ministerial changes are made for purposes of clarity, but these two exclusions remain substantively and operationally unchanged. The agencies add exclusions for waters and features previously identified as generally exempt (e.g., exclusion for certain ditches that are not located in or drain wetlands) in preamble language from **Federal Register** documents by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction, including ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies’ intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions reflect the agencies’ current practice, and their inclusion in the rule as specifically excluded furthers the agencies’ goal of providing greater clarity over what waters are and are not protected under the CWA.

Role of States and Tribes Under the Clean Water Act

States and tribes play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator’s authority under the CWA.

Of particular importance, states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404. Forty-six states and the U.S. Virgin Islands are authorized to administer the NPDES program under section 402, while two states administer the section 404 program. The CWA identifies the waters over which states may assume section 404 permitting jurisdiction. *See* CWA section 404(g)(1). The scope of waters

that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for “waters of the United States” within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Agreement between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). EPA has initiated a separate process to address how the EPA can best clarify assumable waters for dredged and fill material permit programs pursuant to the Clean Water Act section 404(g)(1). 80 FR 13539 (Mar. 16, 2015). Additional CWA programs that utilize the definition of “waters of the United States” and are of importance to the states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load (TMDL) programs under section 303, and the section 401 state water quality certification process.

States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to ensure compliance with the goals of the CWA. See 33 U.S.C. 1377; 56 FR 64876, 64878–79 (Dec. 12, 1991). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Overview of the Preamble

The remainder of this preamble is organized as follows. Section III (Significant Nexus Standard) provides additional background on the rule, including a discussion of Supreme Court precedent, the science underpinning the rule, and the agencies’ overall interpretive approach to applying the significant nexus standard. Section IV (Definition of Waters of the United States) explains the provisions of the final rule, including subsections on each of the major elements of the rule. Section V summarizes the economic analysis of the rule and Section VI addresses Related Acts of Congress, Executive Orders and Agency Initiatives.

III. Significant Nexus Standard

With this rule, the agencies interpret the scope of the “waters of the United States” for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience. The key to the agencies’ interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: Waters are “waters of the United States” if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The agencies interpret specific aspects of the significant nexus standard in light of the science, the law, and the agencies’ technical expertise: The scope of the region in which to evaluate waters when making a significant nexus determination; the waters to evaluate in combination with each other; and the functions provided by waters and strength of those functions, and when such waters significantly affect the chemical, physical, or biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas.

In the rule, the agencies determine that tributaries, as defined (“covered tributaries”), and “adjacent waters”, as defined (“covered adjacent waters”), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are “waters of the United States.” In the rule, the agencies also establish that defined sets of additional waters may be determined to have a significant nexus on a case-specific basis: (1) Five specific types of waters

that the agencies conclude are “similarly situated” and therefore must be analyzed “in combination” in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus analysis; and (2) waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, or waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries. The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations.

Significant nexus is not a purely scientific determination. The opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright line boundaries with respect to where “water ends” for purposes of the CWA. Therefore, the agencies’ interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them. With this context, this section addresses, first, the Supreme Court case law and the significant nexus standard, second, the relevant scientific conclusions reached by analysis of existing scientific literature, and third, the agencies’ significant nexus determinations underpinning the rule. Section IV of the preamble addresses in more detail the precise definitions of the covered waters promulgated by the agencies to provide the bright line boundaries identifying “waters of the United States.”

A. The Significant Nexus Standard

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Section 101(a). The agencies’ longstanding regulations define “waters of the United States” for purposes of the Clean Water Act, and the Supreme Court has addressed the scope of “waters of the United States” protected by the CWA in three cases. The significant nexus standard evolved through those cases.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), which involved wetlands adjacent to a traditional navigable water in Michigan, the Court, in a unanimous opinion, deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters

to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” *Id.* at 134. The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation’s waters “incorporated a broad, systemic view of the goal of maintaining and improving water quality . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’ In keeping with these views, Congress chose to define the waters covered by the Act broadly.” *Id.* at 132–33 (citing Senate Report No. 92–414). The Court also recognized that “[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ‘waters’ is far from obvious.” *Id.* The Court then deferred to the agencies’ interpretation: “In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” *Id.* at 134.

The issue of CWA jurisdiction over “waters of the United States” was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC*, the Court (in a 5–4 opinion) held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The *SWANCC* Court noted that in *Riverside* it had “found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparably bound up’ with the ‘waters’ of the United States” and that “[i]t was the significant nexus between the wetlands and

‘navigable waters’ that informed our reading of the CWA” in that case. *Id.* at 167. *SWANCC* did not invalidate any parts of the regulatory definition of “waters of the United States.”

Five years after *SWANCC*, the Court again addressed the term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. All Members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water . . .” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a “continuous surface connection . . .” to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. . . .” *Id.* at 732 n.5 (emphasis in original).

Justice Kennedy concurred that the cases should be remanded for further decision making, and stated that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759 (citing *SWANCC*, 531 U.S. at 167, 172). Justice Kennedy concluded that “The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,’ 33 U.S.C. 1251(a), and it pursued that objective by restricting dumping and filling in ‘navigable waters,’ §§ 1311(a), 1362(12).” *Id.* at 779. He concluded that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780. Justice Kennedy’s opinion notes that such a relationship with navigable waters must

be more than “speculative or insubstantial.” *Id.* at 780.

While Justice Kennedy’s opinion focused on adjacent wetlands in light of the facts of the cases before him, his opinion is clear that a significant nexus is the basis for jurisdiction to protect non-navigable waters and wetlands under the CWA (*id.* at 759), and there is no indication in his opinion that the analytical framework his opinion provides for determining significant nexus for adjacent wetlands is limited to adjacent wetlands. In addition, the four dissenting Justices in *Rapanos*, who would have affirmed the court of appeals’ application of the agencies’ regulation, also concluded that the term “waters of the United States” encompasses, *inter alia*, all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.” *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the current regulatory provisions defining “waters of the United States.”

Chief Justice Roberts’ concurrence in *Rapanos* emphasized that “[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.” *Id.* at 758. Chief Justice Roberts made clear that, if the agencies had undertaken such a rulemaking, “the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.” *Id.* (Emphasis in original.)

The agencies utilize the significant nexus standard, as articulated by Justice Kennedy’s opinion and informed by the unanimous opinion in *Riverside Bayview* and the plurality opinion in *Rapanos* which all recognize that the Act and the agencies must identify the scope of CWA jurisdiction “on this continuum to find the limit of ‘waters,’” *Riverside Bayview* at 132, to interpret the scope of the statutory term “waters of the United States.” While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute’s goals, objectives and policies, the case law, and the agencies’ technical expertise and experience when interpreting the terms of the CWA.

B. Science Report

EPA’s Office of Research and Development prepared the Science Report, a peer-reviewed compilation and analysis of published peer-reviewed scientific literature summarizing the current scientific understanding of the

connectivity of and mechanisms by which streams and wetlands, singly or in combination, affect the chemical, physical, and biological integrity of downstream waters. The final Science Report is available in the docket and at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414>.

The process for developing the Science Report followed standard information quality guidelines for EPA. In September 2013, EPA released a draft of the Science Report for an independent SAB review and invited submissions of public comments for consideration by the SAB panel. In October 2014, after several public meetings and hearings, the SAB completed its peer review of the draft Science Report. The SAB was highly supportive of the draft Science Report's conclusions regarding streams, riparian and floodplain wetlands, and open waters, and recommended strengthening the conclusion regarding non-floodplain waters to include a more definitive statement that reflects how numerous functions of such waters sustain the integrity of downstream waters.⁷ The final peer review report is available on the SAB Web site, as well as in the docket for this rulemaking. EPA revised the draft Science Report based on comments from the public and recommendations from the SAB panel.

The SAB was established in 1978 by the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), to provide independent scientific and technical advice to the EPA Administrator on the technical basis for Agency positions and regulations. Advisory functions include peer review of EPA's technical documents, such as the Science Report. At the time the peer review was completed, the chartered SAB was comprised of more than 50 members from a variety of sectors including academia, non-profit organizations, foundations, state governments, consulting firms, and industry. To conduct the peer review, EPA's SAB staff formed an ad hoc panel based on nominations from the public to serve as the primary reviewers. The panel consisted of 27 technical experts in an array of relevant fields, including hydrology, wetland and stream ecology, biology, geomorphology, biogeochemistry, and freshwater science. Similar to the chartered SAB, the panel members represented sectors

including academia, a federal government agency, non-profit organizations, and consulting firms. The chair of the panel was a member of the chartered SAB.

The SAB process is open and transparent, consistent with the Federal Advisory Committee Act, 5 U.S.C., App 2, and agency policies regarding Federal advisory committees. Consequently, the SAB has an approved charter, which must be renewed biennially, announces its meetings in the **Federal Register**, and provides opportunities for public comment on issues before the Board. The SAB staff announced via the **Federal Register** that they sought public nominations of technical experts to serve on the expert panel: SAB Panel for the Review of the EPA Water Body Connectivity Report (via a similar process the public also is invited to nominate chartered SAB members). 78 FR 15012 (Mar. 8, 2013). The SAB staff then invited the public to comment on the list of candidates for the panel. Once the panel was selected, the SAB staff posted a memo on its Web site addressing the formation of the panel and the set of determinations that were necessary for its formation (e.g., no conflicts of interest). In the public notice of the first public meetings interested members of the public were invited to submit relevant comments for the SAB Panel to consider pertaining to the review materials, including the charge to the Panel. Over 133,000 public comments were received by the Docket. Every meeting was open to the public, noticed in the **Federal Register**, and had time allotted for the public to present their views. In total, the Panel held a two-day in-person meeting in Washington, DC, in December 2013, and three four-hour public teleconferences in April, May, and June 2014. The SAB Panel also compiled four draft versions of its peer review report to inform and assist the meeting deliberations that were posted on the SAB Web site. In September 2014, the chartered SAB conducted a public teleconference to conduct the quality review of the Panel's final draft peer review report. The peer review report was approved at that meeting, and revisions were made to reflect the chartered SAB's review. The culmination of that public process was the release of the final peer review report in October 2014. All meeting minutes and draft reports are available on the SAB Web site for public access.

The final Science Report states that connectivity is a foundational concept in hydrology and freshwater ecology. Connectivity is the degree to which components of a system are joined, or connected, by various transport

mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. Connectivity for purposes of interpreting the scope of "waters of the United States" under the CWA serves to demonstrate the "nexus" between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea. The scientific literature does not use the term "significant" as it is defined in a legal context, but it does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies from the connections among covered tributaries, covered adjacent waters, and case-specific waters and those downstream waters. The scientific literature also does not use the terms traditional navigable waters, interstate waters, or the territorial seas. However, evidence of strong chemical, physical, and biological connections to larger rivers, estuaries, and lakes applies to that subset of rivers, estuaries, and lakes that are traditional navigable waters, interstate waters, or the territorial seas.

The Science Report presents evidence of those connections from various categories of waters, evaluated singly or in combination, which affect downstream waters and the strength of that effect. The objectives of the Science Report are (1) to provide a context for considering the evidence of connections between downstream waters and their tributary waters, and (2) to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which the connections affect the function or condition of downstream waters. The connections and mechanisms discussed in the Science Report include transport of physical materials and chemicals such as water, wood, sediment, nutrients, pesticides, and mercury; functions that covered adjacent waters perform, such as storing and cleansing water; movement of organisms or their seeds and eggs; and hydrologic and biogeochemical interactions occurring in and among surface and groundwater flows, including hyporheic zones⁸ and alluvial aquifers.

The Science Report presents five major conclusions:

⁷ U.S. EPA. 2014. SAB review of the draft EPA report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. EPA-SAB-15-001, U.S. Environmental Protection Agency, Washington, DC. ("SAB 2014a.")

⁸ The hyporheic zone is the subsurface area immediately below the bed of intermittent and ephemeral streams that remains wet even when there is no surface flow. These areas are extremely important to macro-benthic organisms critical to the bio-chemical integrity of streams.

Conclusion 1: Streams

The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the chemical, physical, and biological integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Streams are the dominant source of water in most rivers, and the majority of tributaries are perennial, intermittent, or ephemeral headwater streams. Headwater streams also convey water into local storage compartments such as ponds, shallow aquifers, and floodplains, and into regional and alluvial aquifers; these local storage compartments are important sources of water for maintaining baseflow in rivers. In addition to water, streams transport sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. The scientific literature provides robust evidence that streams are biologically connected to downstream waters by the dispersal and migration of aquatic and semiaquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both upstream and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. In addition to material transport and biological connectivity, ephemeral, intermittent, and perennial flows influence fundamental biogeochemical processes by connecting channels and shallow groundwater with other landscape elements. Chemical, physical, and biological connections between streams and downstream waters interact via integrative processes such as nutrient spiraling. This occurs when stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, thereby increasing nutrient loads and associated impairments due to excess nutrients in downstream waters. Science Report at ES–2.

Conclusion 2: Riparian/Floodplain Wetlands and Open Waters

The scientific literature clearly shows that wetlands and open waters in riparian areas and floodplains are chemically, physically, and biologically integrated with rivers via functions that improve downstream water quality,

including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transformation and transport of stored organic matter. Riparian/floodplain wetlands and open waters improve water quality through the assimilation, transformation, and sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals that can degrade downstream water integrity. In addition to providing effective buffers to protect downstream waters from point source and nonpoint source pollution, these systems form integral components of river food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Lateral expansion and contraction of the river in its floodplain result in an exchange of organic matter and organisms, including fish populations that are adapted to use floodplain habitats for feeding and spawning during high water, that are critical to river ecosystem function. Riparian/floodplain wetlands and open waters also affect the integrity of downstream waters by subsequently releasing (desynchronizing) floodwaters and retaining large volumes of stormwater, sediment, and contaminants in runoff that could otherwise negatively affect the condition or function of downstream waters. Science Report at ES–2 to ES–3.

Conclusion 3: Non-Floodplain Wetlands and Open Waters

Wetlands and open waters in non-floodplain landscape settings (“non-floodplain wetlands”) provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of groundwater that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or seeds to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many Prairie potholes or vernal pools) can be connected to downstream waters through surface water, shallow subsurface water, and groundwater flows, and through biological and chemical connections.

In general, connectivity of non-floodplain wetlands occurs along a gradient, and can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to

downstream waters. These descriptors are influenced by climate, geology, and terrain, which interact with factors such as the magnitudes of the various functions within wetlands (e.g., amount of water storage or carbon export) and their proximity to downstream waters to determine where wetlands occur along the connectivity gradient. At one end of this gradient, the functions of non-floodplain wetlands clearly affect the condition of downstream waters if a visible (e.g., channelized) surface water or a regular shallow subsurface-water connection to the river network is present. For non-floodplain wetlands lacking a channelized surface or regular shallow subsurface connection (*i.e.*, those at intermediate points along the gradient of connectivity), generalizations about their specific effects on downstream waters from the available literature are difficult because information on both function and connectivity is needed. Science Report at ES–3.

Conclusion 4: Degrees and Determinants of Connectivity

Connectivity of streams and wetlands to downstream waters occurs along a gradient that can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. These terms, which we refer to collectively as connectivity descriptors, characterize the range over which streams and wetlands vary and shift along the connectivity gradient in response to changes in natural and anthropogenic factors and, when considered in a watershed context, can be used to predict probable effects of different degrees of connectivity over time. The evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The connectivity and effects of non-floodplain wetlands and open waters are more variable and thus more difficult to address solely from evidence available in peer-reviewed studies. Science Report at ES–3 to ES–4.

Conclusion 5: Cumulative Effects

The incremental effects of individual streams and wetlands are cumulative across entire watersheds, and therefore, must be evaluated in context with other streams and wetlands. Downstream waters are the time-integrated result of all waters contributing to them. For example, the amount of water or biomass contributed by a specific

ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters. Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters.

When considering the effect of an individual stream or wetland, all contributions and functions of that stream or wetland should be evaluated cumulatively. For example, the same stream transports water, removes excess nutrients, transports pollutants, mitigates flooding, and provides refuge for fish when conditions downstream are unfavorable; if any of these functions is ignored, the overall effect of that stream would be underestimated. Science Report at ES-5 to ES-6.

SAB Review of the Proposed Rule

In addition to its peer review of the draft Science Report, in a separate effort the SAB also reviewed the adequacy of the scientific and technical basis of the proposed rule and provided its advice and comments on the proposal in September 2014.⁹ The same SAB Panel that reviewed the draft Science Report met via two public teleconferences in August 2014 to discuss the scientific and technical basis of the proposed rule. The Panel submitted comments to the Chair of the chartered SAB. A work group of chartered SAB members considered comments provided by panel members, agency representatives, and the public on the adequacy of the science informing the rule. This work group then led the September 2014 public teleconference discussion of the chartered SAB. The public had an opportunity to submit oral or written comments during these two public meetings. The SAB's final letter to the EPA Administrator can be found on the SAB Web site and in the docket for this rule.

The SAB found that the available science provides an adequate scientific basis for the key components of the proposed rule. The SAB noted that although water bodies differ in degree of connectivity that affects the extent of

influence they exert on downstream waters (*i.e.*, they exist on a "connectivity gradient"), the available science supports the conclusion that the types of water bodies identified as "waters of the United States" in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters. In particular, the SAB expressed support for the proposed rule's inclusion of tributaries and "adjacent waters" as categorical waters of the United States and the inclusion of "other waters" on a case-specific basis, though noting that certain "other waters" can be determined as a subcategory to be similarly situated.

Regarding tributaries, the SAB found, "[t]here is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological processes." The Board advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks (*e.g.*, ephemeral streams with arid and semi-arid environments or in low gradient landscapes where the flow of water is unlikely to cause an ordinary high water mark). The SAB also advised EPA to consider changing the wording in the definition to "bed, bank, and other evidence of flow." SAB 2014b at 2. The agencies did not make this change because this recommendation seemed to suggest that any hydrologic connection is sufficient for CWA jurisdiction. The definition of "tributary" in the rule better identifies tributaries that have a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas. In addition, the SAB suggested that EPA reconsider whether flow-through lentic systems should be included as "adjacent waters" and wetlands, rather than as tributaries.

Regarding "adjacent waters" and wetlands, the SAB stated, "[t]he available science supports the EPA's proposal to include 'adjacent waters' and wetlands as a waters of the United States. . . . because [they] have a strong influence on the physical, chemical, and biological integrity of navigable waters." *Id.* In particular, the SAB noted, "the available science supports defining adjacency or determination of adjacency on the basis of functional relationships," rather than "solely on

the basis of geographical proximity or distance to jurisdictional waters." *Id.* at 2–3. The agencies have determined which waters are adjacent, and thus jurisdictional under the rule, based on both functional relationships and proximity because those factors identify the waters that have a strong influence on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Section C. and IV.F below. The agencies' determination is informed by the science, and consideration of proximity is reasonable in interpreting the scope of adjacency.

In the evaluation of "other waters," the SAB found that "scientific literature has established that 'other waters' can influence downstream waters, particularly when considered in aggregate." *Id.* at 3. The SAB thus found it "appropriate to define 'other waters' as waters of the United States on a case-by-case basis, either alone or in combination with similarly situated waters in the same region." *Id.* The SAB found that distance could not be the sole indicator used to evaluate the connection of "other waters" to jurisdictional waters. The agencies' identification of the areas within which a water is assessed on a case-specific basis for a significant nexus is informed by the science and the agencies' experience and technical expertise, and consideration of proximity is reasonable in interpreting the scope of the statute. The SAB also expressed support for language in one of the options discussed in the preamble to the proposed rule. Specifically, the SAB stated there is "also adequate scientific evidence to support a determination that certain subcategories and types of 'other waters' in particular regions of the United States (*e.g.*, Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (*i.e.*, they have a similar influence on the chemical, physical, and biological integrity of downstream waters and are similarly situated on the landscape) and thus could be considered waters of the United States." *Id.* The Board noted that other sets of wetlands could be identified as "similarly situated" as the science continues to develop and that science does not support excluding groups of "other waters" or subcategories thereof from jurisdiction.

The exclusions paragraph of the proposed rule generated the most comments from the SAB. The SAB noted, "[t]he Clean Water Act exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not

⁹ U.S. EPA. 2014. SAB Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act." EPA-SAB-14-007, U.S. Environmental Protection Agency, Washington, DC. ("SAB 2014b.")

have scientific justification.” *Id.* With regard to ditches, the Board found that there is a lack of scientific knowledge to determine whether ditches should be categorically excluded. For example, some ditches that would be excluded in the Midwest may drain Cowardin wetlands and may provide certain ecosystem services, while gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. The SAB also noted that artificial lakes or ponds, or reflection pools, can be directly connected to jurisdictional waters via either shallow or deep groundwater. The SAB also recommended that the agencies clarify in the preamble to the final rule that “significant nexus” is a legal term, not a scientific one.

C. Significant Nexus Conclusions

As noted earlier, the agencies interpret the scope of “waters of the United States” protected under the CWA based on the information and conclusions in the Science Report, other relevant scientific literature, the Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule, the relevant Supreme Court decisions, the agencies’ technical expertise and experience, and the objectives and requirements of the CWA. In light of this information, the agencies made scientifically and technically informed judgments about the nexus between the relevant waters and the significance of that nexus and conclude that “tributaries” and “adjacent waters,” each as defined by the rule, have a significant nexus such that they are “waters of the United States” and no additional analysis is required. The agencies also determined that additional waters may, on a case-specific basis, have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas, either alone or in combination with similarly situated waters. The agencies’ interpretation of the scope of “waters of the United States” is informed by the Science Report and the review and comments of the SAB. The rule reflects the judgment of the agencies in balancing the science, the agencies’ expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law.

Since the *Rapanos* decision, the agencies have gained extensive experience making significant nexus determinations, and that experience and expertise has informed the judgment of the agencies as reflected in the provisions of the rule. The agencies,

most often the Corps, have made more than 400,000 CWA jurisdictional determinations since 2008. Of those, more than 120,000 are case-specific significant nexus determinations. The agencies made determinations in every state in the country, from the arid West to the tropics of Hawaii, from the Appalachian Mountains in the East to the lush forests of the Northwest. With field staff located in 38 Corps District offices and 10 EPA regional offices, the agencies have almost a decade of nationwide experience in making significant nexus determinations. These individual jurisdictional determinations have been made for waters ranging from an intermittent stream that provides flow to a drinking water source, to a group of floodplain wetlands in North Dakota that provide important protection from floodwaters to downstream communities alongside the Red River, to headwater mountain streams that provide high quality water that supplies baseflow and reduces the harmful concentrations of pollutants in the main part of the river below. Through this experience, the agencies developed wide-ranging technical expertise in assessing the hydrologic flowpaths along which water and materials are transported and transformed that determine the degree of chemical, physical, or biological connectivity, as well as the variations in climate, geology, and terrain within and among watersheds and over time that affect the functions (such as the removal or transformation of pollutants) performed by streams and wetlands for downstream traditional navigable waters, interstate waters or the territorial seas.

The agencies utilize many tools and many sources of information to help make jurisdictional determinations, including U.S. Geological Survey (USGS) and state and local topographic maps, aerial photography, soil surveys, watershed studies, scientific literature and references, and field work. For example, USGS and state and local stream maps and datasets, aerial photography, gage data, watershed assessments, monitoring data, and field observations are often used to help assess the contributions of flow of tributary streams, including intermittent and ephemeral streams, to downstream traditional navigable waters, interstate waters or the territorial seas. Similarly, floodplain and topographic maps of federal, state and local agencies, modeling tools, and field observations can be used to assess how wetlands are trapping floodwaters that might otherwise affect downstream waters.

Further, the agencies utilize the large body of scientific literature regarding the functions of tributaries, including tributaries with ephemeral, intermittent and perennial flow and of wetlands and open waters to inform their evaluations of significant nexus. In addition, the agencies have experience and expertise for decades prior to and since the *SWANCC* and *Rapanos* decisions with making jurisdictional determinations, and consider hydrology, ordinary high water mark, biota, and other technical factors in implementing Clean Water Act programs. This immersion in the science along with the practical expertise developed through case-specific determinations across the country and in diverse settings is reflected in the agencies’ conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where “waters of the United States” end.

1. Scope of Significant Nexus Analysis

Under the significant nexus standard, waters possess the requisite significant nexus if they “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos* at 780. Several terms in this standard were not defined. In this rule the agencies interpret these terms and the scope of “waters of the United States” based on the goals, objectives, and policies of the statute, the scientific literature, the Supreme Court opinions, and the agencies’ technical expertise and experience. Therefore, for purposes of a significant nexus analysis, the agencies have determined (1) which waters are “similarly situated,” and thus should be analyzed in combination, in (2) the “region,” for purposes of a significant nexus analysis, and (3) the types of functions that should be analyzed to determine if waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. These determinations underpin many of the key elements of the rule and are reflected in the definition of “significant nexus” in the rule.

a. Similarly Situated Waters

As reflected in the rule’s definition of “significant nexus,” the agencies determined that it is reasonable to consider waters as “similarly situated” where they function alike and are sufficiently close to function together in affecting the nearest traditional

navigable water, interstate water, or the territorial sea. Since the focus of the significant nexus standard is on protecting and restoring the chemical, physical, and biological integrity of the nation's waters, the agencies interpret the phrase "similarly situated" in terms of whether particular waters are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together. Regarding covered tributaries and covered adjacent waters, the agencies define each water type such that the functions provided are similar and the waters are situated so as to provide those functions together to affect downstream waters.

The science demonstrates that covered tributaries provide many common vital functions important to the chemical, physical, and biological integrity of downstream waters, regardless of the size of the tributaries. The science also supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark. The science also supports the conclusion that tributaries function together to affect downstream waters. The agencies conclude that covered tributaries with a bed and banks and ordinary high water mark are similarly situated for purposes of the agencies' significant nexus analysis.

For covered adjacent waters, the science demonstrates that these waters provide many similar vital functions to downstream waters, and the agencies defined "adjacent waters" with distance boundaries to ensure that the waters are providing similar functions to downstream waters and that the waters are located comparably in the region such that the agencies' reasonably judged them to be similarly situated.

For waters for which a case-specific significant nexus determination is required the agencies have determined that some waters in specific regions are similarly situated; for other specified waters, the determination of whether there are any other waters providing similar functions in a similar situation in the region must be made as part of a case-specific determination. See section IV.H.

Assessing the functions of identified waters in combination is consistent not only with Justice Kennedy's significant nexus standard, but with the science. Scientists routinely combine the effects of groups of waters, aggregating the known effect of one water with those of ecologically similar waters in a specific geographic area, or to a certain scale. This is because the chemical, physical,

and biological integrity of downstream waters is directly related to the aggregate contribution of upstream waters that flow into them, including any tributaries and connected wetlands. As a result, the scientific literature and the Science Report consistently document that the health of larger downstream waters is directly related to the aggregate health of waters located upstream, including waters such as wetlands that may not be hydrologically connected but function together to ameliorate the potential impacts of flooding and pollutant contamination from affecting downstream waters. See Technical Support Document.

For example, excess nutrients discharged into small tributary streams in the aggregate can cause algal blooms downstream that reduce dissolved oxygen levels and increase turbidity in traditional navigable waters, interstate waters, and the territorial seas. Water low in dissolved oxygen cannot support aquatic life. This widely-recognized phenomenon, known as hypoxia, has impacted commercial and recreational fisheries in the northern Gulf of Mexico. In this instance, the cumulative effects of nutrient export from the many small headwater streams of the Mississippi River have resulted in large-scale ecological and economically harmful impacts hundreds of miles downstream. See Technical Support Document.

In review of the scientific and technical adequacy of the rule, the SAB panel members "generally agreed that aggregating 'similarly situated' waters is scientifically justified, given that the combined effects of these waters on downstream waters are often only measurable in aggregate."¹⁰ As stated in section III.B. above, one of the main conclusions of the Science Report is that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed. For example, the Science Report finds, "[t]he amount of nutrients removed by any one stream over multiple years or by all headwater streams in a watershed in a given year can have substantial consequences for downstream waters." Science Report at 1–11. Cumulative effects of streams, wetlands, and open waters across a watershed must be considered because

"[t]he downstream consequences (e.g., the amount and quality of materials that eventually reach a river) are determined by the aggregate effect of contributions and sequential alterations that begin at the source waters and function along continuous flowpaths to the watershed outlet." *Id.* at 1–19.

The agencies conclude that it is appropriate to assess the effects of waters in combination based on the similarity of the functions they provide to the downstream water and their location in the watershed. This is consistent with the science and effectively meets the goals of the CWA.

b. In the Region

Since Justice Kennedy did not define the "region," the agencies determined that the single point of entry watershed is a reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard. A single point of entry watershed is the drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea. The agencies determined that because the movement of water from watershed drainage basins to coastal waters, river networks, and lakes shapes the development and function of these systems in a way that is critical to their long-term health, the watershed is a reasonable and technically appropriate way to identify the scope of waters that together may have an effect on the chemical, physical, or biological integrity of a particular traditional navigable water, interstate water, or territorial sea. The watershed includes all streams, wetlands, lakes, and open waters within its boundaries. Using the watershed that flows to the nearest single traditional navigable water, interstate water, or territorial sea is consistent with court decisions that these waters are the ultimate focus of CWA protections. Using the single point of entry watershed ensures that any analysis of significant nexus is appropriately connected to these touchstone waters.

Because the movement of water from watershed drainage basins to coastal waters, river networks, and lakes shapes the development and function of these systems in a way that is critical to their integrity, using a watershed as the framework for conducting significant nexus evaluations is scientifically supportable. Watersheds are generally regarded as the most appropriate spatial unit for water resource management. Anthropogenic actions and natural events can have widespread effects within the watershed that collectively

¹⁰ September 2, 2014. Memorandum from Dr. Amanda Rodewald to Dr. David Allen. Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of 'Waters of the United States' under the Clean Water Act." ("SAB 2014c.")

impact the integrity and quality of the relevant traditional navigable water, interstate water, or the territorial sea. The functions of the contributing waters are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water, interstate water, or the territorial sea. For these reasons, it is more appropriate to conduct a significant nexus analysis at the watershed scale than to focus on a specific site, such as an individual stream segment. See proposal Appendix A, Scientific Analysis, 79 FR 22246, April 21, 2014, Science Report, and Technical Support Document.

Concluding that the watershed is the reasonable and appropriate region for purposes of a significant nexus analysis is also consistent with the agencies' longstanding practice and experience. To restore or maintain the health of the downstream affected water, the agencies' standard practice is to evaluate the condition of the waters that are in the contributing watersheds and to develop a plan to address the issues of concern. The Corps has used watershed framework approaches for water sources, for navigation approaches for more than 100 years, and in the regulatory program since its inception. Also, using a watershed framework is consistent with more than two decades of practice by EPA and many other governmental, academic, and additional entities that recognize that a watershed approach is the most effective framework to address water resource challenges. Finally, the watershed that drains to the nearest (*i.e.*, first downstream) traditional navigable water, interstate water, or the territorial sea is likely to be of a size commonly understood as a "region."

In light of the scientific literature, the longstanding approach of the agencies' implementation of the CWA, and the statutory goals underpinning Justice Kennedy's significant nexus framework, the watershed draining to the nearest traditional navigable water, interstate water, or the territorial sea, is the appropriate "region" for a significant nexus analysis. See the proposed rule preamble and Technical Support Document.

c. Significantly Affect Chemical, Physical, or Biological Integrity

The agencies' definition of the term "significant nexus" in the rule is consistent with language in *Riverside Bayview*, *SWANCC*, and *Rapanos*, and with the goals, objectives, and policies of the CWA. The definition reflects that not all waters have a requisite connection to traditional navigable waters, interstate waters, or the

territorial seas sufficient to be determined jurisdictional. Justice Kennedy was clear that to be covered, waters must significantly affect the chemical, physical, or biological integrity of a downstream navigable water and that the requisite nexus must be more than "speculative or insubstantial," *Rapanos*, at 780. The agencies define significant nexus in precisely those terms. Under the rule a "significant nexus" is established by a showing of a significant chemical, physical, or biological effect. In characterizing the significant nexus standard, Justice Kennedy stated: "[t]he required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'" 547 U.S. at 779. It is clear that Congress intended the CWA to "restore and maintain" all three forms of "integrity," Section 101(a), so if any one is compromised then that is contrary to the statute's stated objective. It would subvert the objective if the CWA only protected waters upon a showing that they had effects on every attribute of the integrity of a traditional navigable water, interstate water, or the territorial sea.

In the rule's definition of "significant nexus," the agencies identify the functions that waters provide that can significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters and the territorial seas. In identifying the functions to be considered the agencies were informed by the goals of the statute and the available science. Among the means to achieve the CWA's objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, Congress established an interim national goal to achieve wherever possible "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." Section 101(a)(2). Functions to be considered for the purposes of determining significant nexus are sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas.

The effect of an upstream water can be significant even when a water, alone or in combination, is providing a subset, or even just one, of the functions listed.

Science demonstrates that these aquatic functions provided by smaller streams, ponds, wetlands and other waters are important for protecting the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. For example, States identify sediment and nutrients as the primary contaminants in the nation's waters. Sediment storage and export via streams to downstream waters is critical for maintaining the river network, including the formation of channel features. Although sediment is essential to river systems, excess sediment can impair ecological integrity by filling interstitial spaces, reducing channel capacity, blocking sunlight transmission through the water column, and increasing contaminant and nutrient concentrations. Streams and wetlands can prevent excess deposits of sediment downstream and reduce pollutant concentrations in downstream waters. Thus the function of trapping of excess sediment, along with export of sediment, have a significant effect on the chemical, physical, and biological integrity of downstream waters.

Nutrient recycling results in the uptake and transformation of large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, thereby decreasing nutrient loads and associated impairments due to excess nutrients in downstream waters. Streams, wetlands and open waters improve water quality through the assimilation, transformation, or sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals that can degrade downstream water integrity. Nutrient transport exports nutrients downstream and can degrade water quality and lead to stream impairments. Nutrients are necessary to support aquatic life, but excess nutrients lead to excessive plant growth and hypoxia, in which over-enrichment causes dissolved oxygen concentrations to fall below the level necessary to sustain most aquatic animal life in the downstream waters. Nutrient recycling, retention, and export can significantly affect downstream chemical integrity by impacting downstream water quality.

The contribution of flow downstream is an important role, as upstream waters can be a cumulative source of the majority of the total mean annual flow to bigger downstream rivers and waters, including via the recharge of baseflow.

Streams, wetlands, and open waters contribute surface and subsurface water downstream, and are the dominant sources of water in most rivers. Contribution of flow can significantly affect the physical integrity of downstream waters, helping to sustain the volume of water in larger waters.

Small streams and wetlands are particularly effective at retaining and attenuating floodwaters. By subsequently releasing (desynchronizing) floodwaters and retaining large volumes of stormwater that could otherwise negatively affect the condition or function of downstream waters, streams and adjacent wetlands and open waters affect the physical integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. This function can reduce flood peaks downstream and can also maintain downstream river baseflows by recharging alluvial aquifers.

Streams, wetlands, and open waters supply downstream waters with dissolved and particulate organic matter (e.g., leaves, wood), which support biological activity throughout the river network. In addition to organic matter, streams, wetlands, and open waters can also export other food resources downstream, such as aquatic insects that are the food source for fish in downstream waters. The export of organic matter and food resources downstream is important to maintaining the food webs and thus the biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

Streams, wetlands, and open waters provide life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas. Many species require different habitats for different resources (e.g., food, spawning habitat, overwintering habitat), and thus move throughout the river network over their life-cycles. For example, headwater streams can provide refuge habitat under adverse conditions, enabling fish to persist and recolonize downstream areas once conditions have improved. These upstream systems form integral components of downstream food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects, including for species that are critical to downstream ecosystem function. The provision of life-cycle dependent aquatic habitat for species located in downstream waters

significantly affects the biological integrity of those downstream waters.

Tributaries, adjacent wetlands, and open waters can perform multiple functions, including functions that change depending upon the season. For example, the same stream can contribute flow when evapotranspiration is low and can retain water when evapotranspiration is high. These functions, particularly when considered in aggregate with the functions of similarly situated waters in the region, can significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas. When considering the effect of an individual stream, wetland, or open water, all contributions and functions that the water provides should be evaluated cumulatively. For example, the same wetland retains sediment, removes excess nutrients, mitigates flooding, and provides habitat for amphibians that also live downstream; if any of these functions is ignored, the overall effect of that wetland would be underestimated. It is important to note, however, that a water or wetland can provide just one function that may significantly affect the chemical, physical or biological integrity of the downstream water.

2. Categories of Waters Determined to Have a Significant Nexus

In this rule, the agencies determine that: (1) Covered tributaries, in combination with other covered tributaries located in a watershed that drains to a traditional navigable water, interstate water, or the territorial seas, significantly affect the chemical, physical, and biological integrity of that water; and (2) covered adjacent waters, in combination with other covered adjacent waters located in a watershed that drains to a traditional navigable water, interstate water, or the territorial seas, significantly affect the chemical, physical, and biological integrity of that water.

a. Covered Tributaries

The agencies determine based on their scientific and technical expertise that waters meeting the definition of “tributary” in a single point of entry watershed are similarly situated and have a significant nexus because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. As such, it is appropriate to conclude covered tributaries as a category are “waters of the United States.” See Technical Support Document. The agencies

limited the tributaries that are “waters of the United States” to those that have both a bed and banks and another indicator of ordinary high water mark. That limitation served as a reasonable basis to consider covered tributaries similarly situated because those physical characteristics indicated sufficient flow that the covered tributaries are performing similar functions and located such that they are working together in the region to provide those functions to the nearest traditional navigable water, interstate water, or the territorial seas. Justice Kennedy noted that the requirement of a perceptible ordinary high water mark for tributaries, a measure that had been used by the Corps, “may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute ‘navigable waters’ under the Act.” 547 U.S. at 781, *see also id.* at 761. The science supports this.

The agencies analyzed the Science Report and other scientific literature to determine whether tributaries to traditional navigable waters, interstate waters, or the territorial seas have a significant nexus to constitute “waters of the United States” under the Act such that it is reasonable to assert CWA jurisdiction over all such tributaries by rule. Covered tributaries have a significant impact on the chemical, physical, or biological integrity of waters into which they eventually flow—for CWA purposes, traditional navigable waters, interstate waters, and the territorial seas. The great majority of covered tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. Covered tributaries serve to store water, thereby reducing flooding; provide biogeochemical functions that help maintain water quality; trap and transport sediments; transport, store and modify pollutants; provide habitat for plants and animals; and sustain the biological productivity of downstream rivers, lakes, and estuaries. Such waters have these significant effects whether they are natural, modified, or constructed.

Covered tributaries significantly affect the chemical integrity of traditional navigable waters, interstate waters, and the territorial seas. Covered tributaries influence the chemical composition of downstream waters, through the transport and removal of chemical elements and compounds, such as nutrients, ions, organic matter and pollutants. Ecosystem processes in

covered tributaries transform, remove, and transport these substances to downstream waters. In turn, these chemical compounds can influence water quality, sediment deposition, nutrient availability, and biotic functions in rivers. Because water flow transports chemical substances downstream, chemical effects are closely related to hydrological connectivity. Within covered tributaries, there are processes that occur that transform and export nutrients and carbon to downstream waters, serving important source functions that influence the chemical integrity of downstream waters. Organic carbon, in both dissolved and particulate forms, exported from covered tributaries is consumed by downstream organisms. The organic carbon that is exported downstream thus supports biological activity throughout the river network.

Covered tributaries act as both sinks and sources of chemical substances, further affecting the chemical integrity of traditional navigable waters, interstate waters, and the territorial seas. Covered tributaries provide sink functions by trapping chemicals through absorption to sediments in the stream substrate (*e.g.*, phosphorous adsorption to clay particles). They provide source functions by transporting chemicals to downstream traditional navigable waters, interstate waters, and the territorial seas as chemicals dissolved in the waters or as chemicals attached to suspended sediments.

Covered tributaries significantly affect the physical integrity of traditional navigable waters, interstate waters, and the territorial seas. Physical connections between covered tributaries and traditional navigable waters, interstate waters, and the territorial seas result from the hydrologic transport from covered tributaries to downstream waters of numerous materials, including water, sediment and organic matter such as leaves and wood. This transport affects the physical characteristics of downstream waters. Covered tributaries, even when seasonally dry, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments. One of the primary functions of covered tributaries is transporting sediment to downstream waters. Covered tributaries, particularly headwaters, shape and maintain river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. These effects occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries

are great distances from the traditional navigable water, interstate water, or the territorial sea (such as some headwater covered tributaries).

Covered tributaries significantly affect the biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Covered tributaries, including intermittent and ephemeral streams, are critical in the life-cycles of many organisms capable of moving throughout river networks. In fact, many organisms, such as anadromous salmon, have complex life-cycles which involve migration through the river network, from headwaters to downstream rivers and oceans and back, over the course of their lives. In addition to providing critical habitat for complex life-cycle completion, covered tributaries provide refuge from predators and adverse physical conditions in rivers, and are reservoirs of genetic- and species-level diversity. Covered tributaries contribute materials to downstream food networks and supporting populations for aquatic species, including economically important species such as salmon. These effects occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are large distances from the traditional navigable waters, interstate waters, and the territorial seas (such as some headwater covered tributaries).

Similarly, modified and constructed tributaries perform the same functions as natural tributaries, especially the conveyance of water that carries nutrients, pollutants, and other constituents, both good and bad, to traditional navigable waters, interstate waters, and the territorial seas. Modified and constructed covered tributaries also provide corridors for movement of organisms between headwaters and traditional navigable waters, interstate waters, and the territorial seas. The important effect—and thus the significant nexus—between a covered tributary and a traditional navigable water, interstate water, and the territorial sea is not broken where the covered tributary flows through a culvert or other structure. The scientific literature recognizes that features that convey water, whether they are natural, modified, or constructed, provide substantial connectivity between streams and downstream waters. For example, ditches that meet the definition of tributary and are not excluded quickly move water downstream to traditional navigable waters, interstate waters, and the territorial seas due to their often straightened and channelized nature,

transporting downstream sediment, nutrients, and other materials.

The CWA regulates and controls pollution at its source, in part because most pollutants do not remain at the site of the discharge, but instead flow and are washed downstream through the tributary system to endanger drinking water supplies, fisheries, and recreation areas. These fundamental facts about the movement of pollutants and the interconnected nature of the tributary system demonstrate why covered tributaries of traditional navigable waters, interstate waters, and the territorial seas, alone or in combination with other covered tributaries in a watershed, have a significant nexus with those downstream waters. Thus, in the rule the agencies assert CWA jurisdiction over all covered tributaries as defined. Those covered tributaries are “waters of the United States” without the need for further analysis.

b. Covered Adjacent Waters

Based on the agencies’ review of the scientific literature and the law, the agencies determine that covered adjacent waters, as defined, have a significant nexus and are “waters of the United States.” The scientific literature, including the Science Report, consistently supports the conclusion that covered adjacent waters provide similar functions and work together to maintain the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, and the territorial seas because of their hydrological and ecological connections to, and interactions with, those waters. Science demonstrates that this functional connectivity is particularly evident where covered adjacent waters are located within the floodplain of the traditional navigable water, interstate water, the territorial seas, covered tributary, or impoundment to which they are adjacent or are otherwise sufficiently proximate to waters with no floodplain, such as lakes and ponds. Location within the floodplain and proximity ensure that the aquatic functions performed by covered adjacent waters are effectively and consistently provided to downstream waters. *See* Technical Support Document.

The agencies conclude that all waters meeting the definition of “adjacent” in the rule are similarly situated for purposes of analyzing whether they have a significant nexus to a traditional navigable water, interstate water, or the territorial sea. Based on a review of the scientific literature, the agencies conclude that these bordering, contiguous, or neighboring waters

provide similar functions and function together to significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Further, because the definition of “adjacent” considers both the functional relationships and the proximity of the waters (*i.e.*, those that are located near traditional navigable waters, interstate waters, the territorial seas, impoundments, and covered tributaries), interpreting the term “similarly situated” to include all covered adjacent waters, as defined in the rule, is informed by the science and is a reasonable interpretation of the scope of the statute. The geographic proximity of an “adjacent” water relative to the traditional navigable waters, interstate waters, the territorial seas, impoundments, and covered tributaries is indicative of the relationship to it, with many of its defining characteristics resulting from the movement of materials and energy between the categories of waters. The scientific literature supports that waters, including wetlands, ponds, lakes, oxbow lakes, and similar waters, that are “adjacent,” as defined in the rule, to traditional navigable waters, interstate waters, the territorial seas, impoundments, and covered tributaries, are integral parts of stream networks because of their ecological functions and how they interact with each other, and with downstream traditional navigable waters, interstate waters, or the territorial seas.

Covered adjacent waters function together to maintain the chemical, physical, or biological health of traditional navigable waters, interstate waters, and the territorial seas to which they are directly adjacent or to which they are connected by the tributary system. This functional interaction can result from hydrologic connections or because covered adjacent waters can act as water storage areas holding damaging floodwaters or filtering harmful pollutants. These chemical, physical, and biological connections affect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas through the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local groundwater sources of baseflow for downstream waters and their tributaries, and transformation and transport of organic matter. Covered adjacent waters improve water quality through the assimilation, transformation, or sequestration of pollutants, including excess nitrogen and phosphorus, and

chemical contaminants such as pesticides and metals that can degrade downstream water integrity. In addition to providing effective buffers to protect downstream waters from pollution, covered adjacent waters form integral components of downstream food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Covered adjacent waters serve an important role in the integrity of traditional navigable waters, interstate waters, and the territorial seas by subsequently releasing (desynchronizing) floodwaters and retaining large volumes of stormwater, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of traditional navigable waters, interstate waters, and the territorial seas.

Floodplain areas connect aquatic environments through both surface and shallow subsurface hydrologic flowpaths. Waters in these areas are therefore uniquely situated in watersheds to receive and process water that passes over densely vegetated areas and through subsurface zones before reaching streams and rivers. When contaminants reach a floodplain water, they can be sequestered in sediments, assimilated into wetland plants and animals, transformed into less harmful and/or mobile forms or compounds, or lost to the atmosphere. Wetlands located in floodplains store large amounts of sediment and organic matter from upstream and upland areas. In addition, the primary function of many floodplain wetlands in the Western United States is sediment exchange, which can transform materials and compounds temporarily on floodplains.

Wetlands and other similar waters in floodplain areas act as buffers that are among the most effective tools for mitigating nonpoint source pollution. The literature shows that collectively, wetlands and other similar waters improve water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants—such as pesticides and metals—that can affect downstream water quality. These pollutants enter floodplain wetlands from dry and wet atmospheric deposition, runoff from upland agricultural and urban areas, spray drift, subsurface water flows, outfalls, pipes, and ditches.

Floodplain waters, including wetlands, can reduce flood peaks by storing and desynchronizing floodwaters. They can also maintain river baseflows by recharging alluvial aquifers. Many studies have

documented the ability of floodplain wetlands to reduce flood pulses by storing excess water from streams and rivers. One review of wetland studies reported that floodplain wetlands reduced or delayed floods in 23 of 28 studies. For example, peak discharges between upstream and downstream gaging stations on the Cache River in Arkansas were reduced 10–20 percent primarily due to floodplain water storage.

Ecosystem function within a river system is driven by interactions between the physical environment and the diverse biological communities living within the river system. Wetlands in floodplains become important seed sources for the river network, especially if catastrophic flooding scours vegetation and seed banks in other parts of the channel. Movements of organisms that connect aquatic habitats and their populations, even across different watersheds, are important for the survival of individuals, populations, and species, and for the functioning of the river ecosystem. For example, lateral expansion and contraction of the river in its floodplain results in an exchange of matter and organisms, including fish populations that are adapted to use floodplain habitat for feeding and spawning during high water. The organisms that live within the hyporheic zone for these mid- and large-sized river systems have a demonstrated connection outward to several miles within the floodplain. General field practice observations further indicate that covered adjacent waters with a close proximity have a significant nexus with the downstream waters.

Waters adjacent to impoundments and covered tributaries are integrally linked to the chemical, physical, and biological functions of the waters to which they are adjacent and, through those waters, are integrally linked to the chemical, physical, and biological functions of the downstream traditional navigable waters, interstate waters, or the territorial seas. Thus, where waters are adjacent to impoundments or covered tributaries, they also have a significant nexus to the downstream traditional navigable waters, interstate waters, or the territorial seas. The important functions that covered adjacent waters perform that impact downstream traditional navigable waters, interstate waters, and the territorial seas and their integrated behavior with the tributary system demonstrate why all waters adjacent to traditional navigable waters, interstate waters, or the territorial seas as well as impoundments and covered tributaries, alone or in combination with other

covered adjacent wetlands in a watershed have a significant nexus with those downstream waters.

Based on the science and their technical expertise and experience, the agencies determine it is appropriate to protect all covered adjacent waters because those waters are functioning as an integrated system with the downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect such downstream waters. Consequently, these waters are “adjacent” and therefore “waters of the United States” under the CWA. Covered adjacent waters are “waters of the United States” without the need for further analysis.

3. Case-Specific Significant Nexus Determinations

a. Two Exclusive Circumstances for Case-Specific Significant Nexus Determinations

The rule identifies two exclusive circumstances under which a significant nexus determination is made on a case-specific basis to determine whether the water is a “water of the United States.” First, there are five subcategories of waters—Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands—that the agencies conclude must be analyzed “in combination” as “similarly situated” waters when making a case-specific significant nexus analysis. Second, there are waters for which the agencies have made no conclusions with respect to which waters are “similarly situated” but for which a case-specific significant nexus analyses may be undertaken. The rule establishes that case-specific determinations may be made for waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and for waters located within 4,000 feet from the high tide line or the ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments, or tributaries.

b. Summary of Rationale for “Similarly Situated” Determinations

Based on the agencies’ expertise and experience and available literature and data, the agencies have determined that waters in the five subcategories of waters identified in paragraph (a)(7) are similarly situated and must be combined with other waters in the same subcategory located in the same watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas. See Technical Support Document. The

scientific literature shows that these subcategories of waters are frequently located together in a complex or are otherwise closely co-located and perform similar functions. The agencies specifically sought comment in the proposal on options to address these five subcategories of waters, including whether waters in these subcategories should be found “similarly situated” by rule.

Based on the body of scientific literature regarding the subcategories of waters specified in paragraph (a)(7) and their functions, the agencies determined that waters of the specified subcategories are similarly situated because they perform similar functions and they are located sufficiently close to each other to function together in affecting downstream waters and therefore reasonably be evaluated in combination with regard to their effects on the integrity of traditional navigable waters, interstate waters, or the territorial seas. The specified subcategories of waters perform similar functions as waters of the same subcategory in the same single point of entry watershed and collectively function together to affect a traditional navigable water, interstate water, or the territorial seas. Among the functions and relationships in the landscape the agencies considered to conclude that the subcategories are each similarly situated are the physical capacity of the waters to provide flood and sediment retention. In determining that the waters in each of the five subcategories are “similarly situated,” the agencies concluded that these subcategories of waters are co-located to each other or similar to the tributary system such that they have cumulative and additive effects on pollutant removal through parallel, serial, or sequential processing, such as the role of pocosins in maintaining water quality in estuaries. The subcategories of waters are sufficiently near each other or the tributary system to function as an integrated habitat that can support the life-cycle of a species or more broadly provide habitat to a large number of a single species.

The SAB expressed support for the agencies’ option in the preamble of the proposed rule to identify certain subcategories of waters as similarly situated and highlighted these same five subcategories. It stated, “[t]here is also adequate scientific evidence to support a determination that certain subcategories and types of ‘other waters’ in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (*i.e.*, they

have a similar influence on the physical, chemical and biological integrity of downstream waters and are similarly situated on the landscape) and thus could be considered waters of the United States. Furthermore, as the science continues to develop, other sets of wetlands may be identified as ‘similarly situated.’” SAB 2014b at 3.

The agencies concluded that the specific subcategories of waters listed in paragraph (a)(7) are similarly situated for purposes of a case-specific significant nexus based on the following:

(i) Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets that are found in the central United States and Canada. In the United States, they are found from central Iowa through western Minnesota, Montana, eastern South Dakota, and North Dakota. Prairie potholes demonstrate a wide range of hydrologic permanence; some hold permanent standing water and others are wet only in years with high precipitation. This in turn influences the diversity and structure of their biological communities.

Prairie potholes generally accumulate and retain water effectively due to the low permeability of their underlying soil, which can modulate flow characteristics of nearby streams and rivers. One of the most noted hydrologic functions of Prairie potholes is water storage. Because most of the water outflow in Prairie potholes is via evapotranspiration, Prairie potholes can become water sinks, preventing flow to downstream waters. Prairie potholes also can accumulate chemicals in overland flow, thereby reducing chemical loading to other bodies of water. When Prairie potholes are artificially connected to streams and lakes through drainage, they become sources of water and chemicals to downstream waters. Prairie potholes also support a community of highly mobile organisms, from plants to invertebrates that move among Prairie potholes and that can biologically connect the entire complex to the river network.

Prairie potholes can be highly connected to other Prairie potholes via shallow subsurface connections and via surface hydrologic connections during the wet season. They can also be connected to the stream network via surface and shallow subsurface connections. Intense precipitation events or high cumulative precipitation over one or more seasons can result in temporary hydrologic connectivity between Prairie potholes and from

Prairie potholes to the tributary system via “fill-and-spill” events.

Their density across the landscape varies from region to region as the result of several factors, including patterns of glacial movement, topography, and climate. In some parts of the region, prairie pothole density is very high. Though their density varies across the landscape, Prairie potholes often act as a complex. They have similar functions that can collectively impact downstream waters.

Prairie potholes have been determined to be similarly situated based on the characteristics of Prairie potholes, including their density on the landscape, their interaction and formation as a complex of wetlands and open waters, their connections to each other and the tributary network, and their similar functions. In addition, their chemical, physical, and biological connections to downstream waters and the strength of their effects on the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas support this determination that Prairie potholes are similarly situated by rule.

(ii) Carolina and Delmarva bays are ponded depressional wetlands that occur along the Atlantic coastal plain from northern Florida to New Jersey. Though Carolina and Delmarva bays are from the same category of wetland and perform similar functions, they are located in different parts of the Atlantic coastal plain and thus have unique names. Carolina bays are most abundant in North Carolina and South Carolina, while Carolina bays found in the Delmarva Peninsula are commonly referred to as Delmarva bays or Delmarva potholes.

Most bays receive water through precipitation, lose water through evapotranspiration, and lack natural surface outlets. Both mineral-based and peat-based bays have shown connections to shallow groundwater. Bays typically are in proximity to each other or to streams, providing for hydrologic connections to each other and to downstream waters in large rain events via overland flow or shallow subsurface connections. Some Delmarva bays have surface water connections to the Chesapeake Bay. In addition, human channeling and ditching of the bays are widespread and create surface connections to other waters, including the tributary system and estuaries. These ditches commonly connect the surface water of bays to other bays that are lower on the landscape, and ultimately, to streams.

The hydrology in bays allow for denitrification (chemical and biological processes that remove nitrogen from water), which can reduce the amount of nitrate in both groundwater and downstream surface waters. Because bays are frequently connected chemically to downstream waters through ditches, they can be sources of sediment and nutrients to downstream waters. Where they are not connected via confined surface connections, bays can act as sediment and nutrient sinks.

Fish are reported in bays that are known to dry out, indirectly demonstrating surficial connections. Amphibians and reptiles use bays extensively for breeding and for rearing young. These animals can disperse many feet on the landscape and can colonize, or serve as a food source to, downstream waters. Similarly, bays foster abundant insects that have the potential to become part of the downstream food chain. Humans have ditched and channelized a high percentage of bays, creating new surface connections to downstream waters and allowing transfer of nutrients, sediment, and other pollutants, such as methylmercury.

Carolina and Delmarva bays can occur in high density on the landscape and can act as a wetlands complex. Bays have similar functions to other bays and cumulatively these functions can impact downstream waters.

The agencies conclude that Carolina and Delmarva bays are similarly situated based on their close proximity to each other and the tributary network, their hydrologic connections to each other and the tributary network, their density on the landscape, and their similar functions.

(iii) The word pocosin comes from the Algonquin Native American word for “swamp on a hill,” and these evergreen shrub and tree-dominated wetlands are found from Virginia to northern Florida, but mainly in North Carolina. Typically, there is no standing water present in these peat-accumulating wetlands, but a shallow water table leaves the soil saturated for much of the year. They range in size from less than an acre to several thousand acres. The slow movement of water through the dense organic matter in pocosins removes excess nutrients deposited by rainwater. The same organic matter also acidifies the water. This water is slowly released to downstream waters and estuaries, where it helps to maintain the proper salinity, nutrients, and acidity.

Because pocosins are the topographic high areas on the regional landscape, they serve as the source of water for downstream waters. Pocosins often have

seasonal connections to drainageways leading to estuaries or are adjoining other wetlands draining into perennial streams or estuaries. Other pocosins have been ditched and are directly connected to streams.

The agencies conclude that pocosins are similarly situated based on their close proximity to each other and the tributary network, their hydrologic connections to each other and the tributary network, their density on the landscape, and their similar functions.

(iv) Western vernal pools are shallow, seasonal wetlands that accumulate water during colder, wetter months and gradually dry up during warmer, drier months. Western vernal pools are seasonal wetlands from the Pacific Northwest to northern Baja California, Mexico associated with topographic depressions, soils with poor drainage, mild, wet winters and hot, dry summers. The agencies have determined that California vernal pools are “similarly situated.”

Because their hydrology and ecology are so tightly coupled with the local and regional geological processes that formed them, western vernal pools in California typically occur within “vernal pool landscapes,” or complexes of pools in which swales connect pools to each other and to seasonal streams. Some common findings about the hydrologic connectivity of western vernal pools include evidence for temporary or permanent outlets, frequent filling and spilling of higher pools into lower elevation swales and stream channels, and conditions supporting subsurface flows through pools without perched aquifers to nearby streams.

Non-glaciated vernal pools in western states are reservoirs of biodiversity and can be connected genetically to other locations and aquatic habitats through wind- and animal-mediated dispersal. Animals and other organisms can move between western vernal pool complexes and streams. Insects and zooplankton can be flushed from vernal pools into streams and other waters during periods of overflow, carried by animal vectors (including humans), or dispersed by wind.

The agencies conclude that western vernal pools in California are similarly situated based on their close proximity to each other and the tributary network, their interaction and arrangement as a complex of wetlands, their hydrologic connections to each other and the tributary network, their density on the landscape, and their similar functions.

(v) Along the Gulf of Mexico from western Louisiana to south Texas, freshwater wetlands occur as a mosaic

of depressions, ridges, intermound flats, and mima mounds. These coastal prairie wetlands were formed thousands of years ago by ancient rivers and bayous and once occupied almost a third of the landscape around Galveston Bay, Texas. The term Texas coastal prairie wetlands is not used uniformly in the scientific literature but encompasses Texas prairie pothole (freshwater depressional wetlands) and marsh wetlands that are described in some studies that occur on the Lissie and Beaumont Geological Formations, and the Ingleside Sand.

Texas coastal prairie wetlands are locally abundant and in close proximity to other coastal prairie wetlands and function together cumulatively. Collectively as a complex, Texas coastal prairie wetlands can be geographically and hydrologically connected to each other via swales and connected to downstream waters, contributing flow to those downstream waters. Cumulatively, these wetlands can control nutrient release levels and rates to downstream waters, as they capture, store, transform, and pulse releases of nutrients to those waters.

The agencies conclude that Texas coastal prairie wetlands are similarly situated based on their close proximity to each other and the tributary network, their hydrologic connections to each other and the tributary network, their interaction and formation as a complex of wetlands, their density on the landscape, and their similar functions.

IV. Definition of “Waters of the United States”

A. Summary of the Rule

The rule revises the existing definition of “waters of the United States” consistent with the CWA, science, the agencies’ technical expertise and experience, and Supreme Court decisions. The final rule establishes categories of waters that are jurisdictional and other categories of waters that are excluded, as well as categories of waters and wetlands that require a case-specific significant nexus evaluation to determine if they are “waters of the United States” and covered by the CWA. The rule also provides definitions for key terms used in the regulation. The final rule retains much of the structure of the agencies’ longstanding definition of “waters of the United States,” and many of the existing provisions of that definition where revisions are not required in light of Supreme Court decisions or other bases for revision. All existing exclusions from the definition of “waters of the United States” are retained, and several exclusions reflecting longstanding

agencies’ practice are added to the regulation for the first time.

The agencies define “waters of the United States” in paragraph (a) of the rule for all sections of the CWA to include the traditional navigable waters (a)(1), interstate waters (a)(2), the territorial seas (a)(3), impoundments of jurisdictional waters (a)(4), covered tributaries (a)(5), and covered adjacent waters (a)(6). Waters in these categories are jurisdictional “waters of the United States” by rule—no additional analysis is required. This eliminates the need to make a case-specific significant nexus determination for covered tributaries or covered adjacent waters because the agencies determined that these waters have a significant nexus to waters identified in (a)(1) through (a)(3) of the rule and thus are “waters of the United States.” The agencies emphasize that the finding of jurisdiction for these covered tributaries and covered adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with other of these covered tributaries or covered adjacent waters in the watershed, is significant.

The agencies exclude specified waters from the definition of “waters of the United States” in paragraph (b) of the rule. The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA and makes no change to the existing exclusion for prior converted cropland. The rule excludes for the first time certain waters and features over which the agencies have generally not asserted CWA jurisdiction, as well as groundwater, which the agencies have never interpreted to be a “water of the United States” under the CWA. Codifying these longstanding practices supports the agencies’ goals of providing greater clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical.

This final rule provides clear exclusions for certain types of ditches. The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Waters and features that are excluded under paragraph (b) of the rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a).

In addition to waters that are categorically “waters of the United States” or categorically excluded under paragraphs (a) and (b), the rule identifies certain waters that can be

“waters of the United States” only where a case-specific determination has found a significant nexus between the water and traditional navigable waters, interstate waters, or the territorial seas. First, paragraph (a)(7) of the rule specifies five types of waters (Prairie potholes, Delmarva and Carolina bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that the agencies have determined to be “similarly situated,” and thus are to be considered in combination in a significant nexus analysis. Second, paragraph (a)(8) specifies that waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters located within 4,000 feet from the high tide line or the ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments, or covered tributaries may be found to have a significant nexus on a case-specific basis, but the agencies have not made a determination that the waters are “similarly situated.” As a result, a significant nexus analysis for these waters will include a case-specific assessment of whether there are any similarly situated waters, as well as whether the water, alone or in combination with any waters determined to be similarly situated, has a significant nexus to a traditional navigable water, interstate water, or territorial sea. The rule outlines at (c)(5)(i)–(ix) functions relevant to these case-specific significant nexus analyses.

Paragraph (c) of the rule provides definitions for key terms used in the regulation. Some of these are unchanged from the current regulations, including the definitions for “wetlands” at (c)(4), “ordinary high water mark” at (c)(6) and “high tide line” at (c)(7), although the latter two are existing, unchanged Corps’ definitions added to EPA’s regulations for the first time. 33 CFR 328.3(d)–(e). The rule also defines for the first time “tributary” and “tributaries” at (c)(3), “neighboring” (an aspect of adjacency) at (c)(2), and “significant nexus” at (c)(5).

This rule is effective on August 28, 2015. Under existing Corps’ regulations and guidance, approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant or, consistent with existing Corps’ guidance, unless new information warrants revision of the determination before the expiration period. Similarly, consistent with existing regulations and guidance, approved jurisdictional determinations

associated with issued permits and authorizations are valid until the expiration date of the permit or authorization.

As a general matter, the agencies' actions are governed by the rule in effect at the time the agency issues a jurisdictional determination or permit authorization, not by the date of a permit application, request for authorization, or request for a jurisdictional determination. However, any jurisdictional determinations issued prior to the effective date of the rule and jurisdictional determinations associated with permit applications deemed by the Corps to have been complete on the date this rule is published in the **Federal Register**, including complete pre-construction notifications, will be made consistent with the existing rule, unless the applicant requests that its approved jurisdictional determination or permit authorization be decided after the effective date of the new rule. Reliance on preliminary jurisdictional determinations is also not affected by the issuance of this rule. All other jurisdictional determinations and requests for authorization requiring an approved jurisdictional determination issued on or after the effective date of this rule will be made consistent with this rule.

It is important to emphasize that the agencies do not anticipate being able to complete new jurisdictional determinations submitted after this rule is published before it becomes effective. As a result, requesters seeking jurisdictional determinations after the rule is published should expect the determination will be made consistent with this rule. The agencies recognize there are a number of requests for permit applications and requests for jurisdictional determinations pending at any time. The agencies expect only a small portion of those pending actions will require additional information from or work by the requester. As described in the Economic Analysis, the vast majority of requests address streams and adjacent wetlands, and the agencies do not expect new information or work will be needed to complete those requests. If any additional information is needed to assess these requests, the agencies will work proactively with permit applicants to reduce potential short-term disruptions in the permit process that may be associated with the rule.

B. Traditional Navigable Waters

The existing regulations include within the definition of "waters of the United States" all waters that are currently used, or were used in the past, or may be susceptible to use in

interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. *See, e.g.*, 33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1); 40 CFR 122.2 ("waters of the U.S."). This paragraph of the regulation encompasses those waters that are often referred to as "traditional navigable waters." The rule does not make any changes to this paragraph of the regulation.

For purposes of CWA jurisdiction, waters will be considered traditional navigable waters, and jurisdictional under (a)(1) of the rule, if they:

- Are subject to section 9 or 10 of the Rivers and Harbors Appropriations Act of 1899;
- Have been determined by a Federal court to be navigable-in-fact under Federal law;
- Are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
- Have historically been used for commercial navigation, including commercial waterborne recreation; or
- Are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

See Technical Support Document; "U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook Appendix D, "Traditional Navigable Waters," available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_d_traditional_navigable_waters.pdf.

The agencies received several comments on the scope of traditional navigable waters. Some commenters observed that "traditional navigable waters" as a jurisdictional category is not based in science. Several commenters thought that the final rule should specify considerations to be taken into account when determining if a water is susceptible to being used in future commercial navigation. The agencies have not revised the regulation to address susceptibility, but observe that case law has provided a number of considerations and examples that are described further in the Technical Support Document and are reflected in longstanding agencies' practice.

C. Interstate Waters

The existing regulations define "waters of the United States" to include interstate waters, including interstate wetlands. The rule does not change that provision of the regulations. Therefore, interstate waters are "waters of the United States" even if they are not

navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, the rule protects impoundments of interstate waters, tributaries to interstate waters, waters adjacent to interstate waters, and waters adjacent to covered tributaries of interstate waters because they have a significant nexus to interstate waters. Protection of these waters is thus critical to protecting interstate waters.

The language of the CWA indicates that Congress intended the term "navigable waters" to include interstate waters without imposing a requirement that they be traditional navigable waters themselves or be connected to traditional navigable waters. The precursor statutes to the CWA subjected interstate waters and their tributaries to Federal jurisdiction. The text of the CWA, specifically CWA section 303, which establishes ongoing requirements for interstate waters, in conjunction with the definition of navigable waters, provides clear indication of Congress' intent to protect interstate waters that were previously subject to Federal regulation. Other provisions of the statute provide additional textual evidence of the scope of the primary jurisdictional term of the CWA.

The agencies also have a longstanding regulatory interpretation that interstate waters fall within the scope of CWA jurisdiction. The agencies' interpretation was promulgated contemporaneously with the passage of the CWA and is consistent with the statutory and legislative history of the CWA. Furthermore, the Supreme Court has never addressed the CWA's coverage of interstate waters, and it is not reasonable to read its decisions in *SWANCC* and *Rapanos* to question the jurisdictional status of interstate waters or to impose additional jurisdictional requirements on interstate waters. The assertion of jurisdiction over interstate waters is based on the statute and under predecessor statutes where "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Pub. L. 80-845, sec. 10, 62 Stat. 1155, at 1161 (1948). The agencies will continue to implement the provision consistent with the intent of Congress. For additional discussion of the agencies' interpretation of the CWA with respect to interstate waters, *see* Appendix B of the proposed rule and the Technical Support Document.

It is reasonable to assert jurisdiction over tributaries, adjacent waters, and waters that have a significant nexus to interstate waters consistent with the framework set forth in Justice Kennedy's

opinion in *Rapanos* for establishing jurisdiction over waters with a significant nexus to traditional navigable waters. Waters and wetlands with a significant nexus to traditional navigable waters and interstate waters have important beneficial effects on those waters, and by recognizing that polluting or destroying waters with a significant nexus can harm downstream jurisdictional waters. Traditional navigable waters and interstate waters cannot be protected without also protecting the waters that have a significant nexus to those waters as identified in the rule. The rule thus defines “waters of the United States” to include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and other waters that have a significant nexus to interstate waters.

The agencies received a number of comments on interstate waters. Some commenters asserted that interstate waters required a significant nexus to a traditional navigable water in order to be jurisdictional after *Rapanos*. The agencies disagree for the reasons described above, in Appendix B to the proposed rule, and in the Technical Support Document.

D. Territorial Seas

The CWA and its existing regulations include “the territorial seas” as a “water of the United States.” The rule makes no changes to that provision of the regulation other than to change the ordering to earlier in the regulation. The CWA defines “navigable waters” to include “the territorial seas” at section 502(7). The CWA goes on to define the “territorial seas” in section 502(8) as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.” The territorial seas establish the seaward limit of “waters of the United States.” The territorial seas are clearly covered by the CWA (they are also traditional navigable waters), and it is reasonable to protect their covered tributaries and covered adjacent waters.

Although some comments addressed the definition of “territorial seas” provided in the CWA suggesting that the distance thresholds be revised to reflect other resource statutes, the agencies do not have authority to revise statutory language.

E. Impoundments

The existing regulations provide that impoundments of “waters of the United States” remain “waters of the United States,” and the rule does not make any changes to the existing regulatory language.

Impoundments are jurisdictional because an impoundment of a “water of the United States” remains a “water of the United States,” and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. See Technical Support Document. The Supreme Court has confirmed that damming or impounding a “water of the United States” does not make the water non-jurisdictional. See *S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them.”). Similarly, when presented with a tributary to the Snake River which flows only about two months per year because of an irrigation diversion structure installed upstream, the Ninth Circuit noted “it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.” *U.S. v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008). As a matter of policy and law, impoundments do not defederalize a water, even where there is no longer flow below the impoundment. The agencies have analyzed stream networks, above and below impoundments, for connection to downstream traditional navigable waters, interstate waters, or the territorial seas. Scientific literature, as well as the agencies’ scientific and technical expertise and experience confirm that impoundments have chemical, physical, and biological effects on downstream waters. See Technical Support Document.

The agencies also note that an impoundment of a water that is not a “water of the United States” can become jurisdictional if, for example, the impounded waters become navigable-in-fact and covered under paragraph (a)(1) of the rule.

By their nature, impoundments of jurisdictional waters would also often meet the definition of “adjacent waters,” as they are typically bordering or contiguous. Impoundments of “waters of the United States” are *per se* jurisdictional under paragraph (a)(4) of

the rule without the need to determine if they are also adjacent under paragraph (a)(6). However, as described in section IV.G below, “adjacent waters,” as defined, have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, which bolsters the agencies’ determination that impoundments of “waters of the United States” remain “waters of the United States.”

Impoundments also may be one of the waters through which tributaries indirectly contribute flow to a traditional navigable water, interstate water, or territorial sea. As a matter of law and science, an impoundment does not cut off a connection between upstream tributaries and a downstream traditional navigable water, interstate water, or territorial sea, so covered tributaries above the impoundment are still considered a tributary to downstream traditional navigable waters, interstate waters, or the territorial seas even where the flow of water might be impeded due to the impoundment. See paragraph (a)(5).

The agencies received comments on impoundments, which generally explored the impacts of impoundments on connectivity to downstream waters. For the reasons described above and in the Technical Support Document, the agencies concluded that impoundments of “waters of the United States” remain “waters of the United States.”

F. Tributaries

The existing definition of “waters of the United States” regulates all tributaries without qualification. The final rule protects only waters that have a significant effect on the integrity of traditional navigable waters, interstate waters, or the territorial seas. The rule establishes a definition of “tributary,” and provides that a water meeting the definition of tributary, unless it is excluded under paragraph (b), is a “water of the United States” without the need for a separate case-specific significant nexus evaluation. As explained in Section III above, covered tributaries and the functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas. See also Technical Support Document. This section describes the provisions of the rule addressing tributaries and changes made to the provisions in the proposed rule based on public comments.

1. What are the provisions in the rule?

The rule defines “tributary” by emphasizing the physical characteristics created by sufficient volume, frequency and duration of flow, and that the water contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. This definition is based on the best available science, intent of the CWA, and case law, and is consistent with current practice. As mentioned above in Section III, the Science Report concludes that “[t]he scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters.” Science Report at ES–2.

First, to meet the rule’s definition of “tributary,” a water must flow directly or through another water or waters to a traditional navigable water, interstate water, or the territorial seas. Waters through which a tributary may contribute flow indirectly include, for example, impoundments, wetlands, lakes, and other tributaries. A tributary may contribute flow through any number of downstream waters, including non-jurisdictional features, such as a ditch excluded under paragraph (b) of the rule, and jurisdictional waters that are not tributaries, such as an adjacent wetland—but it must be part of a tributary system that eventually flows to a traditional navigable water, an interstate water, or the territorial seas. This limitation on what constitutes a tributary for purposes of this rule is fundamental. If a water is not part of the tributary system of a traditional navigable water, interstate water, or the territorial seas, it does not meet the definition of “tributary” and is not jurisdictional under this provision of the rule. For example, an intermittent stream that exists wholly within one state, is not itself a traditional navigable water, and whose flows eventually ends without connecting to a traditional navigable water, interstate water, or the territorial seas is not a “water of the United States” as a “tributary” for purposes of this rule. To determine whether a water meets this aspect of the definition, the connection can be traced using direct observation, U.S. Geological Survey (USGS) data, stream datasets such as the National Hydrography Dataset, aerial photography or other reliable remote sensing information, or other appropriate information.

Under the rule, flow in the tributary may be perennial, intermittent, or ephemeral. The agencies received comments suggesting that the final rule

provide definitions for the terms ephemeral flow, intermittent flow, and perennial flow. The agencies considered the request and determined that there was no need to include a definition since they are commonly used scientific terms. Longstanding agencies’ practice considers perennial streams as those with flowing water year-round during a typical year, with groundwater or contributions of flow from higher in the stream or river network as primary sources of water for stream flow. Intermittent streams are those that have both precipitation and groundwater providing part of the stream’s flow, and flow continuously only during certain times of the year (e.g., during certain seasons such as the rainy season). Ephemeral streams have flowing water only in response to precipitation events in a typical year, and are always above the water table. Precipitation can include rainfall as well as snowmelt. Science shows that tributaries regardless of flow duration are very effective at transporting pollutants downstream, such as excess nutrients and sediment, which impact the integrity and character of traditional navigable waters, interstate waters, and the territorial seas. *See* Technical Support Document.

Second, the rule requires two physical indicators of flow: There must be a bed and banks and an indicator of ordinary high water mark. This definition of “tributary” includes only those waters the agencies have concluded are the type of waters that the CWA was intended to protect and which either individually or in combination with other covered tributaries in the watershed have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Thus, the agencies are not defining “waters of the United States” to include all streams that might be considered “tributaries” in the general scientific literature. To provide additional clarity and for ease of use for the public, the agencies are including the Corps’ existing definition of ordinary high water mark in EPA’s regulations as well. Under that existing Corps regulation, ordinary high water mark indicators include characteristics such as shelving, scour, changes in soil characteristics, and destruction of terrestrial vegetation, among others.

A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. *See* Technical Support Document. For purposes of the rule, “bed and banks”

means the substrate and sides of a channel between which flow is confined. The banks constitute a break in slope between the edge of the bed and the surrounding terrain, and may vary from steep to gradual. Existing Corps regulations define ordinary high water mark as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e). That definition is not changed by the rule and is added to EPA’s regulations.

Current Corps regulations and guidance identify bed and banks as indicators of the ordinary high water mark. The definition of “tributary” in this rule requires the presence of a bed and banks and an additional indicator of ordinary high water mark such as staining, debris deposits, or other indicator identified in the rule or agency guidance. In many tributaries, the bed is that part of the channel below the ordinary high water mark, and the banks often extend above the ordinary high water mark. For other tributaries, such as those that are incised, changes in vegetation, changes in sediment characteristics, staining, or other ordinary high water mark indicators may be found within the banks. In concrete-lined channels, the concrete acts as the bed and banks and can have other ordinary high water mark indicators such as staining and debris deposits. Indicators of an ordinary high water mark may vary from region to region across the country. *See* Technical Support Document.

Other evidence, besides direct field observation, may establish the presence of bed and banks and another indicator of ordinary high water mark. The agencies currently use many tools in identifying tributaries and will continue to rely on their experience and expertise in identifying the presence of a bed and banks and ordinary high water mark. For example, several reliable, well-established remote sensing sources of information or mapping can assist to establish the presence of water that contributes flow to a traditional navigable water, interstate water, or the territorial seas and provide evidence regarding the presence of a bed and banks and another indicator of ordinary high water mark. Among the types of remote sensing or mapping information that can assist in establishing the presence of water are USGS topographic

data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark.

Both the USGS topographic data and the NHD data assist to delineate tributaries to traditional navigable waters, interstate waters, or the territorial seas. Where one or both of these sources have indicated a “blue line stream,” there is an indication that the tributary could exhibit a bed and banks and another indicator of ordinary high water mark. Where this information is combined with stream order,¹¹ more certainty can result. For example, a water that is a second-order stream will be more likely to exhibit a bed and banks and another indicator of ordinary high water mark as compared to a first-order stream. This information will vary in validity in different parts of the country, so care will be taken to evaluate additional information prior to reasonably concluding a bed and banks or other indicators of ordinary high water mark are associated with the stream. This will be particularly true for first-order streams and for many streams in the arid portions of the country. Supporting information that can be used to conclude the presence of a bed and banks and another indicator of ordinary high water mark would be the presence of USGS stream data on the NRCS county Soil Survey or local stream maps which are mapped independently of the USGS, aerial photography interpretation, or digital terrain depictions created from LIDAR. *See* Technical Support Document.

Tributaries are observable in aerial photography by their topographic expression, characteristic linear and

curvilinear patterns, dark photographic tones, and the presence and pattern of riparian vegetation. The characteristic linear and curvilinear patterns and dark photographic tones observed on aerial photography can be caused by shadow cast from the banks of an incised stream or from water in the stream channel itself. In some cases stream channel morphology is visible, providing evidence of scour, materials sorting, and deposition, all characteristics of an ordinary high water mark. Visible persistent water (*e.g.*, multiple dates of aerial photography showing visible water) provides strong evidence of the sufficient frequency and duration of surface flow to create a bed and banks and other indicators of ordinary high water mark. Visible indicators of running water such as rapids, riffles, and pools all indicate the presence of a bed and banks and other indicators of ordinary high water mark. Other physical characteristics of an ordinary high water mark that may be visible on aerial photography include the destruction of terrestrial vegetation and the absence of vegetation in a channel. These indicators gleaned from aerial photography interpretation can be correlated with the presence of USGS streams data in reasonably concluding that a bed and banks and another indicator of ordinary high water mark are present. *See* Technical Support Document.

Additional desktop tools can assist in the identification of bed and banks and other indicators of ordinary high water mark. For instance, field staff use other methods for estimating ordinary high water mark, including, but not limited to, lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence. Some desktop tools, such as a regional regression analysis and the Hydrologic Modeling System (HEC-HMS), provide for the hydrologic estimation of stream discharge sufficient to create an ordinary high water mark in tributaries under regional conditions. Such desktop tools are particularly useful for identifying presence of bed and banks and another indicator of ordinary high water mark when supported by additional remote sensing tools that indicate the presence of such physical features.

LIDAR is a powerful tool to analyze the characteristics of the land surface, including tributary identification and characterization. LIDAR data are becoming more and more widespread for engineering and land use planning purposes. Where LIDAR data have been processed to create a bare earth model, detailed depictions of the land surface

are available. Bare earth models reveal subtle elevation changes and can clearly show a tributary's bed and banks and channel morphology. In many cases LIDAR can help delineate tributaries that would exhibit a bed and banks and another indicator of an ordinary high water mark in greater detail than aerial photography interpretation alone can. Visible linear and curvilinear incisions on a bare earth model are strong evidence that a tributary with a bed and banks and another indicator of an ordinary high water mark is present. LIDAR-indicated tributaries can be correlated with aerial photography interpretation and USGS stream data, to reasonably conclude the presence of a bed and banks and another indicator of an ordinary high water mark in the absence of a field visit. *See* Technical Support Document. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible.

In addition, such desktop tools are critical in circumstances where physical characteristics of bed and banks and another indicator of ordinary high water mark are absent in the field, often due to unpermitted alteration of streams. In such cases where physical characteristics of bed and banks and another indicator of ordinary high water mark no longer exist, they may be determined by using other appropriate means that consider the characteristics of the surrounding areas. Such reliable methods that can indicate prior existence of bed and banks and other indicators of ordinary high water mark include, but are not limited to, lake and stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, the use of reference conditions, or through the remote sensing and desktop tools described above.

The upper limit of the tributary is the point where a bed and banks and another indicator of ordinary high water mark cease to be identifiable. The ordinary high water mark establishes the lateral limits of a water, and its absence generally determines when a tributary's channel or bed and banks has ended, representing the upper limit of the tributary. However, a natural or constructed break in bed and banks or other indicator of ordinary high water mark does not constitute the upper limit of a tributary where bed and banks or other indicator ordinary high water mark can be found farther upstream. Note that waters, including wetlands, which are adjacent to a tributary at the

¹¹ Stream order is a method for stream classification based on relative position within a river network, when streams lacking upstream tributaries (*i.e.*, headwater streams) are first-order streams and the junction of two streams of the same order results in an increase in stream order (*i.e.*, two first-order streams join to form a second-order stream, and so on). When streams of different orders join, the order of the larger stream is retained. *See* Science Report and Technical Support Document.

upper limit of the channel are jurisdictional as “adjacent waters.”

The definition of “tributary” includes tributaries that flow directly or indirectly through impoundments that are jurisdictional under paragraph (a)(4) of the rule. Tributaries to impoundments of “waters of the United States” are jurisdictional for the same reasons the impoundments themselves are jurisdictional. As discussed in section IV. E., under case law, an impoundment of a “water of the United States” remains a “water of the United States,” and scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, and the territorial seas. Therefore, tributaries to such impoundments continue to have a significant nexus, alone or in combination with other covered tributaries in the watershed, to the downstream traditional navigable water, interstate water, or the territorial seas.

Waters that meet the rule definition of tributary remain tributaries even if there is a manmade or natural break at some point along the connection to the traditional navigable water, interstate water, or the territorial seas. In many tributaries, there are often natural or constructed breaks in the presence of a bed and banks or ordinary high water mark while hydrologic connectivity remains. For example, in some regions of the country where there is a very low gradient, the banks of a tributary may be very low or may even disappear at times. Many tributaries lose their ordinary high water mark when adjacent wetlands are contiguous with the stream channel. The definition of “tributary” addresses these circumstances and states that waters that meet the definition of tributary remain tributaries even if such breaks occur, so long as bed and banks and an ordinary high water mark are present upstream of the break. Under the rule, when a covered tributary flows through a wetland into another tributary (sometimes called a “run-of-stream” wetland), the covered tributary remains jurisdictional even though it lost its ordinary high water mark through the wetland. By looking to the presence of a bed and banks and an ordinary high water mark upstream, the rule ensures that a mere break in the ordinary high water mark does not render tributaries with a significant nexus to downstream waters not jurisdictional. Other breaks that do not sever jurisdiction include constructed breaks such as bridges, culverts, pipes, dams, or waste treatment systems, or

natural breaks such as debris piles, boulder fields, or a stream that flows underground so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. Site specific conditions will continue to determine the distance up valley that needs to be evaluated to see if the break in bed and banks and ordinary high water mark is temporary or the start of the stream system.

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as a ditch with ephemeral flow. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional. A water also continues to meet the definition of tributary if at some point the water contributes flow through a jurisdictional water that is not a tributary, such as an adjacent wetland or impoundment.

The agencies’ longstanding interpretation of the CWA has included tributaries that are natural, modified, or constructed waters. While this rule at paragraph (b) excludes specific types of constructed waters from jurisdiction, it continues to interpret constructed tributaries as jurisdictional unless expressly excluded in paragraph (b). Natural, modified, and constructed tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to traditional navigable waters, interstate waters, or the territorial seas. The discharge of a pollutant into a tributary generally has the same effect downstream whether the tributary waterway is natural, modified, or constructed. See discussion in section III.C. above and the Technical Support Document. Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly modified or constructed. For example, tributaries that have been channelized in concrete or otherwise have been modified may still meet the definition of tributaries under the rule so long as they have bed and banks and an ordinary high water mark, contribute flow to a traditional navigable water, interstate water, or the territorial seas, and are not excluded under paragraph (b). The important consideration for a modified or constructed water is whether it meets the definition of “tributary” and is not excluded under paragraph (b).

Ditches are one important example of constructed features that in many instances can meet the definition of tributary. Ditches are jurisdictional under the rule only if they both meet the definition of “tributary” and are not excluded under paragraph (b)(3) in the rule. Not all ditches meet the definition of a tributary, and others—as discussed in Section I—are expressly excluded from jurisdiction.

Ditches protected by the rule must meet the definition of tributary, having a bed and banks and ordinary high water mark, and contributing flow directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas. Jurisdictional ditches include ditches such as the following:

- Ditches with perennial flow,
- Ditches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands,
- Ditches, regardless of flow, that are excavated in or relocate a tributary.

The definition of tributary includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary. In addition, alteration or modification of natural streams and rivers for purposes such as flood control, erosion control, and other reasons does not convert the tributary to a ditch. A stream or river that has been channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, is not a ditch. A stream that has banks stabilized through use of concrete or rip-rap (e.g., rocks or stones) is not a ditch. The Los Angeles River, for example, is a “water of the United States” (and, indeed, a traditional navigable water) and remains a “water of the United States” and is not excluded under paragraph (b)(3) even where it has been ditched, channelized, or concreted.

A ditch that relocates a stream is not an excluded ditch under paragraph (b)(3), and a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. A ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing the stream’s aquatic character. The latter type of ditch is excluded from jurisdiction where it meets the listed characteristics of excluded ditches under paragraph (b)(3). Agency staff can determine historical presence of tributaries using a variety of resources, such as historical maps, historic aerial photographs, local surface water management plans, street

maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts. A ditch with intermittent flow that drains a wetland and otherwise meets the definition of “tributary” is a “tributary” and is not excluded under paragraph (b)(3). See IV.I. below.

Evidence, such as current or historic photographs, prior delineations, or USGS, state and local topographic maps, may be used to determine whether a ditch is an excluded ditch. Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may or may not connect to another “water of the United States.”

2. What changes did the Agencies make from the proposed rule based on public comments?

The rule’s definition of “tributary” retains many elements from the proposed rule, but reflects public comments in several important ways. In particular, the rule emphasizes flow. The rule defines “tributary” by emphasizing physical characteristics created by water flow and requiring that the water contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The rule also is clearer regarding the jurisdictional status of certain ditches, and clarifies that wetlands and waters such as ponds and lakes that contribute flow to a traditional navigable water, interstate water, or the territorial seas but typically lack a bed and banks and ordinary high water mark are considered “adjacent” but not a “tributary.”

A number of commenters suggested that the agencies should exclude ephemeral streams from the definition of tributary, expressing concern that ephemeral waters that flow very rarely would be considered a jurisdictional tributary. The rule definition of “tributary” requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered a “tributary” under this rule. While some commenters expressed concern that a feature that flowed very rarely could meet the proposed definition of “tributary,” it is the agencies’ judgment that such a feature is not a tributary under the rule because it would not

form the physical indicators required under the definitions of “ordinary high water mark” and “tributary.”

The rule includes ephemeral streams that meet the definition of tributary as “waters of the United States” because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. As noted by the SAB, and consistent with the scientific literature, tributaries as a group exert strong influence on the chemical, physical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of chemical, physical, and biological processes. *See, e.g.,* SAB 2014b. These significant effects on traditional navigable waters, interstate waters, and the territorial seas occur even when the tributary is small, intermittent, or ephemeral.

In addition, the Science Report concludes that, “[a]lthough less abundant, the available evidence for connectivity and downstream effects of ephemeral streams was strong and compelling, particularly in context with the large body of evidence supporting the physical connectivity and cumulative effects of channelized flows that form and maintain stream networks.” Science Report at 6–13. For example, ephemeral headwater streams shape river channels in traditional navigable or interstate waters by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris. These materials help structure traditional navigable and interstate river channels by slowing the flow of water through channels and providing substrate and habitat for aquatic organisms.

Moreover, the agencies have historically considered ephemeral tributaries to be “waters of the United States.” For example, for many years EPA has reviewed and approved state water quality standards for ephemeral waters under CWA section 303(c), several Corps’ Nationwide Permits under CWA section 404 address discharges of dredged or fill material into ephemeral waters, and the agencies’ definition of “waters of the United States” prior to this rule included all tributaries without reference to flow regime.

Numerous commenters asked that the final rule define “bed and banks,”

which are physical characteristics called for under the definition of tributary. Such commenters emphasized the importance of a definition of “bed and banks,” and some suggested definitional language. To increase clarity, the preamble in IV.F.1. above includes a definition of bed and banks adapted largely from longstanding agencies’ practice as well as comments. Several commenters suggested that the rule should add a definition of “ordinary high water mark.” In response and to increase clarity, the rule adds the Corps’ existing regulatory ordinary high water mark definition to EPA’s regulations. Corps technical manuals are available to help identify ordinary high water mark, referenced above. Several commenters suggested that the agencies not require a tributary to have both bed and banks and ordinary high water mark, because bed and banks are themselves an indicator of ordinary high water mark, and because ordinary high water mark alone is an appropriate criterion for many streams in the arid west where the characteristic of bed and banks is less common. The agencies based their significant nexus determination for the covered tributaries in part on the amount of flow indicated where a tributary has both a bed banks and another indicator of ordinary high water mark, so the rule continues to require both physical indicators with the preamble at IV.F.1. above clarifying the means to conclude that those indicators exist.

Several commenters suggested that the rule exclude all constructed waters from the definition of “waters of the United States.” While the rule does exclude several types of constructed waters from jurisdiction, it continues to consider constructed tributaries as jurisdictional unless expressly excluded in paragraph (b) for the reasons described in section IV.I. and the Technical Support Document.

Many comments recommended that wetlands, ponds, and lakes that contribute flow to a traditional navigable water, interstate water, or the territorial seas but lack a bed and banks and ordinary high water mark not be considered as tributaries, because of the importance of those physical characteristics to the definition. Wetlands typically lack bed and banks and ordinary high water mark, while lakes and ponds typically have an ordinary high water mark and a bed but may lack banks. The proposed rule expressly sought comment on whether such waters should be considered as tributaries or as “adjacent waters,” recognizing that it might add an element of uncertainty to the definition of

“tributary” to include waters that lacked the physical features called for in the definition. In addition, the SAB commented that tributaries are not typically defined to include lentic systems (still waters), and suggested that the agencies reconsider including ponds, lakes, and wetlands as covered adjacent waters instead of tributaries. SAB 2014b at 2. In response, the rule does not consider these waters to be tributaries, but defines covered adjacent waters to include wetlands, lakes, and ponds that connect segments of tributaries or are at the head of the tributary system. *See* section G for further discussion.

G. Adjacent Waters

Section III above explains the basis for the agencies’ conclusion that covered adjacent waters have a significant nexus with traditionally navigable waters, interstate waters, or the territorial seas. The adjacency provision is based on the best available science, intent of the CWA, and case law, and is consistent with the experience of the agencies in making case-specific significant nexus determinations. As discussed above in Section III, the SAB concludes, “[t]he available science supports [the agencies’] proposal to include adjacent waters and wetlands as waters of the United States.” SAB 2014b at 2. This section describes the provisions of the rule governing adjacent waters, changes made to the adjacent waters provision based on comments on the proposed rule, and, finally, how science and the law support the agencies’ conclusions in the final rule.

1. What are the provisions of the rule?

Under the rule, “adjacent” means bordering, contiguous, or neighboring, including waters separated from other “waters of the United States” by constructed dikes or barriers, natural river berms, beach dunes, and the like. Waters adjacent to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, are “waters of the United States.” For purposes of adjacency, an adjacent water includes wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary. Therefore, waters that connect segments of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary or are located at the head of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary may be determined to be

bordering, contiguous, or neighboring, and thus adjacent. “Adjacent waters” include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. “Adjacent waters” do not include any water excluded under paragraph (b) of the rule. Note also that a water that does not meet the definition of “adjacent waters” may be determined to be a “water of the United States” on a case-specific basis under paragraph (a)(8) of the rule.

Within the definition of “adjacent,” the terms bordering and contiguous are well understood, and for continuity and clarity the agencies continue to interpret and implement those terms consistent with the current policy and practice. Waters separated by a berm or other similar feature remain “adjacent” under the definition.

Some waters included under the definition of “tributary” in the proposed rule, after consideration of public comment, are “adjacent” in the final rule. Specifically, waters that connect segments of, or are at the head of, a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary are adjacent to that water. For example, a pond that is the source water to a tributary and borders the tributary at its uppermost reach is jurisdictional as an adjacent water. Further, the rule states that an adjacent water includes wetlands within or abutting its ordinary high water mark. This language is designed to ensure that if there is a fringe wetland abutting that pond that is the source water to a tributary, that wetland is considered part of the pond under the rule and such pond as a whole, including any abutting wetlands, is jurisdictional as an adjacent water.

For purposes of adjacency, including all three provisions of the definition of “neighboring,” the entire water is adjacent if any part of the water is bordering, contiguous or neighboring. Therefore, the entire wetland is “adjacent” if any part of it is within the distance thresholds established in the definition of “neighboring.” For example, if a tributary has a 1,000 foot wide 100-year floodplain, then a water that is located within 1,000 feet of the ordinary high water mark of a covered tributary and extends to 2,000 feet is jurisdictional in its entirety as “neighboring.” In addition, for purposes of determining whether a water is “adjacent” artificial features (such as roads) do not divide a water; rather, the water is treated as one entire water.

The definition of “adjacent” in the rule does not include those waters in which established, normal farming, silviculture, and ranching activities

occur. Wetlands and farm ponds in which normal farming activities occur, as those terms are used in section 404(f) of the Clean Water Act and its implementing regulations, are not jurisdictional under the Act as an “adjacent” water. Waters in which normal farming, ranching, and silviculture activities occur instead will continue to be subject to case-specific review, as they are today. These waters may be determined to have a significant nexus on a case-specific basis under paragraph (a)(7) or (a)(8). Recognizing the vital role of farmers in providing the nation with food, fiber, and fuel, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. “Normal” farming, ranching, and silviculture is clarified in the agencies’ implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 CFR 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional as “adjacent.” It is important to recognize that “tributaries,” including those ditches that meet the tributary definition, are not “adjacent” waters and are jurisdictional by rule.

This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation’s agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters in which normal farming, silviculture, or ranching practices occur may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters in which normal farming, silviculture, or ranching practices occur are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination.

The rule establishes a definition of “neighboring” for purposes of determining adjacency. In the rule, the

agencies identify three circumstances under which waters would be “neighboring” and therefore “waters of the United States.”

First, the term “neighboring” includes all waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary.

Second, the term “neighboring” includes all waters within the 100-year floodplain of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary that is located in whole or in part within 1,500 feet of the ordinary high water mark of that jurisdictional water. In this rule, the agencies interpret “100-year floodplain” to mean “the area that will be inundated by the flood event having a one percent chance of being equaled or exceeded in any given year.” This is consistent with the Federal Emergency Management Agency’s (FEMA) definition of “100-year flood.” If the 100-year floodplain is greater than 1,500 feet from the ordinary high water mark, only those waters that are located in whole or in part within 1,500 feet of the ordinary high water mark are “neighboring.” In addition, if the 100-year floodplain is less than 1,500 feet from the ordinary high water mark, only those waters located in whole or in part within the floodplain are “neighboring” under this provision.

Third, the rule defines “neighboring” to include all waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas, and all waters located within 1,500 feet of the ordinary high water mark of the Great Lakes. This provision defines waters that begin within 1,500 feet of a tidally-influence traditional navigable water or the territorial seas and waters within 1,500 feet of the ordinary high water mark of the Great Lakes as “waters of the United States.” To provide clarity for this aspect of the definition, the agencies incorporated the Corps’ existing definition of high tide line into EPA’s regulations at paragraph (c)(7) in the rule.

As noted above, the rule provides that with respect to the boundaries for covered adjacent waters the entire water is jurisdictional as long as the water is at least partially located within the distance threshold, and the agencies interpret the rule to apply to any single water or wetland that may straddle a distance threshold. Low-centered polygonal tundra and patterned ground bogs (also called strangmoor, string bogs, or patterned ground fens) are

considered a single water for purposes of the rule because their small, intermingled wetland and non-wetland components are physically and functionally integrated. These areas often have complex micro-topography with repeated small changes in elevation occurring over short distances. Science demonstrates that these wetlands function as a single wetland matrix having clearly hydrophytic vegetation, hydric soils, and wetland hydrology. As a result, the agencies will continue to evaluate these wetlands as a single water under the rule. Where any portion of these wetland types is bordering, contiguous or neighboring, the entire wetland is a “water of the United States.” Similarly, for purposes of a case-specific determination under paragraph (a)(8), wetlands of these types constitute a single water when making a significant nexus determination. Other wetlands may also have intermingled wetland and non-wetland components that are so physically and functionally integrated they can be considered a single water for purposes of the rule. Groups of wetlands that are simply part of a complex of wetlands would not be considered a single water for purposes of the rule.

The final rule also makes some ministerial changes to the definition of “adjacent.” The existing regulation defined “adjacent” to mean “bordering, contiguous, or neighboring,” and had a second sentence that clarified that wetlands separated by berms and the like remain adjacent wetlands. The final rule combines those sentences without changing the scope of adjacency.

When determining the jurisdictional boundaries under the CWA for “adjacent waters,” the agencies will rely on published FEMA Flood Zone Maps to identify the location and extent of the 100-year floodplain. <https://msc.fema.gov/portal>. These maps are publicly available and provide a readily accessible and transparent tool for the public and agencies to use in locating the 100-year floodplain. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground. The agencies will determine if a particular map is no longer accurate based on factors, such as streams or rivers moving out of their channels with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is deemed by the agencies to be out of date, the agencies will rely on other available tools to

identify the 100-year floodplain, including other Federal, State, or local floodplain maps, Natural Resources Conservation Service (NRCS) Soil Surveys (Flooding Frequency Classes), tidal gage data, and site-specific modeling (e.g., Hydrologic Engineering Centers River System Analysis System or HEC-RAS). <http://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm> and HEC-RAS and <http://www.hec.usace.army.mil/software/hec-ras/>. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect of establishing jurisdiction under the rule and the reliable and appropriate tools for identifying the 100-year floodplain may vary, the agencies will coordinate with other federal and state agencies to develop additional information for EPA and Corps field staff to further improve tools for identifying the 100-year floodplain in a consistent, predictable, and scientifically valid manner.

When determining the outer distance threshold for an “adjacent water” the line is drawn perpendicular to the ordinary high water mark or high tide line of the traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary and extended landward from that point. If there are breaks in the ordinary high water mark, the line should be extrapolated from the point where the ordinary high water mark is observed on the downstream side to the point where the ordinary high water mark is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground.

The agencies emphasize that they fully support efforts by States and tribes to protect under their own laws any additional waters, including locally special waters that may not be within the Federal protections of the CWA as the agencies have interpreted its scope in this rule. In promulgating the adjacent water boundaries, the agencies have balanced protection and clarity, scientific uncertainties and regulatory experience, and established boundaries that are, in their judgment, reasonable and consistent with the statute and its goals and objectives.

If waters identified in this section are determined to be adjacent, no case-specific significant nexus evaluation is required.

2. What changes did the agencies make from the proposed rule based on public comments?

In the proposal, the agencies sought comment on a number of ways to address and clarify jurisdiction over “adjacent waters,” including establishing a floodplain interval and providing clarity on reasonable proximity as an important aspect of adjacency. In light of the comments, the science, the agencies’ experience, and the Supreme Court’s consistent recognition of the agencies’ discretion to interpret the bounds of CWA jurisdiction, the agencies have made some revisions in the final rule designed to more clearly establish boundaries on the scope of “adjacent waters.”

Under the proposal and the final rule, “adjacent waters” are jurisdictional based on the conclusion that they have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, and there is no need for additional analysis. Some commenters wanted a case-specific analysis for all “adjacent waters” as they believed that the waters would not individually have a significant nexus to an adjacent “water of the United States,” while others noted that their functional relationship to the downstream traditional navigable waters, interstate waters, or the territorial seas warranted the conclusion that they were all jurisdictional. Based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that “adjacent waters,” as defined, alone or in combination with other covered “adjacent waters” in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. However, the rule also provides for case-specific analysis of some waters that do not meet the definition of “neighboring” established by the rule. See section IV.H.

The proposal included wetlands, ponds, lakes, and impoundments that contribute flow, directly or indirectly, to the downstream traditional navigable waters, interstate waters, or the territorial seas in the definition of “tributary.” Some commenters expressed concern that since such waters generally do not have both an ordinary high water mark and a bed and banks, the definition of tributary was contradictory and confusing. The agencies sought comment on whether to treat these waters as “adjacent waters” instead of tributaries, since they not

only contribute flow, but they also border or are contiguous to the waters to which they contribute flow. The SAB in particular commented that the agencies “may want to consider whether flow-through lentic systems should be included as “adjacent waters” and wetlands, rather than as tributaries.” SAB 2014b at 2. In light of the comments and to provide additional clarity, the agencies revised the definitions of “adjacent” and “tributary” to include these waters as “adjacent.”

Under the existing rule, there is no definition for the term “neighboring,” and the public commented that not having a definition created a lack of clarity and inconsistent field practices across the nation. In the proposal, “neighboring” was defined to include waters located within the riparian area or floodplain of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary; waters with a shallow subsurface hydrologic connection to a jurisdictional water; and waters with a confined surface hydrologic connection to a jurisdictional water. Although the definitions were scientifically-based for the terms “riparian area” and “floodplain” to define the lateral reach of the term “neighboring,” some commenters indicated that the proposed definitions to clarify neighboring were not clear. Those commenters requested that a specific floodplain interval or other limitation should be established to more clearly identify the outer limit of neighboring. Some commenters stated that the proposed definition of “neighboring” was unclear, while other commenters found the definition helped clarify CWA jurisdiction and were supportive of including a broad definition, based on ecological interconnectedness.

Some commenters stated that the proposed definitions of “riparian area” and “floodplain” were vague or ambiguous, broad or effectively limitless, beyond the agencies’ authority or difficult or impossible to implement in the field. Other commenters were supportive of using the riparian area as a basis for adjacency. Some commenters asked why the agencies were proposing a new definition of “floodplain” that was inconsistent with the definition used by other Federal agencies like NRCS or FEMA. Some commenters suggested that if the agencies use floodplains as a means to define “neighboring,” it should be limited to the area inundated by the 2-year, 5-year, 10-year, or 20-year flood, while other commenters supported the use of the 100-year floodplain as a component of

“neighboring.” Some commenters supported including all wetlands and other waters in the 100-year floodplain as categorically jurisdictional. Other commenters requested that floodplain size be based on tributary size, while others suggested that it should be based on soil and geologic features, and some suggested the use of the FEMA flood zone maps. Some commenters stated that “reasonable proximity” was neither defined nor clarified adjacency, noting that adjacency should not apply to waters separated from a “water of the United States” by great distances.

In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific boundaries from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. In the proposal, the agencies requested comment on whether the rule should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water. 79 FR 22209. As recommended by the public and based on science, the agencies’ boundaries for “neighboring” are based largely on use of the 100-year floodplain. The agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Further, should the riparian area on occasion extend beyond the 100-year floodplain, the agencies have the ability to perform a case-specific significant nexus analysis on a water out to 4,000 feet from the ordinary high water mark or high tide line of a traditional navigable water, interstate water, the territorial sea, impoundment, or tributary. The agencies have drawn these lines based on their technical expertise and experience in order to provide a rule that is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Because science indicates that connectivity is on a gradient, the agencies have also identified limited circumstances in which waters that do not meet the definition of “neighboring” may be determined on a case-specific basis to have a significant nexus. See section IV.I.

First, the rule establishes as “neighboring” waters that occur within 100 feet from traditional navigable

waters, interstate waters, the territorial seas, impoundments, and tributaries.

Second, the rule utilizes a specific floodplain and also establishes maximum distances for purposes of “neighboring.” Studies have found that waters within the floodplain are dynamically connected and frequently interact with the downstream traditional navigable water, interstate water, territorial sea, impoundment, or tributary. Some commenters indicated that a specific floodplain or other designation should be set to define the outer boundary of “neighboring.” Further, some commenters requested that the 100-year floodplain designation be used to define the outer boundary of adjacency because the public understands this concept. Several commenters recommended that FEMA or NRCS maps be used to support the analysis as these maps are easily accessible to the public. Because FEMA maps exist for many areas of the country and the NRCS Soil Survey maps do as well, the agencies decided that defining “neighboring” based in part on a particular floodplain or recurrence interval was a reasonable means of ensuring the consistency and certainty that is important to the public and for implementation of the CWA. In drawing lines, the agencies chose the 100-year floodplain in part because FEMA and NRCS together have generally mapped large portions of the United States, and these maps are publicly available, well-known and well-understood.

Because the 100-year floodplain can be very wide in some areas of the country, particularly near large rivers, the agencies chose to provide increased clarity and certainty while ensuring that waters that provide important functions significantly affecting the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas are protected by establishing a 1,500 foot maximum distance for neighboring waters in the rule. Waters within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark are adjacent without regard to the presence of berms or other barriers. However, because the science demonstrates that floodplain waters provide important functions for downstream waters, the agencies have established a provision under paragraph (a)(8) for case-specific significant nexus evaluations of waters located in the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas beyond 1,500 feet.

The rule also establishes a separate bright line for including as

jurisdictional those waters that occur within 1,500 feet of tidally-influenced traditional navigable waters or the territorial seas.

The proposal defined “neighboring” to include waters with a surface connection to jurisdictional waters and some commenters recommended eliminating surface hydrologic connectivity as a basis for adjacency. The definition of neighboring does not include a provision defining “neighboring” based on a surface hydrologic connection. However, waters with confined surface hydrologic connections are considered adjacent where they are bordering, contiguous, or neighboring a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. For example, a water with a confined surface hydrologic connection to a traditional navigable water that is 1,200 feet from the high tide line of that water would meet the definition of neighboring and be considered an adjacent water. In circumstances where a water does not meet the definition of neighboring but is located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, or within 4,000 feet of a jurisdictional water, a confined surface hydrologic connection may be an important factor in evaluating a case-specific significant nexus under paragraph (a)(8). See section H. below.

The proposal defined “neighboring” to include waters connected with a shallow subsurface connection, and some commenters recommended eliminating subsurface hydrologic connectivity as a basis for adjacency. For example, some commenters asserted that, because the CWA does not apply to groundwater, the agencies do not have the authority to assert jurisdiction over waters connected to other “waters of the United States” via a shallow subsurface hydrologic connection. Some commenters were concerned that the distinction between “groundwater” and a “shallow subsurface connection” was unclear and questioned whether using a shallow subsurface connection as a basis for adjacency is contradictory to excluding groundwater—including groundwater drained through subsurface drainage systems—as a “water of the United States.” Some commenters supported use of shallow subsurface connectivity for adjacency, since the significant nexus test would be employed to make the determination of jurisdiction. Several commenters suggested that the rule should protect groundwater and shallow subsurface flow, due to its connectivity to other “waters of the United States” and

particularly since altering it could affect the downstream waters. A few commenters simply requested clarifications regarding issues such as how to determine whether a subsurface connection exists; the meaning of “shallow;” distinguishing between “shallow” and “deep;” whether there were any boundaries on adjacency via hydrologic connectivity; and determining whether the connection was “sufficient” to establish adjacency. In order to provide more certainty to the public, the rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a water on a case-specific basis under paragraph (a)(8), as appropriate.

Some commenters expressed concern that the agencies’ proposed definition of “neighboring,” “riparian area,” and “floodplain” would mean that all land within the floodplain or riparian area would become regulated. In fact, only waters, not land, in the floodplain or riparian area would have been considered adjacent under the proposed rule. Similarly, under the final rule, only waters, not land, are adjacent. In response, the agencies have eliminated the definitions of floodplain and riparian area and have provided a definition of neighboring which is clear that only waters in specified circumstances may be “waters of the United States.”

The agencies also eliminated a parenthetical from the existing “adjacent wetlands” regulatory provision. The phrase “other than waters that are themselves wetlands” was intended to preclude asserting CWA jurisdiction over wetlands that were simply adjacent to a non-jurisdictional wetland. Such waters do not meet the definition of “adjacent” under the rule since waters must be adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary, so the phrase is unnecessary and confusing. With this change, the agencies are protecting all waters that meet the definition of “adjacent” as “waters of the United States,” and eliminating confusion caused by the parenthetical. For example, where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary’s ordinary high water mark are jurisdictional because they are “neighboring” to the tributary, regardless of the wetlands’ position relative to each other.

Some commenters stated that the proposed rule was an expansion of jurisdiction because it would change the

provision from “adjacent wetlands” to “adjacent waters.” The agencies acknowledge that under the existing regulation, the adjacency provision applied only to wetlands adjacent to “waters of the United States.” However, also under the existing regulation, “other waters” (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation or destruction of the water could affect interstate or foreign commerce. This provision of the existing regulation reflected the agencies’ interpretation at the time of the jurisdiction of the CWA to extend to the maximum extent permissible under the Commerce Clause of the Constitution. Therefore, while the language of the specific adjacency provision in the final rule may have changed from wetlands to waters, that does not represent an expansion of jurisdiction as a whole in comparison to the existing regulation, since adjacent non-wetland waters would have been subject to jurisdiction under the “other waters” provision. The final rule does not protect all waters that were protected under the “other waters” provision of the existing regulation, and therefore the inclusion of adjacent ponds, for example, in the “adjacent waters” provision of the final rule does not reflect an overall expansion of jurisdiction when compared to the existing regulation.

3. How do science and law support the rule?

Based on a review of the scientific literature and the agencies’ expertise and experience the agencies determined that the categories of waters discussed below are integrally linked to the chemical, physical, or biological functions of waters to which they are adjacent and downstream to the traditional navigable waters, interstate waters or the territorial seas. Therefore, the agencies determined that the waters defined as adjacent have a significant nexus with traditional navigable waters, interstate waters or the territorial seas and are thus “waters of the United States.” Additional information, including citations, can be found in section III of the preamble, the Science Report, and the Technical Support Document for the rule.

a. Waters that are Bordering or Contiguous

As discussed in section III above, wetlands, ponds, lakes, oxbows, impoundments, and similar water features that are bordering or contiguous

perform a myriad of critical chemical and biological functions associated with the downstream traditional navigable waters, interstate waters, or the territorial seas. Such waters are integrally linked with the jurisdictional waters to which they are adjacent. Because of their close physical proximity to nearby jurisdictional waters, bordering or contiguous waters readily exchange their waters through the saturated soils surrounding the traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary or through surface exchange. This commingling of waters allows bordering or contiguous waters to both provide chemically transformed waters to streams and to absorb excess stream flow, which in turn can significantly affect downstream traditional navigable waters, interstate waters, or the territorial seas. The close proximity also allows for the direct exchange of biological materials, including organic matter that serves as part of the food web of downstream traditional navigable waters, interstate waters, or the territorial seas. Waters that are bordering or contiguous are often located on the floodplain or within the riparian area of the waters to which they are adjacent. Bordering or contiguous waters include those that directly abut a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. The Science Report and the Technical Support Document demonstrate that such waters are physically, chemically, and biologically integrated with downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect their integrity.

b. Waters Separated From Other “Waters of the United States” by Constructed Dikes or Barriers, Natural River Berms, Beach Dunes and the Like

Adjacent waters separated from a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary by constructed dikes or barriers, natural river berms, beach dunes, and the like continue to have a significant effect on downstream traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with other “adjacent waters.” Such waters continue to have a hydrologic connection to downstream waters. This is because constructed dikes or barriers, natural river berms, beach dunes, and the like typically do not block all water flow. This hydrologic connection can occur via

seepage, or the flow of water through the soil pores, or via over-topping, where water from the nearby traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary periodically overtops the berm or other similar feature. Berm-like landforms known as natural levees occur naturally and do not isolate adjacent wetlands from the streams that form them. Natural levees and the wetlands and waters behind them are part of the floodplain. Natural levees are discontinuous, which allows for a hydrologic connection to the stream or river via openings in the levees and thus the periodic mixing of river water and backwater. Man-made levees and similar structures also do not isolate “adjacent waters.” Waters, including wetlands, separated from a jurisdictional water by a natural or man-made berm serve many of the same functions as other “adjacent waters.” Furthermore, even in cases where a hydrologic connection may not exist, there are other important considerations, such as chemical and biological functions, that result in a significant nexus between the adjacent wetlands or waters and the nearby “waters of the United States,” and traditional navigable waters, interstate waters, or the territorial seas. On this point, Justice Kennedy stated: “In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps’ definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.” *Rapanos* at 775. For instance, covered adjacent waters behind berms can still serve important water quality functions, serving to filter pollutants and sediment before they reach downstream waters. Wetlands and open waters behind berms, where the system is extensive, can help reduce the impacts of storm surges caused by hurricanes. Such “adjacent waters,” including wetlands, separated from waters by berms and the like maintain ecological connection with those waters. It is not the existence of the dike, levee, and the like that makes these waters jurisdictional. Adjacent waters separated from the tributary network by constructed dikes or barriers, natural river berms, beach dunes, and the like continue to have a hydrologic connection to downstream waters.

Waters behind berms and the like can significantly affect the chemical, physical, and biologic integrity of traditional navigable waters, interstate waters, or the territorial seas.

c. Waters Within 100 Feet

All wetlands, ponds, lakes, oxbows, impoundments, and similar water features that are located in whole or in part within 100 feet of the ordinary high water mark of a jurisdictional water perform a myriad of critical chemical, physical, and biological functions associated with the downstream traditional navigable water, interstate water or the territorial seas and therefore the agencies have determined that they are “neighboring” and thus “waters of the United States.” Waters within 100 feet of a jurisdictional water are often located within the riparian area and are often connected via surface and shallow subsurface hydrology to the water to which they are adjacent. While the SAB was clear that distance is not the only factor that influences connections and their effects downstream, due to their close proximity to jurisdictional waters, waters within 100 feet are often located within a landscape position that allows for them to receive and process surface and shallow subsurface flows before they reach streams and rivers. These waters individually and collectively affect the integrity of downstream waters by acting primarily as sinks that retain floodwaters, sediments, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters. Wetlands and open waters within close proximity of jurisdictional waters improve water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants that can affect the integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. These waters, including wetlands, also provide important habitat for aquatic-associated species to forage, breed, and rest.

In order to provide greater clarity and consistency and based on a review of the science and the agencies’ expertise and experience, the agencies identified a 100 foot threshold for neighboring waters to a traditional navigable water, interstate water, territorial sea, tributary, or impoundment. Further, the agencies determined that there is a significant nexus with the downstream traditional navigable waters, interstate waters, or the territorial seas, and these “adjacent waters” are “waters of the United States.” With respect to provision of water quality benefits downstream, non-

floodplain waters within close proximity of the stream network often are able to have more water quality benefits than those located at a distance from the stream. Many studies indicate that the primary water quality and habitat benefits will generally occur within a several hundred foot zone of a water. In addition, the scientific literature indicates that to be effective, contaminant removal needs to occur at a reasonable distance prior to entry into the downstream traditional navigable waters, interstate waters, or the territorial seas. Some studies also indicate that fish, amphibians (*e.g.*, frogs, toads), reptiles (*e.g.*, turtles), and small mammals (*e.g.*, otters, beavers, etc.) will use at least a 100 foot zone for foraging, breeding, nesting, and other life cycle needs.

Based on a review of the scientific literature and the agencies’ expertise and experience, there is clear evidence that the identified waters within 100 feet of the ordinary high water mark of a jurisdictional water, even when located outside the floodplain, perform critical processes and functions discussed in section III above. All waters within 100 feet of a jurisdictional water significantly affect the chemical, physical, or biological integrity of the waters to which they are adjacent, and those waters in turn significantly affect the chemical, physical, or biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas. The agencies established a 100 foot threshold from the water’s lateral limit in the definition of neighboring because, based on the agencies’ expertise and experience implementing the CWA and in light of the science, the agencies concluded this was a reasonable and practical boundary within which to conclude the waters clearly significantly affected the integrity of traditional navigable waters, interstate waters, or the territorial seas, and these “adjacent waters” are “waters of the United States.”

d. Floodplain Waters Within 1,500 Feet

As discussed in section III above, wetlands and open waters that are neighboring perform a myriad of critical chemical and biological functions associated with the downstream traditional navigable waters, interstate waters, or the territorial seas. The scientific literature supports that wetlands and open waters in floodplains are chemically, physically, and biologically connected to downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect the integrity of such waters. The Science

Report concludes that wetlands and open waters located in “floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.” Science Report at ES–2 to ES–3. Such waters act as the most effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects that also live in streams, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

For waters in the 100-year floodplain within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary, the agencies determine there is a significant nexus with the downstream traditional navigable waters, interstate waters, or the territorial seas and these waters are critical to protect the downstream waters. Based on a review of the scientific literature, the agencies’ technical expertise and experience, and the implementation value of drawing clear lines, the rule establishes a boundary for floodplain waters to meet the definition of “neighboring” and be “waters of the United States” by rule. This boundary was established in order to protect vitally important waters within a watershed while at the same time providing a practical and implementable rule. The agencies are not determining that waters in the floodplain farther than 1,500 feet from the ordinary high water mark never have a significant nexus. Rather, the agencies are using their technical expertise to promulgate a practical rule that draws reasonable boundaries in order to protect the waters that most clearly have a significant nexus while minimizing uncertainty about the scope of “waters of the United States.” Because waters beyond these boundaries may have a significant nexus, the rule also establishes areas in which a case-specific significant nexus determination must be made. See section IV.H.

e. Waters Within 1,500 Feet of Tidally-Influenced Traditional Navigable Waters or the Territorial Seas or the Great Lakes

Many tidally-influenced waters do not have floodplains, so the agencies

include a separate provision within the definition of “neighboring” to protect the “adjacent” waters that have a significant nexus to tidally-influenced traditional navigable waters or the territorial seas or the Great Lakes. Under *Riverside Bayview* and Justice Kennedy’s opinion in *Rapanos*, waters adjacent to traditional navigable waters, including the territorial seas, are “waters of the United States.” Because the connection to a tidally-influenced traditional navigable water, the territorial seas, or the Great Lakes is so close, the rule defines “neighboring” to include waters within 1,500 feet of the high tide line or the ordinary high water mark of the Great Lakes. Wetlands, ponds, lakes, oxbows, impoundments, and similar water features within 1,500 feet of these waters are physically connected to such waters by surface and shallow subsurface flow. As demonstrated in section III above, these waters perform a myriad of critical chemical and biological functions associated with these nearby waters to which they are adjacent.

These waters in combination significantly affect the integrity of the connected tidally influenced traditional navigable water or the territorial seas or the Great Lakes by acting primarily as sinks that retain floodwaters, sediments, nutrients, and contaminants that could otherwise negatively impact the condition or function of those waters. Like floodplain waters, the scientific literature supports that wetlands and other similar waters within close proximity improve water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants that can affect downstream water quality. These waters also provide important habitat for aquatic-associated species to forage, breed, and rest in.

For example, wetlands dominated by grass-like vegetation that occur in depressional areas between sand dunes or beach ridges along the territorial seas and the Great Lakes shoreline are dependent upon these waters for their water source. The waters, including wetlands, generally form when water levels of the territorial seas fall or the Great Lakes drop, creating swales that support a diverse mix of wetland vegetation and many endangered and threatened species. Many studies demonstrate that these waters have been shown to act in concert with the rising and lowering of the tide, and that the critical functions provided by these waters are similar and play an important role in maintaining the chemical, physical, or biological integrity of the nearby traditional navigable waters,

interstate waters, or the territorial seas because of the hydrological and ecological connections to and interactions with those waters.

Science demonstrates that distance is a factor in the connectivity and the strength of connectivity of wetlands and open waters to downstream waters. Thus, waters that are more distant generally have less opportunity to be connected to downstream waters. Wetlands and open waters closer to the stream network generally will have greater hydrologic and biological connectivity than waters located farther from the same network. For instance, waters that are more closely proximate have a greater opportunity to contribute flow. Via their hydrologic connectivity, they also have chemical connectivity to and effects on these downstream waters and are more likely to impact water quality due to their close distance. Waters more closely located to these waters are also more likely to be biologically connected to such waters more frequently and by more species, including amphibians and other aquatic animals. Because tidally-influenced traditional navigable waters, the territorial seas, and the Great Lakes are generally much larger in size than other jurisdictional waters, the agencies believe that a 1,500 foot threshold is a reasonable distance to capture most wetlands and open waters that are so closely linked to these waters that they can properly be considered adjacent as neighboring waters.

Based on a review of the scientific literature and the agencies’ expertise and experience, there is clear evidence waters within 1,500 feet of these waters, even when located outside the floodplain, perform critical processes and functions discussed in section III above. The agencies established a 1,500 foot threshold from the water’s lateral limit, which would be either the high tide line or the ordinary high water mark, in the definition of neighboring because, based on the agencies’ expertise and experience implementing the CWA and in light of the science, the agencies concluded this was a reasonable and practical boundary within which to conclude the waters most clearly significantly affected the integrity of the traditional navigable water or the territorial seas, and these covered adjacent waters are “waters of the United States.” Waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters located more than 1,500 feet and less than 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, the territorial

seas, an impoundment, or a tributary, may still be determined to have a significant nexus on a case-specific basis under paragraph (a)(8) of the rule and therefore be a “water of the United States.” See section IV.H.

H. Case-Specific “Waters of the United States”

The rule establishes two exclusive circumstances under which case-specific determinations will be made for whether a water has a “significant nexus” and is therefore a “water of the United States.” The proposed rule included a broad provision that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. Many commenters expressed concern that such a broad opportunity for case-specific “waters of the United States” determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The agencies have greatly reduced the extent of waters subject to this individual review by carefully incorporating the scientific literature and by utilizing agency expertise and experience to draw boundaries. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies’ assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

First, the rule identifies at paragraph (a)(7) five subcategories of waters (Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that the agencies have determined are “similarly situated” for purposes of a significant nexus determination. Second, the rule identifies at paragraph (a)(8) specific circumstances under which waters will be subject to a case-specific significant nexus determination but for which the agencies have not made a “similarly situated” determination: Waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or tributaries, as defined. If any water meets the definition of “adjacent” waters it is jurisdictional under paragraph (a)(6) and no case-specific significant nexus is required. Waters that do not fall within the six categorically jurisdictional waters identified in paragraph (a)(1) through

(a)(6) of the rule or within these two case-specific provisions are not “waters of the United States.”

This section first discusses the five subcategories of waters that the agencies determine are “similarly situated” for purposes of a significant nexus determination; second, the 100-year floodplain and 4,000 foot boundaries under which waters will be subject to a case-specific significant nexus determination but for which the agencies have not made a “similarly situated” determination; third, the definition of “significant nexus” and how the case-specific significant nexus determinations will be made under these two provisions; and, finally, the revisions made to the rule with respect to case-specific determinations and major comments.

1. Waters Determined To Be “Similarly Situated” by Rule for Which a Case-Specific Significant Nexus Determination Is Required

In the rule, paragraph (a)(7) specifies the subcategories of waters (Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that, if they are not otherwise jurisdictional under paragraphs (a)(1) through (a)(6), the agencies determine to be “similarly situated” by rule. In the proposal the agencies sought comment on a number of options to address remaining waters that did not fit within the jurisdictional categories, including whether to conclude that other waters were “similarly situated” in certain areas of the country or whether to conclude that specified subcategories of waters were jurisdictional. 79 FR 22215, 22216. The agencies concluded that waters within the five subcategories were “similarly situated” in the areas of the country in which they are located. The rationale for this determination is discussed above in Section III. Under paragraph (a)(7), Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters subject to normal farming, silviculture, and ranching activities that are within these subcategories will be assessed consistent with this provision of the rule. Waters in these subcategories are not jurisdictional as a class under the rule. However, because the agencies determined that these subcategories of waters are “similarly situated,” the waters within the specified subcategories that are not otherwise

jurisdictional under paragraph (a)(6) of the rule must be assessed in combination with all waters of the same subcategory in the region identified by the watershed that drains to the nearest point of entry of a traditional navigable water, interstate water, or the territorial seas (hereinafter referred to as the point of entry watershed).

When performing a case-specific significant nexus evaluation for a water in the paragraph (a)(7) subcategories, the rule establishes which waters must be considered in combination. The similarly situated waters identified in the subparagraphs will be combined with other waters in the same subparagraph located in a single point of entry watershed. For example, under paragraph (a)(7) only western vernal pools can be analyzed with other western vernal pools in the same point of entry watershed. Waters identified in the subparagraphs that are otherwise jurisdictional under the rule cannot be considered in combination with paragraph (a)(7) waters for purposes of a case-specific significant nexus determination under paragraph (a)(7). Individual waters of the specified subcategories may be jurisdictional under other paragraphs of this rule (*e.g.*, a Prairie pothole that sits on a state border is an interstate water under paragraph (a)(2) or a western vernal pool that meets the definition of adjacent under paragraph (a)(6)). Where those individual waters are jurisdictional under paragraph (a)(1) through (a)(6) by rule, no case-specific significant nexus analysis is required. The rule also states that waters in paragraph (a)(7) shall not be combined with waters jurisdictional under paragraph (a)(6). Essentially, while Prairie potholes are an identified subcategory under paragraph (a)(7), that identification does not affect a Prairie pothole that borders a covered tributary and is jurisdictional as an adjacent water under paragraph (a)(6). Additionally, a Prairie pothole that is jurisdictional under paragraph (a)(6) cannot be combined with Prairie potholes that require a case-specific jurisdictional analysis under paragraph (a)(7) since “adjacent waters” have already been determined to have a significant nexus by rule. Finally, waters within the specified subcategories in paragraph (a)(7) are assessed under paragraph (a)(7) not under paragraph (a)(8); waters within the specified subcategories that are within the 100-year flood plain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000 foot boundary established for case-specific determinations under

paragraph (a)(8) remain “similarly situated” waters under paragraph (a)(7). These similarly situated waters are evaluated in combination for their effect on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Additional details about the case-specific significant nexus analysis are found in section 4 below.

2. Waters Within the 100-Year Floodplain of a Traditional Navigable Water, Interstate Water, or the Territorial Seas and Waters Within 4,000 Foot Boundary for Which a Case-Specific Significant Nexus Determination Is Required

Paragraph (a)(8) in the rule specifies that a water that does not otherwise meet the definition of adjacency is evaluated on a case-specific basis for significant nexus under this paragraph where it is located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. Although these waters are not considered similarly situated by rule, waters under this paragraph can be determined on a case-specific basis to be similarly situated. This is a change from the proposal which would have allowed for a similarly situated analysis and significant nexus determination for any water, anywhere in the region. Under the rule, the waters specified in paragraph (a)(7) and waters that meet the requirements in paragraph (a)(8) are the only waters for which a case-specific significant nexus determination may be made.

Under paragraph (a)(8), only waters that are within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000 foot boundary can be evaluated on a case-specific basis for significant nexus to a traditional navigable water, interstate water, or the territorial seas. If a portion of the water is located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or 4,000 feet of the ordinary high water mark or high tide line of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary, the entire water will be considered to be within the boundaries for paragraph (a)(8) and will undergo a case-specific significant nexus determination. Under this provision, if the 100-year floodplain of a traditional navigable water,

interstate water, or the territorial seas extends beyond 4,000 feet of the ordinary high water mark, a water, that is not otherwise jurisdictional under the rule, within that floodplain will be evaluated under the 100-year floodplain boundary of paragraph (a)(8). A water within the boundaries must be evaluated on a case-specific basis for not only a significant nexus but also for a determination of whether there are any waters with which the waters is similarly situated. Waters identified in paragraph (a)(8) may not be combined with waters identified in paragraph (a)(6) for purposes of the significant nexus analysis, but may be combined with similarly situated waters located in the same point of entry watershed. If waters identified in paragraph (a)(8) also meet the definition of adjacency under paragraph (a)(6), they are jurisdictional as “adjacent waters” and do not need a case-specific significant nexus analysis. Under paragraph (a)(8), for example, the agencies would evaluate on a case-specific basis whether a low-centered polygonal tundra and patterned ground bog in an area with a small floodplain and located beyond the 1,500 foot boundary but within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000 foot boundary, or a wetland in which normal farming, ranching, or silviculture activities occur, as those terms are used in section 404(f) of the Clean Water Act and its implementing regulations, has a significant nexus as defined in the rule.

Waters identified in the subcategories in paragraph (a)(7) are evaluated under paragraph (a)(7) only; the provisions of paragraph (a)(8), including the boundaries in paragraph (a)(8), do not apply to paragraph (a)(7) waters. The significant nexus analysis for waters under paragraph (a)(8) will then consider the waters individually or, if it is determined that there are similarly situated waters, as a group of waters within a point of entry watershed for their effect on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

Some commenters asked how wetlands underlain by permafrost would be treated under this rule. Waters subject to case-specific review under paragraph (a)(8) will include areas determined to meet the technical definition of “wetlands” because they have the required hydrology, vegetation, and soils. The presence of permafrost is not itself determinative of whether a particular area satisfies the three parameter requirement needed to be wetlands under the rule. This is true

under existing regulations and remains unchanged in this rule. Because the definition of wetland does not change under the rule, the agencies do not anticipate the rule will alter the current scope of CWA jurisdiction over wetlands underlain by permafrost.

a. Summary of Rationale for Case-Specific Significant Nexus Analysis Within 100-Year Floodplain of a Traditional Navigable Water, Interstate Water, or the Territorial Seas

As discussed in Section III, above, the scientific literature supports that wetlands and open waters in floodplains are physically, chemically, and biologically connected to downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect the integrity of such waters. The Science Report concludes that wetlands and open waters located in “floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.” Science Report at ES–2 to ES–3. As described in the Science Report and the Technical Support Document, such waters act as the most effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects that also live in streams, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters. As discussed above, in defining waters as adjacent, and therefore categorically jurisdictional, the agencies established a 1,500 foot boundary for waters located within the 100-year floodplain of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary in order to protect vitally important waters while at the same time providing a practical and implementable rule. In light of the science on the functions provided by floodplain waters and wetlands, waters and wetlands within the 100-year floodplain of traditional navigable waters, interstate waters, or the territorial seas are likely to provide those functions for traditional navigable waters, interstate waters, or the territorial seas. However, because the 100-year floodplain of a traditional navigable water can, in some case be quite large, the agencies concluded it

was reasonable to subject waters and wetlands in the 100-year floodplain that are beyond 1,500 feet of the ordinary high water mark, and therefore do not meet the definition of “neighboring,” to a case-specific significant nexus analysis rather than concluding that such waters are categorically jurisdictional. This inclusion of a case-specific analysis for such floodplain waters is supported by the SAB. The SAB concluded that “distance should not be the sole indicator used to evaluate the connection of ‘other waters’ to jurisdictional waters.” SAB 2014b at 3. In allowing the case-specific evaluation of waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas that do not meet the definition of adjacency, the agencies are allowing for the functional relationship of those floodplain waters to be considered regardless of distance. The SAB also supported the Science Report’s conclusion that “the scientific literature strongly supports the conclusions that streams and ‘bidirectional’ floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity gradient.” SAB 2014a at 1. In addition, the SAB noted, “the literature review does substantiate the conclusion that floodplains and waters and wetlands in floodplain settings support the physical, chemical, and biological integrity of downstream waters.” *Id.* at 3.

The agencies do not anticipate that there will be numerous circumstances in which this provision will be utilized because relatively few traditional navigable waters will have floodplains larger than 4,000 feet (the other threshold in paragraph (a)(8) for waters regardless of floodplain). Further, the agencies recognize that extensive areas of the nation’s floodplains have been affected by levees and dikes which reduce the scope of flooding. In these circumstances, the scope of the 100-year floodplain is also reduced and is reflected in FEMA mapping used by the agencies. In circumstances where there is little or no alteration of the floodplain and it remains relatively broad, the agencies will explicitly consider distance between the water being evaluated and traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus determination. Based on the science concerning the important functions provided by floodplain waters and wetlands, the agencies established this provision to ensure that truly

important waters may still be protected on a case-specific basis. By using the 100-year floodplain and limiting the provision to traditional navigable waters, interstate waters, or the territorial seas, the agencies are reasonably balancing the protection of waters that may have a significant nexus with the goal of providing additional certainty.

b. Summary of Rationale for Case-Specific Significant Nexus Analysis Within 4,000 Foot Boundary

The agencies establish a provision in the rule for case-specific significant nexus determinations because the agencies concluded that some waters located beyond the distance limitations established for “adjacent waters” can have significant chemical, physical, and biological connections to and effects on traditional navigable waters, interstate waters, or the territorial seas. The agencies reasonably identified the 4,000 foot boundary for these case-specific significant nexus determinations by balancing consideration of the science and the agencies’ expertise and experience in making significant nexus determinations with the goal of providing clarity to the public while protecting the environment and public health. The agencies’ experience has shown that the vast majority of waters where a significant nexus has been found, and which are therefore important to protect to achieve the goals of the Act, are located within the 4,000 foot boundary. Moreover, because of the unique status under the CWA of traditional navigable waters, interstate waters, and the territorial seas, the 100-year floodplain boundary for these waters provides another means of identifying on a case-specific basis those waters that significantly affect traditional navigable waters, interstate waters or the territorial seas. The agencies’ balancing of these considerations is consistent with the statute and the Supreme Court opinions. The agencies decided that it is important to promulgate a rule that not only protects the most vital of our Nation’s waters, but one that is practical and provides sufficient boundaries so that the public reasonably understands where CWA jurisdiction ends.

The agencies’ decision to establish a provision that authorizes case-specific significant nexus analysis for waters within 4,000 feet is based on a number of factors. These waters may be located within the floodplain of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. Section IV.G. and the Technical Support Document discuss

the importance of floodplain waters on the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance boundaries within the 100-year floodplain to define adjacency for floodplain waters. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as “adjacent” are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters.

Similarly, due to the many functions that waters located within 4,000 feet of the high tide line of a traditional navigable water or the territorial seas provide and their often close connections to the surrounding traditional navigable waters, science supports the agencies’ determination that such waters are rightfully evaluated on a case-specific basis for significant nexus to a traditional navigable water or the territorial seas. Waters within 4,000 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary may fall within the riparian areas of such waters. As discussed in section IV.G., in response to comments regarding the uncertainty of the term “riparian area,” the agencies removed the term from the definition of “neighboring.” However, the agencies continue to recognize that science is clear that wetlands and open waters in riparian areas individually and cumulatively can have a significant effect on the chemical, physical, or biological integrity of downstream waters. Thus, the rule allows for a case-specific determination of significant nexus for waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary.

The agencies have always recognized that adjacency is bounded by proximity, and the rule adds additional clarity to adjacency by bounding what can be considered neighboring. The science is clear that a water’s proximity to downstream waters influences its impact on those waters. The Science Report states, “[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters.” Science Report at ES–11.

Generally, waters that are closer to a jurisdictional water are more likely to be connected to that water than waters that are farther away. A case-specific analysis for waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary allows such waters to be considered jurisdictional only where they meet the significant nexus requirements. Even where not within a 100-year floodplain, waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary can have significant chemical, physical, and biological connections with traditional navigable waters, interstate waters, or the territorial seas.

As noted previously, in response to comments concerned that there were no bounds in the proposed rule on how far a surface hydrologic connection could be for purposes of adjacency, the agencies did not include surface hydrologic connections as its own factor for determining adjacency in the final rule. Such connections, however, are relevant in a case-specific significant nexus determination under paragraph (a)(8). For example, waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary that contribute confined surface flow to a downstream water can have important hydrologic connections to and effects on that downstream water such as the attenuation and cycling of nutrients that would otherwise effect downstream water quality.

The agencies’ decision to establish the case-specific provision at paragraph (a)(8), including the boundaries, was also informed by the knowledge that waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary can have a confined surface or shallow subsurface connection to such a water. In order to provide the clarity and certainty that many commenters requested regarding “adjacent waters,” the rule does not define “neighboring” to include all waters with confined surface or shallow subsurface connections.

However, the agencies recognize that the science demonstrates that waters with a confined surface or shallow subsurface connection to jurisdictional

waters can have important effects on downstream waters. For purposes of a case-specific significant nexus analysis under the rule, a shallow subsurface hydrologic connection is lateral water flow over a restricting layer in the top soil horizons, or a shallow water table which fluctuates within the soil profile, sometimes rising to or near the ground surface. In addition, water can move within confined man-made subsurface conveyance systems such as drain tiles and storm sewers, and in karst topography. Confined subsurface systems can move water, and potential contaminants, directly to surface waters and rapidly without the opportunity for nutrient or sediment reduction along the pathway.

Shallow subsurface connections move quickly through the soil and impact surface water directly within hours or days rather than the years it may take long pathways to reach surface waters. See Technical Support Document. Tools to assess shallow subsurface flow include reviewing the soils information from the NRCS Soil Survey, which is available for nearly every county in the United States. When assessing whether a water within the 4,000 foot boundary performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves "waters of the United States."

The proposed rule did not set a distance threshold for case-specific waters to be evaluated for a significant nexus. Some commenters argued that there should be a limitation on areas subject to case-specific analysis while others contended that the agencies lack discretion to set regulatory limits that would exclude from jurisdiction *any* water meeting the significant nexus test. The agencies disagree that the agencies lack the authority to establish reasonable boundaries to determine what areas are subject to case-specific significant nexus analysis. Nothing in the CWA or case law mandates that the agencies require every water feature in the nation be subject to analysis for significant nexus. The Supreme Court has made clear that the agencies have the authority and responsibility to determine the limits of CWA jurisdiction, and establishing boundaries based on agency judgment, expertise and experience in

administering the statute is at the core of the agencies authority and discretion.

After weighing the scientific information about these waters' connectivity and importance to protecting downstream waters, the agencies' considerable experience making jurisdictional determinations, the objective of enhancing regulatory clarity and consistent with the statute and the caselaw, the agencies decided to set a boundary of 4,000 feet for case-specific significant nexus analysis for waters that do not otherwise meet the requirements of paragraphs (a)(1) through (a)(7). Tying this provision for case-specific significant nexus analysis to distance informed by the science, and the agencies' experience and expertise, as spatial proximity is a key contributor to connectivity among waters. Science Report at ES-11. Distance is by no means the sole factor, and aquatic functions will play a prominent role in determining whether specific waters covered under this aspect of paragraph (a)(8) have a significant nexus. In light of the role spatial proximity plays in connectivity and the objective of enhancing regulatory clarity, predictability and consistency, the agencies conclude that establishing a boundary for this aspect of waters subject to case-specific significant nexus analysis based on distance is reasonable.

While, for purposes of this national rule, distance is a reasonable and appropriate measure for identifying where this case-specific significant nexus analysis will be conducted, the science does not point to any particular bright line delineating waters that have a significant nexus from those that do not. The Science Report concluded that connectivity of streams and wetlands to downstream waters occurs along a gradient. The evidence unequivocally demonstrates that the stream channels and floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The connectivity and effects of non-floodplain wetlands and open waters are more variable and thus more difficult to address solely from evidence available in peer-reviewed studies. Science Report at ES-5. Because of this variability, with respect to waters that are not covered by paragraphs (a)(1) through (a)(7) of the rule, the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters.

Like connectivity itself, there is also a continuum of outcomes associated with picking a distance threshold. A

smaller threshold increases the likelihood that waters that could have a significant nexus will not be analyzed and therefore not subject to the Act; a larger threshold reduces that possibility, but also means that agency and the public's resources are expended conducting significant nexus analyses on waters that have a lower likelihood of meriting the Act's protection.

Recognizing that there is no optimal line, in selecting both the 100-year floodplain for and the 4,000 foot boundaries the agencies looked principally to the extensive experience the Corps has gained in making significant nexus determinations since the *Rapanos* decision. As noted in Section III above, since the *Rapanos* decision, the agencies have developed extensive experience making significant nexus determinations, and that experience and expertise informed the judgment of the agencies in establishing both the 100-year floodplain boundary and the 4,000 foot boundary. The agencies have made determinations in every state in the country, for a wide range of waters in a wide range of conditions. The vast majority of the waters that the Corps has determined have a significant nexus are located within 4,000 feet of a jurisdictional tributary, traditional navigable or interstate water, or the territorial seas. Therefore, the agencies conclude that the 100-year floodplain and 4,000 foot boundaries in the rule will sufficiently capture for analysis those waters that are important to protect to achieve the goals of the Clean Water Act.

The agencies acknowledge that, as with any meaningful boundary, some waters that could be found jurisdictional lie beyond the boundary and will not be analyzed for significant nexus. The agencies minimize that risk by also establishing a provision in paragraph (a)(8) for case-specific significant nexus analysis of waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas. While in the agencies' experience the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary, it is the agencies' experience that there are a few waters that have been determined to be jurisdictional that are located beyond this boundary, typically due to a surface or shallow subsurface hydrologic connections. Nonetheless, the agencies have weighed these considerations and concluded that the value of enhancing regulatory clarity, predictability and consistency through a distance limit outweigh the likelihood that a distinct minority of waters that might be shown

to meet the significant nexus test will not be subject to analysis. In the agencies' experience, requiring an evaluation of significant nexus for waters covered by paragraph (a)(8) should capture the vast majority of waters having a significant nexus to the downstream waters. The agencies therefore conclude that that adoption of the 4,000 foot boundary is reasonable.

The rule's requirements for these waters, coupled with those for "adjacent waters," create an integrated approach that tailors the regulatory regime based on the science and the agencies' policy objectives. Determining by rule that covered adjacent waters have a significant nexus follows the science, achieves regulatory clarity and predictability, and avoids expenditure of agency and public resources on case-specific significant nexus analysis. Similarly, providing for case-specific significant nexus analysis for waters that are not adjacent but within the 4,000 foot distance limit, as well as those within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, is consistent with science and agency experience, will ensure protection of the important waters whose protection will advance the goals of the Clean Water Act, and will greatly enhance regulatory clarity for agency staff, regulated parties, and the public.

For these reasons, the agencies decided to allow case-specific determinations of significant nexus for waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and for waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, an interstate water, the territorial seas, an impoundment, or a covered tributary. Under the rule, these waters are jurisdictional only where they individually or cumulatively (if it is determined that there are other similarly situated waters) have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. Additional scientific and policy rationale for including such waters as waters that can be evaluated on a case-specific basis can be found in the Technical Support Document.

The agencies emphasize that they fully support efforts by States and tribes to protect under their own laws any additional waters, including locally special waters that may not be within the jurisdiction of the CWA as the agencies have interpreted its scope in this rule. Indeed, the promulgation of the 100-year floodplain and 4000 foot boundaries for purposes of a case-

specific analysis of significant nexus does not foreclose states from acting consistent with their state authorities to establish protection for waters that fall outside of the protection of the CWA. In promulgating the 4,000 foot boundary, the agencies have balanced protection and clarity, scientific uncertainties and regulatory experience, and established a line that is, in their judgment, reasonable and consistent with the statute and its goals and objectives.

3. Case-Specific Significant Nexus Determinations

Only waters identified in paragraphs (a)(7) or (a)(8) of the rule require a case-specific determination of significant nexus. This section discusses the definition of significant nexus in the rule and how the agencies will make case-specific significant nexus determinations under the rule.

a. Definition of Significant Nexus

Paragraph (c)(5) of the rule defines the term "significant nexus" to mean a significant effect (more than speculative or insubstantial) on the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas. Waters, including wetlands, are evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform. Functions to be considered for the purposes of determining significant nexus are sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export of organic matter, export of food resources, and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas.

The agencies' definition of significant nexus is based upon the language in *SWANCC* and *Rapanos*. The definition is also consistent with current practice, where field staff evaluate the functions of the waters in question and the effects of these functions on downstream waters. In order to add clarity and transparency to the definition of significant nexus, the agencies have listed in the definition the functions that will be considered in a significant nexus analysis. These functions are consistent with the agencies' scientific understanding of the functioning of aquatic ecosystems. A water does not need to perform all of the functions listed in paragraph (c)(5) in order to

have a significant nexus. Depending upon the particular water and the functions it provides, if a water, either alone or in combination with similarly situated waters, performs just one function, and that function has a significant impact on the integrity of a traditional navigable water, interstate water, or the territorial seas, that water would have a significant nexus.

Case-specific determinations of significant nexus require paragraph (a)(7) or (a)(8) waters to be evaluated either alone, or in combination with other similarly situated waters in the region. In the rule, the agencies interpret the phrase "in the region" to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry. See Section III. In circumstances where the single point of entry watershed includes waters that are identified under paragraph (a)(7) and waters that are subject to analysis under paragraph (a)(8), those waters will be analyzed separately under the provisions of those paragraphs.

In a case-specific analysis of significant nexus, the agencies determine whether the water they are evaluating, in combination with other similarly situated waters in the region, has a significant effect on the chemical, physical, or biological integrity of the nearest traditional navigable water, interstate water, or the territorial seas. As noted previously, the agencies evaluate the listed functions in paragraph (c)(5) as part of that evaluation to determine if the water has an impact that is more than speculative or insubstantial.

b. Conducting Case-Specific Significant Nexus Determinations Under Paragraphs (a)(7) and (a)(8)

The significant nexus analysis for waters assessed under paragraphs (a)(7) and (a)(8) is a three-step process: First, the region for the significant nexus analysis must be identified—under the rule, it is the watershed which drains to the nearest traditional navigable water, interstate water or territorial sea; second, any similarly situated waters must be identified—under the rule, that is waters that function alike and are sufficiently close to function together in affecting downstream waters; and third, the waters are evaluated individually or in combination with any identified similarly situated waters in the single point of entry watershed to determine if they significantly impact the chemical, physical or biological integrity of the traditional navigable water, interstate water or the territorial seas.

i. "In the Region"—The Point of Entry Watershed

As discussed in Section III of the preamble and established in the definition of "significant nexus," the region for purposes of a significant nexus analysis is the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas. The first step of the analysis is to identify the point of entry watershed that the water being evaluated under paragraphs (a)(7) or (a)(8) drains to. This point of entry approach identifies the nearest traditional navigable water, interstate water, or the territorial seas that the water being evaluated and any similarly situated waters flow to and delineates the watershed of that nearest traditional navigable water, interstate water, or the territorial seas. The point of entry watershed is the area drained by the nearest traditional navigable water, interstate water, or the territorial seas and is typically defined by the topographic divides between one traditional navigable water, interstate water, or the territorial seas and another.

Available mapping tools, such as those that are based on the NHD, topographic maps, and elevation data, can be used to demarcate boundaries of the single point of entry watershed. As discussed in Section III and in the Technical Support Document, the single point of entry watershed represents the scientifically appropriate sized area for conducting a case-specific significant nexus evaluation in most cases.

In the arid West, the agencies recognize there may be situations where the single point of entry watershed is very large, and it may be reasonable to evaluate all similarly situated waters in a smaller watershed. Under those circumstances, the agencies may demarcate adjoining catchments surrounding the water to be evaluated that, together, are generally no smaller than a typical 10-digit hydrologic unit code (HUC-10) watershed in the same area. The area identified by this combination of catchments would be the "region" used for conducting a significant nexus evaluation under paragraphs (a)(7) or (a)(8) under those situations. The basis for such an approach in very large single point of entry watersheds in the arid West should be documented in the jurisdictional determination.

ii. "Similarly Situated"

Second, the agencies determine if the water or waters to be evaluated are similarly situated. The waters identified in paragraph (a)(7) are similarly situated

by rule and shall be combined with other waters of the same category located in the same watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas with no need for a case-specific similarly situated finding. Under paragraph (a)(7), only waters of the same subparagraph in the point of entry watershed can be considered as similarly situated. For example, only pocosins may be evaluated with other pocosins in the same point of entry watershed. Pocosins in different point of entry watersheds cannot be combined, and pocosins cannot be combined with Carolina bays under paragraph (a)(7), even where they occur in the same point of entry watershed.

Unlike waters evaluated under paragraph (a)(7), the waters specified at paragraph (a)(8) require a determination whether they are similarly situated. Under this step, the agencies apply factors in the determination of when waters evaluated under paragraph (a)(8) should be considered either individually or in combination for purposes of a significant nexus analysis. A determination of "similarly situated" requires an evaluation of whether a group of waters in the region that meet the distance thresholds set out under paragraph (a)(8) can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas.

Similarly situated waters can be identified as sufficiently close together for purposes of this paragraph of the regulation when they are within a contiguous area of land with relatively homogeneous soils, vegetation, and landform (e.g., plain, mountain, valley, etc.). In general, it would be inappropriate, for example, to consider waters as "similarly situated" under paragraph (a)(8) if these waters are located in different landforms, have different elevation profiles, or have different soil and vegetation characteristics, unless the waters perform similar functions and are located sufficiently close to a "water of the United States" to allow them to consistently and collectively function together to affect a traditional navigable water, interstate water, or the territorial seas. In determining whether waters under paragraph (a)(8) are sufficiently close to each other the agencies will also consider hydrologic connectivity to each other or a jurisdictional water.

In determining whether groups of waters under paragraph (a)(8) perform "similar functions" the agencies will consider functions such as habitat,

water storage, sediment retention, and pollution sequestration. In addition, consideration of wetland/water type and landscape location are relevant for determining if the waters are similarly situated. For example, Texas coastal sand sheet wetlands that form a complex of wetlands with other wetlands of the same type on the landscape and are densely located may very well be similarly situated and considered in combination with other Texas coastal sand sheet wetlands in the same single point of entry watershed. However, under paragraph (a)(8), waters do not need to be of the same type (as they do in paragraph (a)(7)) to be considered similarly situated. As described above, waters are similarly situated under paragraph (a)(8) where they perform similar functions or are located sufficiently close to each other, regardless of type. The agencies will consider the hydrologic, geomorphic, and ecological characteristics and circumstances of the waters under consideration. Examples include: Documentation of chemical, physical, or biological interactions of the similarly situated waters; aerial photography; USGS and state and local topographical or terrain maps and information; NRCS soil survey maps and data; other available geographic information systems (GIS) data; National Wetlands Inventory maps where wetlands meet the CWA definition; and state and local information. The evaluation will use any available site information and pertinent field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been completed in the region.

Only those waters that do not meet the requirements in paragraph (a)(1) through (a)(6) are to be considered in case-specific significant nexus determinations; subcategory waters that meet the provisions in paragraph (a)(1) through (a)(6) are *per se* jurisdictional without the need for a significant nexus determination. For example, waters that are identified under paragraph (a)(6) are adjacent and are not subject to a case-specific significant nexus evaluation under paragraph (a)(7) or (a)(8). Waters evaluated under paragraph (a)(7) cannot be combined with waters identified in paragraph (a)(6) or (a)(8), and waters evaluated under paragraph (a)(8) cannot be combined with waters identified in paragraph (a)(6) or (a)(7). For example, Prairie potholes being evaluated under paragraph (a)(7) may not be combined with Prairie potholes that are *per se* jurisdictional under paragraph (a)(6) that meet the definition

of adjacent. When a water meets the specifications at both paragraphs (a)(7) and (a)(8), it can only be evaluated under paragraph (a)(7). That is, for example, if a wetland is a Western vernal pool and is also within 4,000 feet of the ordinary high water mark of a covered tributary, it can only be assessed for significant nexus under paragraph (a)(7) in combination with other Western vernal pools in the point of entry watershed. Unlike paragraph (a)(8), there is no distance threshold for waters evaluated under paragraph (a)(7)—that is, waters in the paragraph (a)(7) subcategories that are more than 4,000 feet from the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary or are beyond the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas are to be included in combination in a significant nexus analysis.

iii. Significant Nexus Analysis for Paragraph (a)(7) and (a)(8) Waters

Third, the agencies evaluate waters individually or in combination with any identified similarly situated waters in the single point of entry watershed to determine if they significantly impact the chemical, physical, or biological integrity of the traditional navigable water, interstate water, or the territorial seas. For purposes of determining significant nexus under paragraph (a)(7), all waters of the specified subcategory are to be considered in combination in the point of entry watershed, as those waters are similarly situated. For purposes of determining significant nexus under paragraph (a)(8), depending on the results of step two, a water within the boundaries in paragraph (a)(8) is evaluated either alone or in combination with other similarly situated waters in the region. For example, in the case where the agencies have determined that a particular water under paragraph (a)(8) is not similarly situated, it is evaluated individually for significant nexus; the water cannot be aggregated if it is not similarly situated with other such waters.

The analysis will include an evaluation of the functions listed in paragraph (c)(5) of the rule, which defines significant nexus. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest traditional

navigable water, interstate water, or the territorial seas. A water may be determined to have a significant nexus based on performing any of the following functions: sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering, and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export of organic matter, export of food resources, or provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditional navigable water, interstate water, or the territorial seas.

For purposes of paragraph (c)(5)(ix), a species is located in a traditional navigable water, interstate water, or the territorial seas if such a water is a typical type of habitat for at least part of the life cycle of the species. For example, amphibians and many reptiles can use a traditional navigable water, interstate water, or the territorial seas for part of their life cycle needs.

When evaluating a water individually or in combination with other similarly situated waters for the presence of a significant nexus to a traditional navigable water, interstate water, or the territorial seas, a variety of factors will influence the chemical, physical, or biological connections the water has with the downstream traditional navigable water, interstate water, or the territorial seas, including distance from a jurisdictional water, the presence of surface or shallow subsurface hydrologic connections, and density of waters of the same type (if it has been concluded that such waters can be evaluated in combination). The likelihood of a significant connection is greater with increasing size and decreasing distance from the identified traditional navigable water, interstate water, or the territorial seas, as well as with increased density of the waters for such waters that can be considered in combination as similarly situated waters. In addition, the presence of a surface or shallow subsurface hydrologic connection can influence the impact that a water has with downstream waters.

In many cases, the presence of a hydrologic connection increases the strength of the impact of the downstream traditional navigable water, interstate water, or the territorial seas. However, a hydrologic connection is not necessary to establish a significant nexus, because, as Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water,

interstate water, or the territorial seas. These functional relationships include retention of floodwaters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water, or the territorial seas. *See* 547 U.S. at 775 (citations omitted) (J. Kennedy) (“it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme”). The Science Report concludes, “[s]ome effects of non-floodplain wetlands on downstream waters are due to their isolation, rather than their connectivity. Wetland ‘sink’ functions that trap materials and prevent their export to downstream waters (e.g., sediment and entrained pollutant removal, water storage) result because of the wetland’s ability to isolate material fluxes.” Science Report at ES-4. For example, a report that reviewed the results of multiple scientific studies concluded that depressional wetlands lacking a surface outlet functioned together to significantly reduce or attenuate flooding. *See* Science Report and Technical Support Document. Even when they lack a surface hydrologic connection to downstream traditional navigable waters, interstate waters, or the territorial seas, Prairie potholes, for instance, cumulatively can store large volumes of water, impacting streamflow and reducing flooding downstream, and several studies have quantified the large storage capacity of Prairie pothole complexes. This water storage function is estimated to hold tens of millions of cubic meters of water, including for example Prairie potholes located in the watersheds of Devils Lake and the Red River of the North, which have both had a long history of flooding. Where Prairie potholes lack a surface hydrologic connection, this water storage capacity is particularly effective in reducing downstream flooding and can have a significant effect on downstream traditional navigable waters, interstate waters, or the territorial seas. Thus, even when lacking a surface hydrologic connection, a water can still have a significant effect on the chemical or the biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas.

The rule recognizes that not all waters have the requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional. Waters with a significant nexus must significantly affect the chemical, physical, or biological integrity of a downstream traditional navigable water,

interstate water, or the territorial seas, and the requisite nexus must be more than “speculative or insubstantial.” *Rapanos* at 780.

Evidence of chemical connectivity and the effect on waters can be found by identifying the properties of the water in comparison to the identified traditional navigable water, interstate water, or the territorial seas; signs of retention, release, or transformation of nutrients or pollutants; and the effect of landscape position on the strength of the connection to the nearest “water of the United States,” and through it to a traditional navigable water, interstate water, or the territorial seas. In addition, relevant factors influencing chemical connectivity include hydrologic connectivity (see physical factors, below), surrounding land use and land cover, the landscape setting, and deposition of chemical constituents (e.g., acidic deposition).

Evidence of physical connectivity and the effect on traditional navigable waters, interstate waters, or the territorial seas can be found by identifying evidence of physical connections, such as flood water or sediment retention (flood prevention). Presence of indicators of hydrologic connections between the other water and jurisdictional water are also indicators of a physical connection. Factors influencing physical connectivity include rain intensity, duration of rain events or wet season, soil permeability, and distance of hydrologic connection between the paragraph (a)(7) or (a)(8) water and the traditional navigable water, interstate water, or the territorial seas, depth from surface to water table, and any preferential flowpaths.

Evidence of biological connectivity and the effect on waters can be found by identifying: Resident aquatic or semi-aquatic species present in the case-specific water and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the case-specific water, and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the case-specific water. Factors influencing biological connectivity include species’ life history traits, species’ behavioral traits, dispersal range, population size, timing of dispersal, distance between the case-specific water and a traditional navigable water, interstate water, or the

territorial seas, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats. Non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule.

For practical administrative purposes, the rule does not require evaluation of all similarly situated waters under paragraph (a)(7) or (a)(8) when concluding that those waters have a significant nexus to a traditional navigable water, interstate water, or territorial sea. When a subset of similarly situated waters provides a sufficient science-based justification to conclude presence of a significant nexus, for efficiency purposes a significant nexus analysis need not unnecessarily require time and resources to locate and analyze all similarly situated waters in the entire point of entry watershed. For example, if a single Carolina bay or a group of Carolina bays in a portion of the point of entry watershed is determined to significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas, the analysis does not have to document all of the similarly situated Carolina bays in the watershed in order to conduct the significant nexus analysis. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water.

While the rule is clear that waters that are jurisdictional by rule cannot be combined with waters subject to a case-specific significant nexus analysis, the analysis may appropriately include the evaluation of functions of paragraph (a)(8) waters that reach covered waters through paragraph (a)(6) waters without consideration of the functions contributed by those paragraph (a)(6) waters. The hydrologic connections between paragraph (a)(8) waters and a covered tributary and eventually to a traditional navigable water, interstate water, or the territorial seas, can often occur through an adjacent water. This hydrologic connection is an appropriate part of the case-specific analysis as to whether the paragraph (a)(8) waters, alone or in combination with any similarly situated paragraph (a)(8) waters in the point of entry watershed, provide those functions downstream such that they significantly affect the chemical, physical or biological

integrity of the traditional navigable water, interstate water, or the territorial seas. For example, when evaluating a wetland that is 2,500 feet from the ordinary high water mark of an paragraph (a)(5) water and that has surface or shallow subsurface connections to downstream traditional navigable waters, interstate waters, or the territorial seas via a wetland that is adjacent to an paragraph (a)(4) water, the existence of those connections is not ignored. However, while a water’s connections to the traditional navigable water, interstate water, or the territorial seas through paragraph (a)(5) through (a)(7) waters can be considered in the significant nexus analysis in order to determine whether the functions of the paragraph (a)(8) waters are provided downstream, only the functions of the water, along with any similarly situated waters, being evaluated under paragraph (a)(8) on downstream water integrity can be included in the significant nexus analysis.

The administrative record for a jurisdictional determination for a water under paragraph (a)(7) or (a)(8) will include available information supporting the determination. In addition to location and other descriptive information regarding the water at issue, the record will include an explanation of the rationale for the jurisdictional conclusion and a description of the information used. Relevant information can come from many sources, and need not always be specific to the water whose jurisdictional status is being evaluated. Studies of the same type of water or similarly situated waters can help to inform a significant nexus analysis as long as they are applicable to the water being evaluated. In the case of paragraph (a)(8) waters, the administrative record will include the rationale behind the similarly situated analysis, including an explanation of the data or information examined.

The agencies expect that where waters are determined to be similarly situated in a single point of entry watershed, such similarly situated waters will often be found jurisdictional through the case-specific analysis of significant nexus. However, case-specific factors such as distance to the traditional navigable water, interstate water, or the territorial seas; density or number of similarly situated waters; individual and cumulative size of the similarly situated waters; soil permeability; climate; etc., may be considered in the determination, and there could be cases where even considering these waters in combination with similarly situated waters will not

be sufficient for waters to have a significant nexus.

Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For paragraph (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For paragraph (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under paragraph (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

4. Summary of Revisions to Case-Specific Determinations of "Waters of the United States" and Major Comments

a. Significant Nexus

Some commenters stated concerns over the potential for inconsistent application of the significant nexus analysis in a jurisdictional determination. To address this concern within the regulatory framework, the agencies provide more detail regarding the definition of significant nexus in the rule and list the specific functions that will be considered in the analysis. This approach provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated

public over which factors will be considered.

Overall, there was support for the concept of the single point of entry watershed as the interpretation of "in the region." Several commenters supported the approach that the single point of entry watershed was an appropriate scale to use to measure effect on traditional navigable waters, interstate waters, or the territorial seas. Other commenters felt the single point of entry watershed was too small to capture all the benefits that waters that do not meet the definition of adjacency contribute. Some of the SAB panel members thought that because surface and ground-watershed units may not align, watersheds might be problematic for defining "in the region." These panel members suggested that a more scientifically justified approach would include surface and subsurface waters in a watershed delineation. The agencies have retained the single point of entry watershed from the proposed rule as the appropriate unit of analysis for significant nexus in the final rule as these watersheds are more easily understood and easier to delineate than those that map subsurface waters as the SAB suggested.

With respect to the agencies' approach to "similarly situated waters," commenters offered support for assessing waters in combination based on their type and function, particularly waters such as Prairie potholes. Conversely, several commenters found that the ability to aggregate waters that do not meet the definition of adjacency is over-reaching and causes uncertainty to the regulated public. Some commenters also attributed uncertainty in which waters were regulated to subjectivity in review by Federal regulator(s). Similarly, some commenters were concerned that waters eligible for protection were based on an individual analyst's interpretation and wanted to know how the agencies would address consistency and potential bias. In response, the rule lists in paragraph (a)(7) a limited number of subcategories of waters where waters of the specified types have been determined by rule to be similarly situated for a significant nexus analysis. This will add consistency, predictability, and clarity, as the rule explicitly states that such waters are similarly situated for purposes of the significant nexus analysis. For waters identified under paragraph (a)(8), the agencies have established two limitations: Waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 foot feet

of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. The agencies also have established within the definition of significant nexus at paragraph (c)(5) criteria for determining whether waters are similarly situated and should therefore be analyzed in combination. Waters identified under paragraph (a)(8) are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. The agencies have not determined that such waters are categorically similarly situated, so the agencies will base their case-specific determinations of whether a particular water has any similarly situated waters on the available information and science. The rule also clarifies that paragraph (a)(8) waters cannot be considered similarly situated with "adjacent waters," which are jurisdictional by rule, and paragraph (a)(7) waters, which have been determined to be similarly situated by rule. These parameters will reduce inconsistency in reviews and add clarity.

Similarly, several commenters expressed concern that landowners would not know which water bodies on their property are subject to CWA jurisdiction due to aggregation, as waters on their property may be considered similarly situated with waters located off-site. While the rule does not eliminate the use of case-specific significant nexus analyses, and the concern arises from Justice Kennedy's phrase "similarly situated," the parameters placed on waters requiring a case-specific determination and the clearer definition of significant nexus address the concerns about uncertainty and inconsistencies in reviews. In particular, waters that are not either one of the five identified subcategories in paragraph (a)(7) or within the thresholds in paragraph (a)(8) cannot be subject to a case-specific significant nexus analysis under the rule. Generally, jurisdictional determinations are conducted at the request of an applicant or landowner for specific waters. While the agencies cannot arbitrarily depart from a determination that waters are "similarly situated," landowners may provide new information to inform subsequent jurisdictional determinations. In addition, owners with questions regarding jurisdiction of waters on their property may always consult their local Corps District or EPA Regional Office, which is not a change from longstanding practice.

b. Case-Specific Determinations

The rule provides more regulatory certainty by narrowing the scope of waters that can be assessed under a case-specific significant nexus evaluation as compared to the proposal. These changes still allow the scientific value of specific waters not covered in paragraph (a)(1) through (a)(6) to be evaluated on a case-specific basis.

In the proposal, the agencies solicited comment regarding a variety of approaches to the category of waters subject to a case-specific significant nexus analysis. In addition, the agencies solicited comment on additional scientific research and data that might further inform decisions about these waters. In particular the agencies solicited information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of subcategories of types of waters, either alone or in combination with similarly situated waters, that can appropriately be identified as always lacking or always having a significant nexus. One of these alternate approaches in the preamble to the proposed rule was to determine by rule that certain additional subcategories of waters would be jurisdictional rather than addressed with a case-specific basis for determining significant nexus.

Many commenters expressed support for the agencies' proposed approach to case-specific waters, included additional references to support these waters being protected by rule, and supported the treatment of certain categories of waters as similarly situated (that is, evaluating them in combination with similarly situated waters for the purposes of the significant nexus analysis). Some suggested the agencies establish jurisdiction over case-specific waters by rule and provided detailed information in support of their position. Other commenters suggested additional subcategories of waters be considered as jurisdictional or as similarly situated by rule, such as playa lakes, kettle lakes, and woodland vernal pools.

However, there was a concern raised by other commenters about what was termed regulatory overreach and uncertainty created by the "other waters" category in the proposal. Some commenters stated that the "other waters" category in the proposal would allow the agencies to regulate virtually any water. To address this concern, the rule places limits on which waters could be subject to a case-specific significant nexus determination, in recognition that case-specific analysis of significant nexus is resource-intensive

and based on the body of science that exists. As noted above, the agencies also establish by rule subcategories of waters that are "similarly situated" for the purposes of a significant nexus analysis because science supports that the subcategory waters fall within a higher gradient of connectivity. By not determining that any one of the waters available for case-specific analysis is jurisdictional by rule, the agencies are recognizing the gradient of connectivity that exists and will assert jurisdiction only when that connection and the downstream effects are significant and more than speculative and insubstantial.

Waters are covered under the rule only where they are identified as jurisdictional in paragraphs (a)(1) through (a)(6), where they are not excluded under paragraph (b), or where they are within the limited number of subcategories listed in paragraphs (a)(7) and (a)(8) and have a case-specific significant nexus to a traditional navigable water, interstate water, or the territorial seas. These limits on jurisdiction reflect the case law and are in response to comments requesting greater regulatory certainty. Although some commenters suggested additional subcategories of waters for consideration, such as playa lakes and kettle lakes, the agencies at this time are not able to determine that the available science supports that the suggested additional subcategories of waters as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of paragraphs (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water, or a woodland vernal pool that is less than 4,000 feet from a jurisdictional tributary and is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

In consideration of the variety of views of the commenters, the Science Report, the input from the SAB, and the developing state of the science, the agencies reasonably decided not to establish jurisdiction over all waters that do not meet the requirements of paragraph (a)(1) through (a)(6) by rule. Instead, the agencies established case-specific provisions for some specified waters at paragraph (a)(7) and waters within the boundaries at paragraph (a)(8). This approach strikes a balance between requests for clear boundaries and limited case-specific reviews with scientific support.

I. Waters and Features That Are Not "Waters of the United States"

In the rule, the agencies identify a variety of waters and features that are not "waters of the United States." Prior converted cropland and waste treatment systems have been excluded from this definition since 1992 and 1979, respectively, and they remain substantively and operationally unchanged. Only ministerial changes to delete an outdated cross reference are made to the exclusion for waste treatment systems. The agencies add exclusions for all waters and features identified as generally exempt in preamble language from **Federal Register** documents by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. In addition, under prior preamble language, the agencies retained the authority to determine that a particular feature generally considered non-jurisdictional was in fact a "water of the United States." The agencies do not retain that authority for features excluded under the rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent. These exclusions are reflective of current agencies' practice, and their inclusion in the rule furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. Importantly, under the rule all waters and features identified in paragraph (b) as excluded will not be "waters of the United States," even if they otherwise fall within one of the categories in paragraphs (a)(4) through (a)(8). For example, a ditch that is excluded under paragraph (b)(3)(i) or (b)(3)(ii) is not jurisdictional even when the ditch connects directly or through another water to a traditional navigable water, interstate water, or the territorial seas. The proposed rule referenced paragraphs (a)(1) through (a)(8), but the agencies did not intend to exclude any traditional navigable waters, for example, and the revision clarifies that. Finally, nothing in the rule is intended to change the way in which the Corps applies individual or nationwide permits.

The exclusions reflect the agencies' long-standing practice and technical judgment that certain waters and

features are not subject to the CWA. The exclusions are also guided by Supreme Court cases. The significant nexus standard arises from the case law and is used to interpret the terms of the CWA. Thus, a significant nexus determination is not a purely scientific inquiry, but rather is a determination by the agencies in light of the statutory language, the statute's goals, objectives and policies, the case law, the relevant science, and the agencies' technical expertise and experience. The plurality opinion in *Rapanos* also noted that there were certain features that were not primarily the focus of the CWA. See 547 U.S. at 734. In this section of the proposed rule, the agencies are drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean Water Act. The Supreme Court has recognized that clarifying the lines of jurisdiction is a difficult task: "Our common experience tells us that this is often no easy task: The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." *Riverside Bayview* at 132–33. The exclusions are an important aspect of the agencies' policy goal of providing clarity and certainty. Just as the categorical assertions of jurisdiction over covered tributaries and covered adjacent waters simplify the jurisdiction issue, the categorical exclusions will likewise simplify the process, and they reflect the agencies' determinations of the lines of jurisdiction based on science, the case law and the agencies' experience and expertise.

The existing exclusion for waste treatment systems moves to paragraph (b)(1) with no substantive changes. One ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference.

Many commenters expressed concern about whether the agencies' insertion of a comma following this ministerial change unintentionally narrowed the

exclusion such that all excluded waste treatment systems must be designed to meet the requirements of the Clean Water Act. The commenters indicated concerns that waste treatment systems built before the Clean Water Act or primarily for purposes of other environmental laws could not be exempt. The agencies do not intend to change how the waste treatment exclusion is implemented and have deleted this proposed comma. Continuing current practice, any waste treatment system built in a "water of the United States" would need a section 404 permit to be constructed and a section 402 permit for discharges from the waste treatment system into "waters of United States."

A number of commenters suggested the agencies clarify how the waste treatment system exclusion is currently implemented. Many comments raised questions about stormwater systems and wastewater reuse and whether such facilities qualified under the waste treatment system exclusion as part of a complete waste treatment system. For clarity, the agencies have identified related exclusions in paragraphs (b)(6) and (b)(7). Many commenters also suggested making substantive changes to the existing exclusion for waste treatment systems. Because the agencies are not making any substantive changes to the waste treatment system exclusion and these comments are outside the scope of the proposed rule, the final rule does not reflect changes suggested in public comments.

The existing exclusion for prior converted cropland moves to paragraph (b)(2) of the rule and is unchanged. A number of commenters suggested changes to the existing exclusion for prior converted cropland. As with waste treatment systems, the preamble to the proposed rule stated this rulemaking was not making changes to the exclusion for prior converted cropland. As a result, comments requesting changes to the prior converted cropland exclusion or seeking clarification of how the exclusion is implemented in the field are outside the scope of this rulemaking, and the rule does not reflect changes or respond to issues raised in public comments. The agencies will continue to implement this exclusion consistent with current policy and practice.

The agencies identify excluded ditches in paragraph (b)(3). Jurisdictional ditches are discussed at more detail in section IV.F. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow

that are not a relocated tributary, excavated in a tributary, or drain wetlands, regardless of whether or not the wetland is a jurisdictional water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. These ditch exclusions are clearer for the regulated public to identify and more straightforward for agency staff to implement than the proposed rule or current policies. The ditch exclusions do not affect the possible status of a ditch as a point source.

Many comments addressed ditches, and many of these comments are reflected in the approach to ditches articulated in the rule. The majority of commenters requested that the agencies' ditch exclusion be clarified or broadened. Many commenters were confused by the term "uplands" and did not feel the term had a common understanding. For example, some commenters felt the term referred only to areas at higher elevations in the landscape. Many expressed concerns that all ditches would be jurisdictional under the proposed rule. Many groups especially called for exclusions of roadside ditches.

The revised exclusions reflect the agencies' careful consideration of these comments. First, the agencies have eliminated the term "uplands" in response to the questions the term created. Second, the agencies have instead provided a clearer statement of the types of ditches that are subject to exclusion—ditches that are not excavated in or relocate a tributary and ditches that do not drain a wetland. Eliminating the term "uplands" with this more straightforward description should improve clarity. Finally, the agencies have more clearly stated the flow regimes in ditches that are subject to the exclusions; these flow regimes are described earlier and have been used by the agencies consistently and are readily understood by field staff and the public.

As noted, the agencies received many comments asking that roadside ditches be addressed, and more specifically excluded, in the final rule. Like the proposed rule, the final rule does not include an explicit exclusion for roadside ditches, but the agencies believe the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have

concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines.

As discussed in Section IV.F.1., the definition of tributary includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary. In addition, natural streams and rivers that are altered or modified for purposes as flood control, erosion control, and other reasons does not convert the tributary to a ditch. A stream or river that has been channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, is not a ditch. A stream that has banks stabilized through use of concrete or rip-rap (*e.g.*, rocks or stones) is not a ditch. The Los Angeles River, for example, is a “water of the United States” (and, indeed, a traditional navigable water) and remains a “water of the United States” and is not a excluded under paragraph (b)(3), even where it has been ditched, channelized, or concreted.

The rule excludes ditches with ephemeral flow except where a ditch is excavated in or relocates a covered tributary. Under the rule, that portion of a ditch with ephemeral flow actually excavated in or relocating the covered tributary would be considered jurisdictional. The jurisdictional status of upstream and downstream portions of the same ditch would have to be assessed based on the specific facts and under the terms of the rule to determine flow characteristics and whether or not the ditch is excavated in or relocates a tributary. This approach reasonably balances the exclusion with the need to ensure that covered tributaries, and the significant functions they provide, are preserved. A ditch that relocates a stream is not an excluded ditch under paragraph (b)(3), and a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. A ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing the stream’s aquatic character. The latter type of ditch is excluded from jurisdiction where it meets the listed characteristics of excluded ditches under paragraph (b)(3). The agencies will determine historical presence of tributaries using a variety of resources, such as USGS and state and local maps, historic aerial photographs, local surface water management plans, street maintenance data, wetlands and

conservation programs and plans, as well as functional assessments and monitoring efforts.

The rule also excludes ditches with intermittent flow except where a ditch is excavated in or relocates a covered tributary, or drains wetlands. Where an excluded ditch drains a wetland, the segment of the ditch that physically intersects the wetland would be considered jurisdictional. The jurisdictional status of upstream and downstream portions of the same ditch would have to be assessed based on the specific facts and under the terms of the rule to determine flow characteristics and whether or not the ditch drains a wetland. The provision of paragraph (b)(3) addressing draining of wetlands is specific to ditches with intermittent flow. As discussed previously, features that are ephemeral will flow only in response to precipitation events, such as rainfall or snowmelt. Ditches with ephemeral flow, therefore, do not typically have the flow characteristics characteristic of ditches that drain wetlands. The agencies have accordingly focused on intermittent ditches that drain wetlands.

In addition, the agencies clarify that a ditch drains a wetland when it physically intersects the wetland. If the ditch has been cut to carry only ephemeral flows, such as those following a storm event, the effect of the ditch is minimal as it carries only that flow that overtops the wetland during and immediately following the rain event. However, if the ditch has been cut to carry intermittent or perennial flows from the wetland, the ditch is serving as a conduit for transferring flow from the wetland to a downstream tributary. As a result of the cut ditch, the wetland’s hydrologic regime is modified and can generally affect the natural functions performed by the wetland. When the ditch has been cut to carry intermittent or perennial flow from the wetland to the downstream tributary, the wetland soils and vegetation can shift into a community that supports less hydric soils and a mix of riparian or upland vegetation. Consequently, the ditch is draining the wetland and the wetland quality degrades and may cease to exist over time. Therefore, a ditch that carries intermittent flow and physically intersects with a wetland is not excluded under this provision.

A number of commenters expressed concern that a ditch could be viewed as both a point source and a “water of the United States.” However, the approach that ditches can be considered both reflects the CWA itself as well as longstanding agency policy.

Paragraph (b)(4) of the rule identifies features and waters that the agencies have identified as generally not “waters of the United States” in previous preambles or guidance documents. Codifying these longstanding practices supports the agencies’ goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. The agencies’ 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be “waters of the United States.” This rule does not allow for this case-specific analysis to be used to establish jurisdiction—these waters are categorically excluded from jurisdiction. Some of the exclusions have been modified slightly to address public comments and improve clarity. The following features are not “waters of the United States”:

- Artificially irrigated areas that would revert to dry land should application of irrigation water to that area cease
- Artificial, constructed lakes or ponds created by excavating and/or diking dry land such as farm and stock watering ponds, irrigation ponds, settling basins, log cleaning ponds, cooling ponds, or fields flooded for rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- Puddles

Several of these exclusions use the phrase “dry land.” This phrase appears in the 1986 and 1988 preambles, and the agencies believe the term is well understood based on the more than 30 years of practice and implementation. But in keeping with the goal of providing greater clarity, the agencies state that “dry land” refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds and the like. However, it is important to note that a “water of the United States” is not considered “dry land” just because it lacks water at a given time. Similarly, an area remains “dry land” even if it is wet after a rainfall event. The agencies received comments suggesting that the

final rule provide a definition of “dry land” as it relates to the exclusion for stormwater control features. The agencies considered the request and determined that there was no agreed upon definition given geographic and regional variability. The agencies concluded that further clarity on this issue can be provided during implementation.

In the exclusion for artificial lakes or ponds, the agencies have removed language regarding “use” of the ponds, including the term “exclusively.” In most cases, the “use” of the pond is captured in its name. More importantly, the agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. For example, rice growing is typically facilitated by land leveling and inundation that floods vast areas. The fields are flooded for the purpose of weed control and to facilitate rice cultivation, but these rice fields are often extensively used by waterfowl and other wildlife. The agencies agree with commenters who raised concern that rice fields “used” both for rice growing and waterfowl habitat should continue to be excluded even where they are not used “exclusively” for a single purpose. The change to the exclusion reflects the agencies’ practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use.

The agencies have also added farm ponds, log cleaning ponds, and cooling ponds to the list of excluded ponds in the rule based on public comments. The list of ponds has always been illustrative rather than exhaustive, and the additions respond to requests to clarify that farm ponds, and log cleaning ponds¹² created in dry land are excluded. The agencies have also added cooling ponds created in dry land to the list of excluded waters. The agencies also note that cooling ponds that are created under section 404 in jurisdictional waters and that have NPDES permits are subject to the waste treatment system exclusion, which is not changing. Cooling ponds created to serve as part of a cooling water system with a valid state permit constructed in waters of the United States prior to enactment of the Clean Water Act and currently excluded from jurisdiction remain excluded under the new rule. Additional ponds will also likely fall under the exclusion based on site

specific evaluation, including, for example, fire control ponds and fishing ponds excavated from dry land. Artificial lakes and ponds created in dry land that do not connect to jurisdictional waters are covered by this exclusion. Where these ponds do connect and discharge to jurisdictional waters, the agencies will evaluate factors such as the potential for introduction of pollutants and coverage under an issued NPDES permit. As a general matter, ponds created in dry land that discharge to “waters of the United States” are covered by the exclusion where such discharge is regulated under a NPDES permit. Conveyances created in dry land that are physically connected to and are a part of the excluded feature are also excluded. These artificial features are working together as a system, and it is appropriate to treat them as one functional unit. The agencies emphasize that ponds excluded from “waters of the United States” can, in some circumstances, be point sources of pollution subject to section 301 of the Act.

The rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies’ 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity.

The agencies also here clarify their longstanding view that only the specific land being directly irrigated that would revert to dry land should irrigation cease is exempt; it is not the case that all waters within watersheds where irrigation occurs are exempt.

The rule identifies all erosional features, including gullies and rills, as non-jurisdictional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary. These features are specifically excluded in the rule to avoid confusion, because preceding guidance identified them as non-jurisdictional and many commenters stated these exclusions were important to maintain in the rule.

Tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. Concentrated surface runoff can occur within erosional features without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark. See Technical Support Document. It should be noted that some ephemeral streams are colloquially called “gullies” or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features.

The rule also excludes lawfully constructed grassed waterways. Grassed waterways are lawfully constructed for purposes of this rule either where they are on dry land and replace non-jurisdictional erosional features or, more commonly, where they have been lawfully converted from an intermittent or ephemeral stream under a CWA permit. Once converted to grassed waterways, these former streams segments no longer exhibit a bed and banks or ordinary high water mark and are excluded because they do not meet the definition of “tributary.” However, such conversion does not sever jurisdiction over the entire length of the tributary above and below the grassed waterway. Instead, the grassed waterway is considered a constructed break in the bed and banks and ordinary high water mark. This is reflected in the definition of tributary, which specifically addresses natural or man-made breaks in bed and banks and ordinary high water mark.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a “water of the United States,” and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems. As discussed in the preamble to the proposed rule, the agencies have never interpreted “waters of the United States” to include groundwater. The exclusion does not apply to surface expressions of groundwater, as some commenters requested, such as where groundwater emerges on the surface and

¹² Log cleaning ponds are used to float logs for removal of twigs, branches, and large knots.

becomes baseflow in streams or spring fed ponds.

The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies stated in the proposed rule that the exclusions were guided by decisions of the Supreme Court and were intended to further the agencies' goal of providing clarity and certainty. The agencies in the proposed rule sought to provide a "full description" of the waters that will not be "waters of the United States." 79 FR at 22218. In response to the agencies' proposal, several commenters indicated additional clarity was needed, particularly with respect to stormwater control features and wastewater recycling facilities. This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed.

The agencies' longstanding practice is to view stormwater control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.

Many commenters, particularly municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressed concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems. A key element of the exclusion is whether the feature or control system was built in dry land and whether it conveys,

treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems, but have never been considered "waters of the United States."

Stormwater control features have evolved considerably over the past several years, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the exclusion, the agencies have not included a list of excluded features in the rule. The rule is intended to exclude the diverse range of control features that are currently in place and may be developed in the future.

Traditionally, stormwater controls were designed to direct runoff away from people and property as quickly as possible. Cities built systems to collect, convey, or store stormwater, using structures such as curbs, gutters, and sewers. Often, cities used existing stream networks as part of the stormwater drainage network. Retention and detention stormwater ponds were built to store excess stormwater until it could be more safely released.

Recently, treatment of stormwater has become more prevalent to remove harmful pollutants before the stormwater is discharged. Even more recently, cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate or evapotranspire precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both water quantity and quality concerns, as well as provide other benefits to communities. This rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices. This exclusion does not cover transportation ditches; those ditches are addressed under paragraph (b)(3) of the rule. As discussed above, the exclusion in paragraph (b)(6) is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule. However, the agencies do not expect the scope of ditches excluded to be different under paragraphs (b)(3) and (b)(6), so there

should be little practical need to distinguish between the two.

Paragraph (b)(7) of the rule clarifies that wastewater recycling structures constructed in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California and the Southwest where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water, which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.

The agencies also received other suggestions for new exclusions that

were not adopted in the final rule. The agencies determined that it was not appropriate or necessary to add certain requested exclusions for one or more reasons, including: (1) The requested exclusion was so broadly characterized as to introduce significant confusion and potentially have the effect of excluding waters that the agencies have consistently determined should be covered as “waters of the U.S.,” (2) the requested exclusion was so site-specific or activity-based as to lack illustrative value, or (3) the requested exclusion was likely covered by another exclusion in the final rule.

It is important to note that while the waters listed in the exclusions are not “waters of the United States,” they can serve as a hydrologic connection that the agencies would consider under a case-specific significant nexus under paragraphs (a)(7) and (a)(8). For example, a wetland may be directly hydrologically connected to a covered tributary via flow through an excluded non-wetland swale. While the swale itself is excluded from jurisdiction, the connection of the wetland to the tributary is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas. In addition, these geographic features may function as “point sources” under CWA section 502(14), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

V. Economic Impacts

This rule establishing the definition of “waters of the United States,” by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations.

While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes. In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. Existing regulations and historic practice in implementing them represent one appropriate baseline for

comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline. A comparison to recent field practice following the 2008 guidance is also an appropriate baseline, and the agencies prepared illustrative estimates of how the costs and benefits of various CWA programs may change with an increase in positive jurisdictional determinations relative to that baseline.

To estimate changes in potential costs and benefits of different CWA programs, the economic analysis utilizes available program data to estimate the extent to which assertion of jurisdiction might change under the associated final policies. The proposed rule analysis utilized CWA Section 404 jurisdictional determination and permit data from fiscal years 2009–2010 (post *SWANCC* and *Rapanos*), following issuance of program guidance in 2008 by the EPA and the Corps. The analysis for the final rule has been updated using data from fiscal years 2013–2014, providing a comparison to a more recent year of data, which responds to public comments. An estimate of how assertion of jurisdiction may change compared to the recent practice baseline, developed using updated data from fiscal years 2013–2014 jurisdictional determinations, is then applied to cost and benefit information for affected CWA programs. Additional updates to the economic analysis include a refined approach to calculating benefits from section 404 compensatory mitigation, differentiating between emergent and forested wetlands, as well as presenting results in ranges to reflect uncertainty. The agencies’ economic analysis yielded the following key conclusions:

- Compared to the current regulations and historic practice of making jurisdictional determinations, the scope of jurisdictional waters will decrease, as would the costs and benefits of CWA programs.
- Compared to a baseline of recent practice, the agencies assessed two scenarios. Those scenarios result in an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually.
- The agencies’ analysis indicates that for both scenarios, the change in benefits of CWA programs exceed the costs by a ratio of greater than 1:1.
- The economic analysis estimates that incremental annual costs for scenario 1 will range from \$158M–\$307M and incremental annual benefits will range from \$339M–\$350M and, for scenario 2, costs will range from

\$237M–\$465M and benefits will range from \$555M–\$572M.

The agencies conducted this economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that may result from a change in the number of positive jurisdictional determinations. The economic analysis was done for informational purposes only, and the final decisions on the scope of “waters of the United States” in this rulemaking are not based on consideration of the information in the economic analysis. The economic analysis fulfills the requirements of Executive Orders 13563 and 12866. An explanation of the data, methods, and assumptions used to estimate indirect costs and benefits can be found in the *Economic Analysis for the Clean Water Rule; Definition of “Waters of the United States” Under the Clean Water Act (Final Rule)* in the accompanying docket.

VI. Related Acts of Congress, Executive Orders, and Agency Initiatives

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, EPA and the Army submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA and the Army prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in *Economic Analysis of the EPA-Army Clean Water Rule*. A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the CWA section 402 program may be found at 40 CFR 9.1. (OMB Control No. 2040–0004, EPA ICR No. 0229.19). For the CWA section 404 regulatory

program, the current OMB approval number for information requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final action on small entities, “small entity” is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration’s size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, we certify that this final rule will not have a significant economic impact on a substantial number of small entities. See, e.g., *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Am. Trucking Ass’n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

Under the RFA, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives “which minimize any significant economic impact of the proposed rule on small entities.” 5 U.S.C. 603. The scope of jurisdiction in this rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining “waters of the United States”). Because fewer waters will be subject to the CWA under the rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action will not have

a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

This rule is not designed to “subject” any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of “the waters of the United States, including the territorial seas,” section 502(7), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos v. United States*, 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term “waters of the United States” is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Army determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court’s decisions. Such outreach, although voluntary, is also consistent with the President’s January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Report of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA–HQ–OW–2011–0880–1927), is available in the docket.

D. Unfunded Mandates Reform Act

This action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538), and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector,

and does not contain regulatory requirements that might significantly or uniquely affect small governments. The definition of “waters of the United States” applies broadly to CWA programs.

E. Executive Order 13132: Federalism

This rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Keeping with the spirit of Executive Order 13132 and consistent with the agencies’ policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

Early in the rulemaking process, EPA held two in-person meetings and two phone calls in the fall and winter of 2011. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States. Additionally, the National Association of Clean Water Agencies and the Association of Clean Water Administrators were invited to participate. The agencies held many additional calls and meetings with state and local governments and their associations, in preparation for the development of a proposed rule.

Similarly to the outreach conducted prior to the development of the rule, the agencies committed themselves to providing a transparent, comprehensive, and effective process for taking public comment on the proposed rule. As part of this consultation, EPA held a meeting on May 13, 2014 to seek technical input on the proposed rule from the largest

national representative organizations for State and local governments. During this process the agencies also extended its focused outreach to include a series of meetings with the Local Government Advisory Committee, and the Environmental Council of the States in conjunction with the Association of Clean Water Administrators and the Association of State Wetland Managers. In addition to engaging these key organizations, the agencies sought additional feedback on the proposed rule through broader public outreach to state and local government organizations during the public comment period.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Report on the Discretionary Consultation and Outreach to State, Local, and County Governments on the Clean Water Rule: Definition of "Waters of the United States;" Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000), agencies generally may not issue a regulation that has tribal implications, (1) that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the agencies consult with tribal officials early in the process of developing the proposed regulation and develop a tribal summary impact statement, or (2) that preempts tribal law unless the agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

This action does not have tribal implications as specified in E.O. 13175. In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to

gain an understanding of tribal views and solicited their comments on the proposed action and on the development of this rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies began consultation with federally-recognized Indian tribes on the Clean Water Rule defining "waters of the United States" in October 2011. The consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, continued, in stages, over a four year period, until the close of the public comment period on November 14, 2014. EPA invited tribes to provide written input on the rulemaking throughout both the tribal consultation process and public comment period.

EPA specifically consulted with tribal officials to gain an understanding of, and to address, the tribal views on the proposed rule. In 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from three tribes during the initial consultation period.

EPA continued to provide status updates to the National Tribal Water Council and the National Tribal Caucus during 2012 through 2014. The final consultation event was completed on October 23, 2014 as a national teleconference with the Office of Water's Deputy Assistant Administrator. Ultimately, EPA received an additional 23 letters from tribes/tribal organizations by the completion of the consultation period. The comments indicated that Tribes, overall, support increased clarity of waters protected by the Clean Water Act, but some expressed concern with the consultation process and the burden of any expanded jurisdiction. The agencies considered the feedback received through consultation and written comments in developing today's rule.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, *Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs federal agencies to use voluntary consensus standards in regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs federal agencies to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, the agencies are not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (E.O.) 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The agencies have determined that the rule will not have disproportionately high and adverse

human health or environmental effects on minority or low-income populations, because it does not adversely affect the level of protection provided to human health or the environment.

The rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of “waters of the United States” is intended to benefit all regulators, stakeholders, and interested parties. In addition, this rule is national in scope and, therefore, is not specific to a particular geographic area.

In the spirit of E.O. 12898, input from environmental justice stakeholders was requested during the rule development process, through a series of stakeholder meetings between April and November 2014. On May 12, 2014, EPA held a focused teleconference with non-traditional stakeholders, including environmental justice and faith-based stakeholders, to solicit their individual input on the proposed rule. The agencies have used the feedback from public outreach as the source of early guidance and recommendations for refining the proposed rule. Stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in today’s rule, and incorporate increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as “waters of the United States.”

The agencies prepared a report summarizing their outreach to the environmental justice community, analysis of potential impacts, and how these results informed the development of the rule. This report, *Environmental Justice Report for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

K. Congressional Review Act

This action is subject to the Congressional Review Act (CRA), and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a “major rule” as defined by 5 U.S.C. 804(2) based on potential indirect costs.

L. Environmental Documentation

In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act. The definition will apply to all provisions of the Act, and this regulation specifically amends EPA regulations implementing

sections 301, 304, 306, 311, 402 and 404, while the Army is making substantively identical revisions to its regulations under section 404 of the CWA. Section 511(c) of the Clean Water Act provides that, except for certain actions not relevant here, no action by EPA constitutes ‘a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]’.

The Army has prepared a final environmental assessment and Findings of No Significant Impact consistent with the National Environmental Policy Act (NEPA). The Army has determined that the rule is not a major federal action significantly affecting the quality of the human environment that would require the preparation of an environmental impact statement. The assessment is contained in the record for this rulemaking. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for general permits and specifically for each and every standard individual permit application before making final permit decisions.

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer. v. EPA*, 553 F.3d 927 (6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

See **DATES** section for information regarding the timing for seeking judicial review of this rule.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401

Environmental protection, Water pollution control.

Dated: May 27, 2015.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: May 27, 2015.

Jo-Ellen Darcy,

Assistant Secretary of the Army, (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is amended by revising paragraphs (a) through (c), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§ 328.3 Definitions.

* * * * *

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1)

through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) *Definitions*. In this section, the following definitions apply:

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this

section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring*. The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this

section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,

- (iii) Pollutant trapping, transformation, filtering, and transport,
- (iv) Retention and attenuation of flood waters,

- (v) Runoff storage,
- (vi) Contribution of flow,
- (vii) Export of organic matter,
- (viii) Export of food resources, and
- (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 4. Section 110.1 is amended by removing the definition of “wetlands” and revising the definition of “navigable waters” to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

- (ii) All interstate waters, including interstate wetlands;

- (iii) The territorial seas;

- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;

- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

- (vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(1) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank,

shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 6. Section 112.2 is amended by removing the definition of “wetlands” and revising the definition of “Navigable waters” to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

- (ii) All interstate waters, including interstate wetlands;

- (iii) The territorial seas;

- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;

- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

- (vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the

100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow

sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the

chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent

aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

■ 7. The authority citation for part 116 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 8. Section 116.3 is amended by revising the definition of “Navigable waters” to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*.

Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire

water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider

the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§ 117.1 Definitions.

* * * * *

(i) *Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (i)(3)(iii) of this section, of waters identified in paragraphs (i)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (i)(1)(i) through

(v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (i)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (i)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (i)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (iii) of this

section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (i)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (i)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (i)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (i)(1)(i) through (v) or are located at the head of a water identified in paragraphs (i)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (i)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (i)(1)(iv) of this section), to

a water identified in paragraphs (i)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (i)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (i)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in

paragraphs (i)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 12. Section 122.2 is amended by:

■ a. Lifting the suspension of the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620);

■ b. Removing the definition of “wetlands” and revising the definition of “Waters of the United States” and

■ c. Suspending the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620).

The revision reads as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters

identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to

meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland.

Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus

to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified

in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 13. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 14. Section 230.3 is amended by:

■ a. Removing paragraph (b) and reserved paragraphs (f), (g), (j) and (l).

- b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).
- c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f).
- d. Redesignating paragraph (k) as paragraph (g).
- e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l).
- f. Redesignating paragraph (q-1) as paragraph (m).
- g. Redesignating paragraph (r) as paragraph (n).
- h. Redesignating paragraph (s) as paragraph (o).
- i. Revising newly redesignated paragraph (o).
- j. Removing paragraph (t).

The revision reads as follows:

§ 230.3 Definitions.

* * * * *

(o) The term *waters of the United States* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis.

If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of

adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for

any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 15. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 16. Section 232.2 is amended by removing the definition of “wetlands” and revising the definition of “Waters of the United States” to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this

definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges,

intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for

rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands

generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the

land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 18. Section 300.5 is amended by revising the definition of “navigable waters” to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition

where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of

this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater

recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is

characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant

nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

■ 19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of “navigable waters” to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands

found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into

a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified

in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by

physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 21. Section 302.3 is amended by revising the definition of “Navigable waters” to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of

waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus,

the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary

structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These

physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with

similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 23. Section 401.11 is amended by revising paragraph (I) to read as follows:

§ 401.11 General definitions.

* * * * *

(I) The term *navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (I)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (I)(3)(iii) of this section, of waters identified in paragraphs (I)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (I)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (I)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (I)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (I)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (I)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (I)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (I)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (I)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (I)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (I)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (I)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (I)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (I)(1)(iv) through (viii) of this section.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (I)(1)(i) through (iii) of this section.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (l), the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (l)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (l)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (l)(1)(i) through (v) or are located at the head of a water identified in paragraphs (l)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (l)(1)(i) through (v) of this section. The entire water is neighboring if a portion is

located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (l)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (l)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (l)(1)(iv) of this section), to a water identified in paragraphs (l)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (l)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence

of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (l)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (l)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the

foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure

from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.
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33 USC CHAPTER 26, SUBCHAPTER I: RESEARCH AND RELATED PROGRAMS**From Title 33—NAVIGATION AND NAVIGABLE WATERS****CHAPTER 26—WATER POLLUTION PREVENTION AND CONTROL****SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS****§1251. Congressional declaration of goals and policy****(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective**

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
- (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
- (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
- (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent

limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, ch. 758, title I, §101, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 816; amended Pub. L. 95–217, §§5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub. L. 100–4, title III, §316(b), Feb. 4, 1987, 101 Stat. 60.)

AMENDMENTS

1987—Subsec. (a)(7). Pub. L. 100–4 added par. (7).

1977—Subsec. (b). Pub. L. 95–217, §26(b), inserted provisions expressing Congressional policy that the States manage the construction grant program under this chapter and implement the permit program under sections 1342 and 1344 of this title.

Subsec. (g). Pub. L. 95–217, §5(a), added subsec. (g).

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110–365, §1, Oct. 8, 2008, 122 Stat. 4021, provided that: "This Act [amending sections 1268 and 1271a of this title] may be cited as the 'Great Lakes Legacy Reauthorization Act of 2008'."

Pub. L. 110–288, §1, July 29, 2008, 122 Stat. 2650, provided that: "This Act [amending sections 1322, 1342, and 1362 of this title] may be cited as the 'Clean Boating Act of 2008'."

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–303, §1(a), Nov. 27, 2002, 116 Stat. 2355, provided that: "This Act [enacting section 1271a of this title, amending sections 1254, 1266, 1268, 1270, 1285, 1290, 1324, 1329, 1330, and 1375 of this title, enacting provisions set out as notes under this section, section 1254 of this title, and section 1113 of Title 31, Money and Finance, and repealing provisions set out as a note under section 50 of Title 20, Education] may be cited as the 'Great Lakes and Lake Champlain Act of 2002'."

Pub. L. 107–303, title I, §101, Nov. 27, 2002, 116 Stat. 2355, provided that: "This title [enacting section 1271a of this title and amending section 1268 of this title] may be cited as the 'Great Lakes Legacy Act of 2002'."

Pub. L. 107–303, title II, §201, Nov. 27, 2002, 116 Stat. 2358, provided that: "This title [amending section 1270 of this title] may be cited as the 'Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002'."

SHORT TITLE OF 2000 AMENDMENTS

Pub. L. 106–457, title II, §201, Nov. 7, 2000, 114 Stat. 1967, provided that: "This title [amending section 1267 of this title and enacting provisions set out as a note under section 1267 of this title] may be cited as the 'Chesapeake Bay Restoration Act of 2000'."

Pub. L. 106–457, title IV, §401, Nov. 7, 2000, 114 Stat. 1973, provided that: "This title [amending section 1269 of this title] may be cited as the 'Long Island Sound Restoration Act'."

Pub. L. 106–457, title V, §501, Nov. 7, 2000, 114 Stat. 1973, provided that: "This title [enacting section 1273 of this title] may be cited as the 'Lake Pontchartrain Basin Restoration Act of 2000'."

Pub. L. 106–457, title VI, §601, Nov. 7, 2000, 114 Stat. 1975, provided that: "This title [enacting section 1300 of this title] may be cited as the 'Alternative Water Sources Act of 2000'."

Pub. L. 106–284, [§1, Oct. 10, 2000](#), 114 Stat. 870, provided that: "This Act [enacting sections 1346 and 1375a of this title and amending sections 1254, 1313, 1314, 1362, and 1377 of this title] may be cited as the 'Beaches Environmental Assessment and Coastal Health Act of 2000'."

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–431, [§1, Oct. 31, 1994](#), 108 Stat. 4396, provided that: "This Act [amending section 1311 of this title] may be cited as the 'Ocean Pollution Reduction Act'."

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–596, [§1, Nov. 16, 1990](#), 104 Stat. 3000, provided that: "This Act [enacting sections 1269 and 1270 of this title, amending sections 1268, 1324, and 1416 of this title, and enacting provisions set out as notes under this section and section 1270 of this title] may be cited as the 'Great Lakes Critical Programs Act of 1990'."

Pub. L. 101–596, [title II, §201, Nov. 16, 1990](#), 104 Stat. 3004, provided that: "This part [probably means title, enacting section 1269 of this title and amending section 1416 of this title] may be cited as the 'Long Island Sound Improvement Act of 1990'."

Pub. L. 101–596, [title III, §301, Nov. 16, 1990](#), 104 Stat. 3006, provided that: "This title [enacting section 1270 of this title, amending section 1324 of this title, and enacting provisions set out as a note under section 1270 of this title] may be cited as the 'Lake Champlain Special Designation Act of 1990'."

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–653, [title X, §1001, Nov. 14, 1988](#), 102 Stat. 3835, provided that: "This title [amending section 1330 of this title and enacting provisions set out as notes under section 1330 of this title] may be cited as the 'Massachusetts Bay Protection Act of 1988'."

SHORT TITLE OF 1987 AMENDMENT

Section 1(a) of Pub. L. 100–4 provided that: "This Act [enacting sections 1254a, 1267, 1268, 1281b, 1329, 1330, 1377, 1381 to 1387, and 1414a of this title, amending this section and sections 1254, 1256, 1262, 1281, 1282 to 1285, 1287, 1288, 1291, 1311 to 1313, 1314, 1317 to 1322, 1324, 1342, 1344, 1345, 1361, 1362, 1365, 1369, 1375, and 1376 of this title, and enacting provisions set out as notes under this section, sections 1284, 1311, 1317, 1319, 1330, 1342, 1345, 1362, 1375, and 1414a of this title, and section 1962d–20 of Title 42, The Public Health and Welfare] may be cited as the 'Water Quality Act of 1987'."

SHORT TITLE OF 1981 AMENDMENT

Pub. L. 97–117, [§1, Dec. 29, 1981](#), 95 Stat. 1623, provided that: "This Act [enacting sections 1298, 1299, and 1313a of this title, amending sections 1281 to 1285, 1287, 1291, 1292, 1296, 1311, and 1314 of this title, and enacting provisions set out as notes under sections 1311 and 1375 of this title] may be cited as the 'Municipal Wastewater Treatment Construction Grant Amendments of 1981'."

SHORT TITLE OF 1977 AMENDMENT

Section 1 of Pub. L. 95–217 provided: "That this Act [enacting sections 1281a, 1294 to 1296, and 1297 of this title, amending this section and sections 1252, 1254 to 1256, 1259, 1262, 1263, 1281, 1282 to 1288, 1291, 1292, 1311, 1314, 1315, 1317 to 1319, 1321 to 1324, 1328, 1341, 1342, 1344, 1345, 1362, 1364, 1375, and 1376 of this title, enacting provisions set out as notes under this section and sections 1284, 1286, 1314, 1321, 1342, 1344, and 1376 of this title, and amending provisions set out as a note under this section] may be cited as the 'Clean Water Act of 1977'."

SHORT TITLE

Section 1 of Pub. L. 92–500 provided that: "That this Act [enacting this chapter, amending section 24 of Title 12, Banks and Banking, sections 633 and 636 of Title 15, Commerce and Trade, and section 711 of former Title 31, Money and Finance, and enacting provisions set out as notes under this section and sections 1281 and 1361 of this title] may be cited as the 'Federal Water Pollution Control Act Amendments of 1972'."

Section 519, formerly section 518, of Act June 30, 1948, ch. 758, title V, as added Oct. 18, 1972, Pub. L. 92–500, [§2](#), 86 Stat. 896, and amended Dec. 27, 1977, Pub. L. 95–217, [§2](#), 91 Stat. 1566, and

renumbered §519, Feb. 4, 1987, Pub. L. 100–4, [title V, §506](#), 101 Stat. 76, provided that: "This Act [this chapter] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)."

SAVINGS PROVISION

Pub. L. 92–500, [§4, Oct. 18, 1972](#), 86 Stat. 896, provided that:

"(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall abate by reason of the taking effect of the amendment made by section 2 of this Act [which enacted this chapter]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

"(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972], and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall continue in full force and effect after the date of enactment of this Act [Oct. 18, 1972] until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [this chapter].

"(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in section 202 of the Federal Water Pollution Control Act as amended by this Act [section 1282 of this title] and in subsection (c) of section 3 of this Act."

SEPARABILITY

Act June 30, 1948, ch. 758, title V, §512, as added by Pub. L. 92–500, [§2, Oct. 18, 1972](#), 86 Stat. 894, provided that: "If any provision of this Act [this chapter], or the application of any provision of this Act [this chapter] to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act [this chapter], shall not be affected thereby."

NATIONAL SHELLFISH INDICATOR PROGRAM

Pub. L. 102–567, [title III, §308, Oct. 29, 1992](#), 106 Stat. 4286; as amended by Pub. L. 105–362, [title II, §201\(b\), Nov. 10, 1998](#), 112 Stat. 3282, provided that:

"(a) ESTABLISHMENT OF A RESEARCH PROGRAM.—The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the 'Program') for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for—

"(1) an environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

"(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

"(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

"(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

"(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

"(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

"(b) **ADVISORY COMMITTEE.**—(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the 'Committee') shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

"(2) The Committee shall—

"(A) identify priorities for achieving the purpose of the Program;

"(B) review and recommend approval or disapproval of Program work plans and plans of operation;

"(C) review and comment on all subcontracts and grants to be awarded under the Program;

"(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

"(E) provide such other advice on the Program as is appropriate.

"(3) The Committee shall consist of at least ten members and shall include—

"(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

"(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference Executive Board), of whom one shall represent the shellfish industry in each region;

"(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

"(D) one member representing the Shellfish Institute of North America.

"(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

"(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the Program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

"(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee, but shall receive travel expenses as authorized by section 5703 of title 5, United States Code.

"(c) **CONTRACT WITH CONSORTIUM.**—Within 30 days after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will—

"(1) be the academic administrative organization and fiscal agent for the Program;

"(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);

"(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;

"(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;

"(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and

"(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.

"(d) **AUTHORIZATION OF APPROPRIATIONS.**—(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98–210; 97 Stat. 1409), there are authorized to be appropriated to the Secretary of Commerce \$5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.

"(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.

"(e) **DEFINITIONS.**—As used in this section, the term—

"(1) 'Consortium' means the Louisiana Universities Marine Consortium; and

"(2) 'shellfish' means any species of oyster, clam, or mussel that is harvested for human consumption."

LIMITATION ON PAYMENTS

Section 2 of Pub. L. 100–4 provided that: "No payments may be made under this Act [see Short Title of 1987 Amendment note above] except to the extent provided in advance in appropriation Acts."

SEAFOOD PROCESSING STUDY; SUBMITTAL OF RESULTS TO CONGRESS NOT LATER THAN JANUARY 1, 1979

Pub. L. 95–217, §74, Dec. 27, 1977, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters and to include in this study an examination of technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and to submit the result of this study to Congress not later than Jan. 1, 1979.

STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare.

OVERSIGHT STUDY

Pub. L. 92–500, §5, Oct. 18, 1972, 86 Stat. 897, authorized the Comptroller General of the United States to conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution conducted, supported, or assisted by any Federal agency pursuant to any Federal law or regulation and assess conflicts between these programs and their coordination and efficacy, and to report to Congress thereon by Oct. 1, 1973.

INTERNATIONAL TRADE STUDY

Pub. L. 92–500, §6, Oct. 18, 1972, 86 Stat. 897, provided that:

"(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine—

"(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and

(B) the market prices of the goods produced by them;

"(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

"(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation—

"(A) does not require its manufacturers to implement pollution abatement and control programs.

"(B) requires a lesser degree of pollution abatement and control in its programs, or

"(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

"(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

"(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

"(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section [Oct. 18, 1972] of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months."

INTERNATIONAL AGREEMENTS

Pub. L. 92–500, §7, Oct. 18, 1972, 86 Stat. 898, provided that: "The President shall undertake to enter into international agreement to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums."

NATIONAL POLICIES AND GOAL STUDY

Pub. L. 92–500, §10, Oct. 18, 1972, 86 Stat. 899, directed President to make a full and complete investigation and study of all national policies and goals established by law to determine what the relationship should be between these policies and goals, taking into account the resources of the Nation, and to report results of his investigation and study together with his recommendations to Congress not later than two years after Oct. 18, 1972.

EFFICIENCY STUDY

Pub. L. 92–500, §11, Oct. 18, 1972, 86 Stat. 899, directed President, by utilization of the General Accounting Office, to conduct a full and complete investigation and study of ways and means of most effectively using all of the various resources, facilities, and personnel of the Federal Government in order to most efficiently carry out the provisions of this chapter and to report results of his investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

SEX DISCRIMINATION

Pub. L. 92–500, §13, Oct. 18, 1972, 86 Stat. 903, provided that: "No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [see Short Title note above] the Federal Water Pollution Control Act [this chapter], or the Environmental Financing Act [set out as a note under section 1281 of this title]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to

racial and other discrimination, under title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42, The Public Health and Welfare]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee."

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

PREVENTION, CONTROL, AND ABATEMENT OF ENVIRONMENTAL POLLUTION AT FEDERAL FACILITIES

Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare, provides for the prevention, control, and abatement of environmental pollution at federal facilities.

EXECUTIVE ORDER No. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, formerly set out as a note under section 1321 of this title.

EX. ORD. NO. 11742. DELEGATION OF FUNCTIONS TO SECRETARY OF STATE RESPECTING THE NEGOTIATION OF INTERNATIONAL AGREEMENTS RELATING TO THE ENHANCEMENT OF THE ENVIRONMENT

Ex. Ord. No. 11742, Oct. 23, 1973, 38 F.R. 29457, provided:

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

DEFINITION OF "ADMINISTRATOR"

Pub. L. 100-4, §1(d), Feb. 4, 1987, 101 Stat. 8, provided that: "For purposes of this Act [see Short Title of 1987 Amendment note above], the term 'Administrator' means the Administrator of the Environmental Protection Agency."

§1252. Comprehensive programs for water pollution control

(a) Preparation and development

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) Planning for reservoirs; storage for regulation of streamflow

(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other

methods of controlling waste at the source.

(2) The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitably in the benefit of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this chapter shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of such features shall be nonreimbursable.

(6) No license granted by the Federal Energy Regulatory Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan.

(c) Basins; grants to State agencies

(1) The Administrator shall, at the request of the Governor of a State, or a majority of the Governors when more than one State is involved, make a grant to pay not to exceed 50 per centum of the administrative expenses of a planning agency for a period not to exceed three years, which period shall begin after October 18, 1972, if such agency provides for adequate representation of appropriate State, interstate, local, or (when appropriate) international interests in the basin or portion thereof involved and is capable of developing an effective, comprehensive water quality control plan for a basin or portion thereof.

(2) Each planning agency receiving a grant under this subsection shall develop a comprehensive pollution control plan for the basin or portion thereof which—

(A) is consistent with any applicable water quality standards effluent and other limitations, and thermal discharge regulations established pursuant to current law within the basin;

(B) recommends such treatment works as will provide the most effective and economical means of collection, storage, treatment, and elimination of pollutants and recommends means to encourage both municipal and industrial use of such works;

(C) recommends maintenance and improvement of water quality within the basin or portion thereof and recommends methods of adequately financing those facilities as may be necessary to implement the plan; and

(D) as appropriate, is developed in cooperation with, and is consistent with any comprehensive plan prepared by the Water Resources Council, any areawide waste management plans developed pursuant to section 1288 of this title, and any State plan developed pursuant to section 1313(e) of this title.

(3) For the purposes of this subsection the term "basin" includes, but is not limited to, rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof as well as the lands drained thereby.

(June 30, 1948, ch. 758, title I, §102, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 817; amended Pub. L. 95–91, title IV, §402(a)(1)(A), Aug. 4, 1977, 91 Stat. 583; Pub. L. 95–217, §5(b), Dec. 27, 1977, 91 Stat. 1567; Pub. L. 104–66, title II, §2021(a), Dec. 21, 1995, 109 Stat. 726.)

AMENDMENTS

1995—Subsec. (d). Pub. L. 104–66 struck out subsec. (d) which read as follows: "The Administrator, after consultation with the States, and River Basin Commissions established under the Water Resources Planning Act, shall submit a report to Congress on or before July 1, 1978, which analyzes the relationship between programs under this chapter, and the programs by which State and Federal agencies allocate quantities of water. Such report shall include recommendations concerning the policy in section 1251(g) of this title to improve coordination of efforts to reduce and eliminate pollution in concert with programs for managing water resources."

1977—Subsec. (d). Pub. L. 95–217 added subsec. (d).

TRANSFER OF FUNCTIONS

"Federal Energy Regulatory Commission" substituted for "Federal Power Commission" in subsec. (b)(6) on authority of Pub. L. 95–91, [title IV, §402\(a\)\(1\)\(A\)](#), [Aug. 4, 1977](#), 91 Stat. 583, which is classified to section 7172(a)(1)(A) of Title 42, The Public Health and Welfare.

EXECUTIVE ORDER No. 10014

Ex. Ord. No. 10014, Nov. 3, 1948, 13 F.R. 6601, which related to the cooperation of Federal and State agencies to prevent pollution of surface and underground waters, was superseded by Ex. Ord. No. 11258, Nov. 17, 1965, 30 F.R. 14483.

§1252a. Reservoir projects, water storage; modification; storage for other than for water quality, opinion of Federal agency, committee resolutions of approval; provisions inapplicable to projects with certain prescribed water quality benefits in relation to total project benefits

In the case of any reservoir project authorized for construction by the Corps of Engineers, Bureau of Reclamation, or other Federal agency when the Administrator of the Environmental Protection Agency determines pursuant to section 1252(b) of this title that any storage in such project for regulation of streamflow for water quality is not needed, or is needed in a different amount, such project may be modified accordingly by the head of the appropriate agency, and any storage no longer required for water quality may be utilized for other authorized purposes of the project when, in the opinion of the head of such agency, such use is justified. Any such modification of a project where the benefits attributable to water quality are 15 per centum or more but not greater than 25 per centum of the total project benefits shall take effect only upon the adoption of resolutions approving such modification by the appropriate committees of the Senate and House of Representatives. The provisions of the section shall not apply to any project where the benefits attributable to water quality exceed 25 per centum of the total project benefits.

(Pub. L. 93–251, [title I, §65](#), [Mar. 7, 1974](#), 88 Stat. 30.)

CODIFICATION

Section was not enacted as part of the Federal Water Pollution Control Act which comprises this chapter.

§1253. Interstate cooperation and uniform laws

(a) The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform State laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.

(b) The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress.

(June 30, 1948, ch. 758, title I, §103, as added Pub. L. 92–500, [§2](#), [Oct. 18, 1972](#), 86 Stat. 818.)

§1254. Research, investigations, training, and information

(a) Establishment of national programs; cooperation; investigations; water quality surveillance system; reports

The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall—

- (1) in cooperation with other Federal, State, and local agencies, conduct and promote the coordination and acceleration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of pollution;

(2) encourage, cooperate with, and render technical services to pollution control agencies and other appropriate public or private agencies, institutions, and organizations, and individuals, including the general public, in the conduct of activities referred to in paragraph (1) of this subsection;

(3) conduct, in cooperation with State water pollution control agencies and other interested agencies, organizations and persons, public investigations concerning the pollution of any navigable waters, and report on the results of such investigations;

(4) establish advisory committees composed of recognized experts in various aspects of pollution and representatives of the public to assist in the examination and evaluation of research progress and proposals and to avoid duplication of research;

(5) in cooperation with the States, and their political subdivisions, and other Federal agencies establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans and the Administrator shall, to the extent practicable, conduct such surveillance by utilizing the resources of the National Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the Coast Guard, and shall report on such quality in the report required under subsection (a) of section 1375 of this title; and

(6) initiate and promote the coordination and acceleration of research designed to develop the most effective practicable tools and techniques for measuring the social and economic costs and benefits of activities which are subject to regulation under this chapter; and shall transmit a report on the results of such research to the Congress not later than January 1, 1974.

(b) Authorized activities of Administrator

In carrying out the provisions of subsection (a) of this section the Administrator is authorized to—

(1) collect and make available, through publications and other appropriate means, the results of and other information, including appropriate recommendations by him in connection therewith, pertaining to such research and other activities referred to in paragraph (1) of subsection (a) of this section;

(2) cooperate with other Federal departments and agencies, State water pollution control agencies, interstate agencies, other public and private agencies, institutions, organizations, industries involved, and individuals, in the preparation and conduct of such research and other activities referred to in paragraph (1) of subsection (a) of this section;

(3) make grants to State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations, and individuals, for purposes stated in paragraph (1) of subsection (a) of this section;

(4) contract with public or private agencies, institutions, organizations, and individuals, without regard to section 3324(a) and (b) of title 31 and section 6101 of title 41, referred to in paragraph (1) of subsection (a) of this section;

(5) establish and maintain research fellowships at public or nonprofit private educational institutions or research organizations;

(6) collect and disseminate, in cooperation with other Federal departments and agencies, and with other public or private agencies, institutions, and organizations having related responsibilities, basic data on chemical, physical, and biological effects of varying water quality and other information pertaining to pollution and the prevention, reduction, and elimination thereof; and

(7) develop effective and practical processes, methods, and prototype devices for the prevention, reduction, and elimination of pollution.

(c) Research and studies on harmful effects of pollutants; cooperation with Secretary of Health and Human Services

In carrying out the provisions of subsection (a) of this section the Administrator shall conduct research on, and survey the results of other scientific studies on, the harmful effects on the health or welfare of persons caused by pollutants. In order to avoid duplication of effort, the Administrator shall, to the extent practicable, conduct such research in cooperation with and through the facilities of the Secretary of Health and Human Services.

(d) Sewage treatment; identification and measurement of effects of pollutants; augmented streamflow

In carrying out the provisions of this section the Administrator shall develop and demonstrate under varied conditions (including conducting such basic and applied research, studies, and experiments as may be necessary):

(1) Practicable means of treating municipal sewage, and other waterborne wastes to implement the requirements of section 1281 of this title;

(2) Improved methods and procedures to identify and measure the effects of pollutants, including those pollutants created by new technological developments; and

(3) Methods and procedures for evaluating the effects on water quality of augmented streamflows to

control pollution not susceptible to other means of prevention, reduction, or elimination.

(e) Field laboratory and research facilities

The Administrator shall establish, equip, and maintain field laboratory and research facilities, including, but not limited to, one to be located in the northeastern area of the United States, one in the Middle Atlantic area, one in the southeastern area, one in the midwestern area, one in the southwestern area, one in the Pacific Northwest, and one in the State of Alaska, for the conduct of research, investigations, experiments, field demonstrations and studies, and training relating to the prevention, reduction and elimination of pollution. Insofar as practicable, each such facility shall be located near institutions of higher learning in which graduate training in such research might be carried out. In conjunction with the development of criteria under section 1343 of this title, the Administrator shall construct the facilities authorized for the National Marine Water Quality Laboratory established under this subsection.

(f) Great Lakes water quality research

The Administrator shall conduct research and technical development work, and make studies, with respect to the quality of the waters of the Great Lakes, including an analysis of the present and projected future water quality of the Great Lakes under varying conditions of waste treatment and disposal, an evaluation of the water quality needs of those to be served by such waters, an evaluation of municipal, industrial, and vessel waste treatment and disposal practices with respect to such waters, and a study of alternate means of solving pollution problems (including additional waste treatment measures) with respect to such waters.

(g) Treatment works pilot training programs; employment needs forecasting; training projects and grants; research fellowships; technical training; report to the President and transmittal to Congress

(1) For the purpose of providing an adequate supply of trained personnel to operate and maintain existing and future treatment works and related activities, and for the purpose of enhancing substantially the proficiency of those engaged in such activities, the Administrator shall finance pilot programs, in cooperation with State and interstate agencies, municipalities, educational institutions, and other organizations and individuals, of manpower development and training and retraining of persons in, on entering into, the field of operation and maintenance of treatment works and related activities. Such program and any funds expended for such a program shall supplement, not supplant, other manpower and training programs and funds available for the purposes of this paragraph. The Administrator is authorized, under such terms and conditions as he deems appropriate, to enter into agreements with one or more States, acting jointly or severally, or with other public or private agencies or institutions for the development and implementation of such a program.

(2) The Administrator is authorized to enter into agreements with public and private agencies and institutions, and individuals to develop and maintain an effective system for forecasting the supply of, and demand for, various professional and other occupational categories needed for the prevention, reduction, and elimination of pollution in each region, State, or area of the United States and, from time to time, to publish the results of such forecasts.

(3) In furtherance of the purposes of this chapter, the Administrator is authorized to—

(A) make grants to public or private agencies and institutions and to individuals for training projects, and provide for the conduct of training by contract with public or private agencies and institutions and with individuals without regard to section 3324(a) and (b) of title 31 and section 6101 of title 41;

(B) establish and maintain research fellowships in the Environmental Protection Agency with such stipends and allowances, including traveling and subsistence expenses, as he may deem necessary to procure the assistance of the most promising research fellows; and

(C) provide, in addition to the program established under paragraph (1) of this subsection, training in technical matters relating to the causes, prevention, reduction, and elimination of pollution for personnel of public agencies and other persons with suitable qualifications.

(4) The Administrator shall submit, through the President, a report to the Congress not later than December 31, 1973, summarizing the actions taken under this subsection and the effectiveness of such actions, and setting forth the number of persons trained, the occupational categories for which training was provided, the effectiveness of other Federal, State, and local training programs in this field, together with estimates of future needs, recommendations on improving training programs, and such other information and recommendations, including legislative recommendations, as he deems appropriate.

(h) Lake pollution

The Administrator is authorized to enter into contracts with, or make grants to, public or private agencies and organizations and individuals for (A) the purpose of developing and demonstrating new or improved methods for the prevention, removal, reduction, and elimination of pollution in lakes, including the undesirable effects of nutrients and vegetation, and (B) the construction of publicly owned research facilities for such purpose.

(i) Oil pollution control studies

The Administrator, in cooperation with the Secretary of the Department in which the Coast Guard is operating, shall—

- (1) engage in such research, studies, experiments, and demonstrations as he deems appropriate, relative to the removal of oil from any waters and to the prevention, control, and elimination of oil and hazardous substances pollution;
- (2) publish from time to time the results of such activities; and
- (3) from time to time, develop and publish in the Federal Register specifications and other technical information on the various chemical compounds used in the control of oil and hazardous substances spills.

In carrying out this subsection, the Administrator may enter into contracts with, or make grants to, public or private agencies and organizations and individuals.

(j) Solid waste disposal equipment for vessels

The Secretary of the department in which the Coast Guard is operating shall engage in such research, studies, experiments, and demonstrations as he deems appropriate relative to equipment which is to be installed on board a vessel and is designed to receive, retain, treat, or discharge human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes with particular emphasis on equipment to be installed on small recreational vessels. The Secretary of the department in which the Coast Guard is operating shall report to Congress the results of such research, studies, experiments, and demonstrations prior to the effective date of any regulations established under section 1322 of this title. In carrying out this subsection the Secretary of the department in which the Coast Guard is operating may enter into contracts with, or make grants to, public or private organizations and individuals.

(k) Land acquisition

In carrying out the provisions of this section relating to the conduct by the Administrator of demonstration projects and the development of field laboratories and research facilities, the Administrator may acquire land and interests therein by purchase, with appropriated or donated funds, by donation, or by exchange for acquired or public lands under his jurisdiction which he classifies as suitable for disposition. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal, the values shall be equalized by the payment of cash to the grantor or to the Administrator as the circumstances require.

(l) Collection and dissemination of scientific knowledge on effects and control of pesticides in water

(1) The Administrator shall, after consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, as soon as practicable but not later than January 1, 1973, develop and issue to the States for the purpose of carrying out this chapter the latest scientific knowledge available in indicating the kind and extent of effects on health and welfare which may be expected from the presence of pesticides in the water in varying quantities. He shall revise and add to such information whenever necessary to reflect developing scientific knowledge.

(2) The President shall, in consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, conduct studies and investigations of methods to control the release of pesticides into the environment which study shall include examination of the persistency of pesticides in the water environment and alternatives thereto. The President shall submit reports, from time to time, on such investigations to Congress together with his recommendations for any necessary legislation.

(m) Waste oil disposal study

(1) The Administrator shall, in an effort to prevent degradation of the environment from the disposal of waste oil, conduct a study of (A) the generation of used engine, machine, cooling, and similar waste oil, including quantities generated, the nature and quality of such oil, present collecting methods and disposal practices, and alternate uses of such oil; (B) the long-term, chronic biological effects of the disposal of such waste oil; and (C) the potential market for such oils, including the economic and legal factors relating to the sale of products made from such oils, the level of subsidy, if any, needed to encourage the purchase by public and private nonprofit agencies of products from such oil, and the practicability of Federal procurement, on a priority basis, of products made from such oil. In conducting such study, the Administrator shall consult with affected industries and other persons.

(2) The Administrator shall report the preliminary results of such study to Congress within six months after October 18, 1972, and shall submit a final report to Congress within 18 months after such date.

(n) Comprehensive studies of effects of pollution on estuaries and estuarine zones

(1) The Administrator shall, in cooperation with the Secretary of the Army, the Secretary of Agriculture, the Water Resources Council, and with other appropriate Federal, State, interstate, or local public bodies and

private organizations, institutions, and individuals, conduct and promote, and encourage contributions to, continuing comprehensive studies of the effects of pollution, including sedimentation, in the estuaries and estuarine zones of the United States on fish and wildlife, on sport and commercial fishing, on recreation, on water supply and water power, and on other beneficial purposes. Such studies shall also consider the effect of demographic trends, the exploitation of mineral resources and fossil fuels, land and industrial development, navigation, flood and erosion control, and other uses of estuaries and estuarine zones upon the pollution of the waters therein.

(2) In conducting such studies, the Administrator shall assemble, coordinate, and organize all existing pertinent information on the Nation's estuaries and estuarine zones; carry out a program of investigations and surveys to supplement existing information in representative estuaries and estuarine zones; and identify the problems and areas where further research and study are required.

(3) The Administrator shall submit to Congress, from time to time, reports of the studies authorized by this subsection but at least one such report during any six-year period. Copies of each such report shall be made available to all interested parties, public and private.

(4) For the purpose of this subsection, the term "estuarine zones" means an environmental system consisting of an estuary and those transitional areas which are consistently influenced or affected by water from an estuary such as, but not limited to, salt marshes, coastal and intertidal areas, bays, harbors, lagoons, inshore waters, and channels, and the term "estuary" means all or part of the mouth of a river or stream or other body of water having unimpaired natural connection with open sea and within which the sea water is measurably diluted with fresh water derived from land drainage.

(o) Methods of reducing total flow of sewage and unnecessary water consumption; reports

(1) The Administrator shall conduct research and investigations on devices, systems, incentives, pricing policy, and other methods of reducing the total flow of sewage, including, but not limited to, unnecessary water consumption in order to reduce the requirements for, and the costs of, sewage and waste treatment services. Such research and investigations shall be directed to develop devices, systems, policies, and methods capable of achieving the maximum reduction of unnecessary water consumption.

(2) The Administrator shall report the preliminary results of such studies and investigations to the Congress within one year after October 18, 1972, and annually thereafter in the report required under subsection (a) of section 1375 of this title. Such report shall include recommendations for any legislation that may be required to provide for the adoption and use of devices, systems, policies, or other methods of reducing water consumption and reducing the total flow of sewage. Such report shall include an estimate of the benefits to be derived from adoption and use of such devices, systems, policies, or other methods and also shall reflect estimates of any increase in private, public, or other cost that would be occasioned thereby.

(p) Agricultural pollution

In carrying out the provisions of subsection (a) of this section the Administrator shall, in cooperation with the Secretary of Agriculture, other Federal agencies, and the States, carry out a comprehensive study and research program to determine new and improved methods and the better application of existing methods of preventing, reducing, and eliminating pollution from agriculture, including the legal, economic, and other implications of the use of such methods.

(q) Sewage in rural areas; national clearinghouse for alternative treatment information; clearinghouse on small flows

(1) The Administrator shall conduct a comprehensive program of research and investigation and pilot project implementation into new and improved methods of preventing, reducing, storing, collecting, treating, or otherwise eliminating pollution from sewage in rural and other areas where collection of sewage in conventional, communitywide sewage collection systems is impractical, uneconomical, or otherwise infeasible, or where soil conditions or other factors preclude the use of septic tank and drainage field systems.

(2) The Administrator shall conduct a comprehensive program of research and investigation and pilot project implementation into new and improved methods for the collection and treatment of sewage and other liquid wastes combined with the treatment and disposal of solid wastes.

(3) The Administrator shall establish, either within the Environmental Protection Agency, or through contract with an appropriate public or private non-profit organization, a national clearinghouse which shall (A) receive reports and information resulting from research, demonstrations, and other projects funded under this chapter related to paragraph (1) of this subsection and to subsection (e)(2) of section 1255 of this title; (B) coordinate and disseminate such reports and information for use by Federal and State agencies, municipalities, institutions, and persons in developing new and improved methods pursuant to this subsection; and (C) provide for the collection and dissemination of reports and information relevant to this subsection from other Federal and State agencies, institutions, universities, and persons.

(4) **SMALL FLOWS CLEARINGHOUSE.**—Notwithstanding section 1285(d) of this title, from amounts that are set

aside for a fiscal year under section 1285(i) of this title and are not obligated by the end of the 24-month period of availability for such amounts under section 1285(d) of this title, the Administrator shall make available \$1,000,000 or such unobligated amount, whichever is less, to support a national clearinghouse within the Environmental Protection Agency to collect and disseminate information on small flows of sewage and innovative or alternative wastewater treatment processes and techniques, consistent with paragraph (3). This paragraph shall apply with respect to amounts set aside under section 1285(i) of this title for which the 24-month period of availability referred to in the preceding sentence ends on or after September 30, 1986.

(r) Research grants to colleges and universities

The Administrator is authorized to make grants to colleges and universities to conduct basic research into the structure and function of freshwater aquatic ecosystems, and to improve understanding of the ecological characteristics necessary to the maintenance of the chemical, physical, and biological integrity of freshwater aquatic ecosystems.

(s) River Study Centers

The Administrator is authorized to make grants to one or more institutions of higher education (regionally located and to be designated as "River Study Centers") for the purpose of conducting and reporting on interdisciplinary studies on the nature of river systems, including hydrology, biology, ecology, economics, the relationship between river uses and land uses, and the effects of development within river basins on river systems and on the value of water resources and water related activities. No such grant in any fiscal year shall exceed \$1,000,000.

(t) Thermal discharges

The Administrator shall, in cooperation with State and Federal agencies and public and private organizations, conduct continuing comprehensive studies of the effects and methods of control of thermal discharges. In evaluating alternative methods of control the studies shall consider (1) such data as are available on the latest available technology, economic feasibility including cost-effectiveness analysis, and (2) the total impact on the environment, considering not only water quality but also air quality, land use, and effective utilization and conservation of freshwater and other natural resources. Such studies shall consider methods of minimizing adverse effects and maximizing beneficial effects of thermal discharges. The results of these studies shall be reported by the Administrator as soon as practicable, but not later than 270 days after October 18, 1972, and shall be made available to the public and the States, and considered as they become available by the Administrator in carrying out section 1326 of this title and by the States in proposing thermal water quality standards.

(u) Authorization of appropriations

There is authorized to be appropriated (1) not to exceed \$100,000,000 per fiscal year for the fiscal year ending June 30, 1973, the fiscal year ending June 30, 1974, and the fiscal year ending June 30, 1975, not to exceed \$14,039,000 for the fiscal year ending September 30, 1980, not to exceed \$20,697,000 for the fiscal year ending September 30, 1981, not to exceed \$22,770,000 for the fiscal year ending September 30, 1982, such sums as may be necessary for fiscal years 1983 through 1985, and not to exceed \$22,770,000 per fiscal year for each of the fiscal years 1986 through 1990, for carrying out the provisions of this section, other than subsections (g)(1) and (2), (p), (r), and (t) of this section, except that such authorizations are not for any research, development, or demonstration activity pursuant to such provisions; (2) not to exceed \$7,500,000 for fiscal years 1973, 1974, and 1975, \$2,000,000 for fiscal year 1977, \$3,000,000 for fiscal year 1978, \$3,000,000 for fiscal year 1979, \$3,000,000 for fiscal year 1980, \$3,000,000 for fiscal year 1981, \$3,000,000 for fiscal year 1982, such sums as may be necessary for fiscal years 1983 through 1985, and \$3,000,000 per fiscal year for each of the fiscal years 1986 through 1990, for carrying out the provisions of subsection (g)(1) of this section; (3) not to exceed \$2,500,000 for fiscal years 1973, 1974, and 1975, \$1,000,000 for fiscal year 1977, \$1,500,000 for fiscal year 1978, \$1,500,000 for fiscal year 1979, \$1,500,000 for fiscal year 1980, \$1,500,000 for fiscal year 1981, \$1,500,000 for fiscal year 1982, such sums as may be necessary for fiscal years 1983 through 1985, and \$1,500,000 per fiscal year for each of the fiscal years 1986 through 1990, for carrying out the provisions of subsection (g)(2) of this section; (4) not to exceed \$10,000,000 for each of the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, for carrying out the provisions of subsection (p) of this section; (5) not to exceed \$15,000,000 per fiscal year for the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, for carrying out the provisions of subsection (r) of this section; and (6) not to exceed \$10,000,000 per fiscal year for the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, for carrying out the provisions of subsection (t) of this section.

(v) Studies concerning pathogen indicators in coastal recreation waters

Not later than 18 months after October 10, 2000, after consultation and in cooperation with appropriate Federal, State, tribal, and local officials (including local health officials), the Administrator shall initiate, and,

not later than 3 years after October 10, 2000, shall complete, in cooperation with the heads of other Federal agencies, studies to provide additional information for use in developing—

- (1) an assessment of potential human health risks resulting from exposure to pathogens in coastal recreation waters, including nongastrointestinal effects;
- (2) appropriate and effective indicators for improving detection in a timely manner in coastal recreation waters of the presence of pathogens that are harmful to human health;
- (3) appropriate, accurate, expeditious, and cost-effective methods (including predictive models) for detecting in a timely manner in coastal recreation waters the presence of pathogens that are harmful to human health; and
- (4) guidance for State application of the criteria for pathogens and pathogen indicators to be published under section 1314(a)(9) of this title to account for the diversity of geographic and aquatic conditions.

(June 30, 1948, ch. 758, title I, §104, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 819; amended Pub. L. 93–207, §1(1), Dec. 28, 1973, 87 Stat. 906; Pub. L. 93–592, §1, Jan. 2, 1975, 88 Stat. 1924; Pub. L. 95–217, §§4(a), (b), 6, 7, Dec. 27, 1977, 91 Stat. 1566, 1567; Pub. L. 95–576, §1(a), Nov. 2, 1978, 92 Stat. 2467; Pub. L. 96–88, title V, §509(b), Oct. 17, 1979, 93 Stat. 695; Pub. L. 96–483, §1(a), Oct. 21, 1980, 94 Stat. 2360; Pub. L. 100–4, title I, §§101(a), 102, Feb. 4, 1987, 101 Stat. 8, 9; Pub. L. 102–154, title I, Nov. 13, 1991, 105 Stat. 1000; Pub. L. 105–362, title V, §501(a)(1), (d)(2)(A), Nov. 10, 1998, 112 Stat. 3283; Pub. L. 106–284, §3(a), Oct. 10, 2000, 114 Stat. 871; Pub. L. 107–303, title III, §302(b)(1), Nov. 27, 2002, 116 Stat. 2361.)

CODIFICATION

In subsecs. (b)(4) and (g)(3)(A), "section 3324(a) and (b) of title 31 and section 6101 of title 41" substituted for references to sections 3648 and 3709 of the Revised Statutes on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, which Act enacted Title 31, Money and Finance, and Pub. L. 111–350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

2002—Subsecs. (a)(5), (n)(3), (4), (o)(2). Pub. L. 107–303 repealed Pub. L. 105–362, §501(a), (d). See 1998 Amendment notes below.

2000—Subsec. (v). Pub. L. 106–284 added subsec. (v).

1998—Subsec. (a)(5). Pub. L. 105–362, §501(d)(2)(A)(i), which directed the substitution of "not later than 90 days after the date of convening of each session of Congress" for "in the report required under subsection (a) of section 1375 of this title", was repealed by Pub. L. 107–303. See Effective Date of 2002 Amendment note below.

Subsec. (n)(3), (4). Pub. L. 105–362, §501(a)(1), which directed the redesignation of par. (4) as (3) and striking out of former par. (3), was repealed by Pub. L. 107–303. See Effective Date of 2002 Amendment note below.

Subsec. (o)(2). Pub. L. 105–362, §501(d)(2)(A)(ii), which directed the substitution of "not later than 90 days after the date of convening of each session of Congress" for "in the report required under subsection (a) of section 1375 of this title", was repealed by Pub. L. 107–303. See Effective Date of 2002 Amendment note below.

1987—Subsec. (q)(4). Pub. L. 100–4, §102, added par. (4).

Subsec. (u). Pub. L. 100–4, §101(a), in cl. (1) struck out "and" after "1975," "1980," and "1981," and inserted "such sums as may be necessary for fiscal years 1983 through 1985, and not to exceed \$22,770,000 per fiscal year for each of the fiscal years 1986 through 1990," in cl. (2) struck out "and" after "1981," and inserted "such sums as may be necessary for fiscal years 1983 through 1985, and \$3,000,000 per fiscal year for each of the fiscal years 1986 through 1990," and in cl. (3) struck out "and" after "1981," and inserted "such sums as may be necessary for fiscal years 1983 through 1985, and \$1,500,000 per fiscal year for each of the fiscal years 1986 through 1990,".

1980—Subsec. (u). Pub. L. 96–483 in par. (1) inserted authorization of not to exceed \$20,697,000 and \$22,770,000 for fiscal years ending Sept. 30, 1981, and 1982, respectively; in par. (2) inserted authorization of the sum of \$3,000,000 for each of fiscal years 1981 and 1982; and in par. (3) inserted authorization of the sum of \$1,500,000 for each of fiscal years 1981 and 1982.

1978—Subsec. (u)(1). Pub. L. 95–576 authorized appropriation of not to exceed \$14,039,000 for fiscal year ending Sept. 30, 1980 and prohibited use of authorizations for any research, development, or demonstration activity pursuant to provisions of this section.

1977—Subsec. (n)(3). Pub. L. 95–217, §6, substituted "any six-year period" for "any three year

period".

Subsec. (q)(3). Pub. L. 95–217, §7, added par. (3).

Subsec. (u)(2). Pub. L. 95–217, §4(a), substituted "1975, \$2,000,000 for fiscal year 1977, \$3,000,000 for fiscal year 1978, \$3,000,000 for fiscal year 1979, and \$3,000,000 for fiscal year 1980," for "1975".

Subsec. (u)(3). Pub. L. 95–217, §4(b), substituted "1975, \$1,000,000 for fiscal year 1977, \$1,500,000 for fiscal year 1978, \$1,500,000 for fiscal year 1979, and \$1,500,000 for fiscal year 1980," for "1975".

1975—Subsec. (u)(1). Pub. L. 93–592, §1(a), substituted "the fiscal year ending June 30, 1974, and the fiscal year ending June 30, 1975," for "and the fiscal year ending June 30, 1974,".

Subsec. (u)(2). Pub. L. 93–592, §1(b), substituted "fiscal years 1973, 1974, and 1975" for "fiscal years 1973 and 1974".

Subsec. (u)(3). Pub. L. 93–592, §1(c), substituted "fiscal years 1973, 1974, and 1975" for "fiscal year 1973".

Subsec. (u)(4), (5), (6). Pub. L. 93–592, §1(d)–(f), substituted "June 30, 1974, and June 30, 1975," for "and June 30, 1974,".

1973—Subsec. (u)(2). Pub. L. 93–207 substituted "fiscal years 1973 and 1974" for "fiscal year 1973".

CHANGE OF NAME

"United States Geological Survey" substituted for "Geological Survey" in subsec. (a)(5) pursuant to provision of title I of Pub. L. 102–154, set out as a note under section 31 of Title 43, Public Lands.

"Secretary of Health and Human Services" substituted for "Secretary of Health, Education, and Welfare" in subsec. (c) pursuant to section 509(b) of Pub. L. 96–88 which is classified to section 3508(b) of Title 20, Education.

EFFECTIVE DATE OF 2002 AMENDMENT

Pub. L. 107–303, [title III, §302\(b\)](#), [Nov. 27, 2002](#), 116 Stat. 2361, provided that:

"(1) **IN GENERAL.**—Effective November 10, 1998, section 501 of the Federal Reports Elimination Act of 1998 (Public Law 105–362; 112 Stat. 3283) is amended by striking subsections (a) [amending this section and section 1330 of this title], (b) [amending section 1324 of this title], (c) [amending section 1329 of this title], and (d) [amending this section and sections 1266, 1285, 1290, and 1375 of this title].

"(2) **APPLICABILITY.**—The Federal Water Pollution Control Act (33 U.S.C. 1254(n)(3)) [33 U.S.C. 1251 et seq.] shall be applied and administered on and after the date of enactment of this Act [Nov. 27, 2002] as if the amendments made by subsections (a), (b), (c), and (d) of section 501 of the Federal Reports Elimination Act of 1998 (Public Law 105–362; 112 Stat. 3283) had not been enacted."

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

**COLUMBIA RIVER BASIN SYSTEM; PROTECTION FROM OIL SPILLS AND DISCHARGES; CRITERIA
FOR EVALUATION AND REPORT TO CONGRESS BY COMMANDANT OF COAST GUARD IN
CONSULTATION WITH FEDERAL, ETC., AGENCIES**

Pub. L. 95–308, §8, June 30, 1978, 92 Stat. 359, set forth Congressional findings and declarations and evaluation criteria with respect to protection from oil spills and discharges and betterment of the Columbia River Basin system, with such evaluation by the Commandant of the Coast Guard to begin within 180 days after June 30, 1978, and immediate submission of the evaluation to appropriate Congressional committees.

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§1254a. Research on effects of pollutants

In carrying out the provisions of section 1254(a) of this title, the Administrator shall conduct research on the harmful effects on the health and welfare of persons caused by pollutants in water, in conjunction with the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and other Federal, State, and interstate agencies carrying on such research. Such research shall include, and shall place special emphasis on, the effect that bioaccumulation of these pollutants in aquatic species has upon reducing the value of aquatic commercial and sport industries. Such research shall further study methods to reduce and remove these pollutants from the relevant affected aquatic species so as to restore and enhance these valuable resources.

(Pub. L. 100–4, title I, §105, Feb. 4, 1987, 101 Stat. 15.)

CODIFICATION

Section was enacted as part of the Water Quality Act of 1987, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

DEFINITION

Administrator means the Administrator of the Environmental Protection Agency, see section 1(d) of Pub. L. 100–4, set out as a note under section 1251 of this title.

§1255. Grants for research and development

(a) Demonstration projects covering storm waters, advanced waste treatment and water purification methods, and joint treatment systems for municipal and industrial wastes

The Administrator is authorized to conduct in the Environmental Protection Agency, and to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of—

- (1) any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants; or
- (2) any project which will demonstrate advanced waste treatment and water purification methods (including the temporary use of new or improved chemical additives which provide substantial immediate improvements to existing treatment processes), or new or improved methods of joint treatment systems for municipal and industrial wastes;

and to include in such grants such amounts as are necessary for the purpose of reports, plans, and specifications in connection therewith.

(b) Demonstration projects for advanced treatment and environmental enhancement techniques to control pollution in river basins

The Administrator is authorized to make grants to any State or States or interstate agency to demonstrate, in river basins or portions thereof, advanced treatment and environmental enhancement techniques to control

pollution from all sources, within such basins or portions thereof, including nonpoint sources, together with in stream ¹ water quality improvement techniques.

(c) Research and demonstration projects for prevention of water pollution by industry

In order to carry out the purposes of section 1311 of this title, the Administrator is authorized to (1) conduct in the Environmental Protection Agency, (2) make grants to persons, and (3) enter into contracts with persons, for research and demonstration projects for prevention of pollution of any waters by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants. No grant shall be made for any project under this subsection unless the Administrator determines that such project will develop or demonstrate a new or improved method of treating industrial wastes or otherwise prevent pollution by industry, which method shall have industrywide application.

(d) Accelerated and priority development of waste management and waste treatment methods and identification and measurement methods

In carrying out the provisions of this section, the Administrator shall conduct, on a priority basis, an accelerated effort to develop, refine, and achieve practical application of:

- (1) waste management methods applicable to point and nonpoint sources of pollutants to eliminate the discharge of pollutants, including, but not limited to, elimination of runoff of pollutants and the effects of pollutants from in place or accumulated sources;
- (2) advanced waste treatment methods applicable to point and nonpoint sources, including in place or accumulated sources of pollutants, and methods for reclaiming and recycling water and confining pollutants so they will not migrate to cause water or other environmental pollution; and
- (3) improved methods and procedures to identify and measure the effects of pollutants on the chemical, physical, and biological integrity of water, including those pollutants created by new technological developments.

(e) Research and demonstration projects covering agricultural pollution and pollution from sewage in rural areas; dissemination of information

(1) The Administrator is authorized to (A) make, in consultation with the Secretary of Agriculture, grants to persons for research and demonstration projects with respect to new and improved methods of preventing, reducing, and eliminating pollution from agriculture, and (B) disseminate, in cooperation with the Secretary of Agriculture, such information obtained under this subsection, section 1254(p) of this title, and section 1314 of this title as will encourage and enable the adoption of such methods in the agricultural industry.

(2) The Administrator is authorized, (A) in consultation with other interested Federal agencies, to make grants for demonstration projects with respect to new and improved methods of preventing, reducing, storing, collecting, treating, or otherwise eliminating pollution from sewage in rural and other areas where collection of sewage in conventional, community-wide sewage collection systems is impractical, uneconomical, or otherwise infeasible, or where soil conditions or other factors preclude the use of septic tank and drainage field systems, and (B) in cooperation with other interested Federal and State agencies, to disseminate such information obtained under this subsection as will encourage and enable the adoption of new and improved methods developed pursuant to this subsection.

(f) Limitations

Federal grants under subsection (a) of this section shall be subject to the following limitations:

- (1) No grant shall be made for any project unless such project shall have been approved by the appropriate State water pollution control agency or agencies and by the Administrator;
- (2) No grant shall be made for any project in an amount exceeding 75 per centum of cost thereof as determined by the Administrator; and
- (3) No grant shall be made for any project unless the Administrator determines that such project will serve as a useful demonstration for the purpose set forth in clause (1) or (2) of subsection (a) of this section.

(g) Maximum grants

Federal grants under subsections (c) and (d) of this section shall not exceed 75 per centum of the cost of the project.

(h) Authorization of appropriations

For the purpose of this section there is authorized to be appropriated \$75,000,000 per fiscal year for the fiscal year ending June 30, 1973, the fiscal year ending June 30, 1974, and the fiscal year ending June 30, 1975, and from such appropriations at least 10 per centum of the funds actually appropriated in each fiscal year shall be available only for the purposes of subsection (e) of this section.

(i) Assistance for research and demonstration projects

The Administrator is authorized to make grants to a municipality to assist in the costs of operating and maintaining a project which received a grant under this section, section 1254 of this title, or section 1263 of this title prior to December 27, 1977, so as to reduce the operation and maintenance costs borne by the recipients of services from such project to costs comparable to those for projects assisted under subchapter II of this chapter.

(j) Assistance for recycle, reuse, and land treatment projects

The Administrator is authorized to make a grant to any grantee who received an increased grant pursuant to section 1282(a)(2) of this title. Such grant may pay up to 100 per centum of the costs of technical evaluation of the operation of the treatment works, costs of training of persons (other than employees of the grantee), and costs of disseminating technical information on the operation of the treatment works.

(June 30, 1948, ch. 758, title I, §105, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 825; amended Pub. L. 93–592, §2, Jan. 2, 1975, 88 Stat. 1925; Pub. L. 95–217, §§8, 9, Dec. 27, 1977, 91 Stat. 1568.)

AMENDMENTS

1977—Subsecs. (i), (j). Pub. L. 95–217 added subsecs. (i) and (j).

1975—Subsec. (h). Pub. L. 93–592 substituted "the fiscal year ending June 30, 1974, and the fiscal year ending June 30, 1975," for "and the fiscal year ending June 30, 1974,".

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

¹ So in original.

§1256. Grants for pollution control programs

(a) Authorization of appropriations for State and interstate programs

There are hereby authorized to be appropriated the following sums, to remain available until expended, to carry out the purpose of this section—

- (1) \$60,000,000 for the fiscal year ending June 30, 1973; and
- (2) \$75,000,000 for the fiscal year ending June 30, 1974, and the fiscal year ending June 30, 1975, \$100,000,000 per fiscal year for the fiscal years 1977, 1978, 1979, and 1980, \$75,000,000 per fiscal year for the fiscal years 1981 and 1982, such sums as may be necessary for fiscal years 1983 through 1985, and \$75,000,000 per fiscal year for each of the fiscal years 1986 through 1990;

for grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate State law enforcement officers or agencies.

(b) Allotments

From the sums appropriated in any fiscal year, the Administrator shall make allotments to the several States and interstate agencies in accordance with regulations promulgated by him on the basis of the extent of the pollution problem in the respective States.

(c) Maximum annual payments

The Administrator is authorized to pay to each State and interstate agency each fiscal year either—

- (1) the allotment of such State or agency for such fiscal year under subsection (b) of this section, or
- (2) the reasonable costs as determined by the Administrator of developing and carrying out a pollution program by such State or agency during such fiscal year,

which ever amount is the lesser.

(d) Limitations

No grant shall be made under this section to any State or interstate agency for any fiscal year when the expenditure of non-Federal funds by such State or interstate agency during such fiscal year for the recurrent expenses of carrying out its pollution control program are less than the expenditure by such State or interstate agency of non-Federal funds for such recurrent program expenses during the fiscal year ending June 30, 1971.

(e) Grants prohibited to States not establishing water quality monitoring procedures or adequate emergency and contingency plans

Beginning in fiscal year 1974 the Administrator shall not make any grant under this section to any State which has not provided or is not carrying out as a part of its program—

- (1) the establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor, and to compile and analyze data on (including classification according to eutrophic condition), the quality of navigable waters and to the extent practicable, ground waters including biological monitoring; and provision for annually updating such data and including it in the report required under section 1315 of this title;
- (2) authority comparable to that in section 1364 of this title and adequate contingency plans to implement such authority.

(f) Conditions

Grants shall be made under this section on condition that—

- (1) Such State (or interstate agency) files with the Administrator within one hundred and twenty days after October 18, 1972:
 - (A) a summary report of the current status of the State pollution control program, including the criteria used by the State in determining priority of treatment works; and
 - (B) such additional information, data, and reports as the Administrator may require.

(2) No federally assumed enforcement as defined in section 1319(a)(2) of this title is in effect with respect to such State or interstate agency.

(3) Such State (or interstate agency) submits within one hundred and twenty days after October 18, 1972, and before October 1 of each year thereafter for the Administrator's approval of its program for the prevention, reduction, and elimination of pollution in accordance with purposes and provisions of this chapter in such form and content as the Administrator may prescribe.

(g) Reallocation of unpaid allotments

Any sums allotted under subsection (b) of this section in any fiscal year which are not paid shall be reallocated by the Administrator in accordance with regulations promulgated by him.

(June 30, 1948, ch. 758, title I, §106, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 827; amended Pub. L. 93–592, §3, Jan. 2, 1975, 88 Stat. 1925; Pub. L. 94–273, §3(20), Apr. 21, 1976, 90 Stat. 377; Pub. L. 95–217, §4(c), Dec. 27, 1977, 91 Stat. 1566; Pub. L. 96–483, §1(b), Oct. 21, 1980, 94 Stat. 2360; Pub. L. 100–4, title I, §101(b), Feb. 4, 1987, 101 Stat. 9.)

AMENDMENTS

1987—Subsec. (a)(2). Pub. L. 100–4 inserted ", such sums as may be necessary for fiscal years 1983 through 1985, and \$75,000,000 per fiscal year for each of the fiscal years 1986 through 1990" after "1982".

1980—Subsec. (a)(2). Pub. L. 96–483 inserted authorization of the sum of \$75,000,000 per fiscal year for fiscal years 1981 and 1982.

1977—Subsec. (a)(2). Pub. L. 95–217 substituted "and the fiscal year ending June 30, 1975, \$100,000,000 per fiscal year for the fiscal years 1977, 1978, 1979, and 1980" for "and the fiscal year ending June 30, 1975".

1976—Subsec. (f)(3). Pub. L. 94–273 substituted "October" for "July".

1975—Subsec. (a)(2). Pub. L. 93–592 substituted "June 30, 1974, and the fiscal year ending June 30, 1975;" for "June 30, 1974;".

§1257. Mine water pollution control demonstrations

(a) Comprehensive approaches to elimination or control of mine water pollution

The Administrator in cooperation with the Appalachian Regional Commission and other Federal agencies is authorized to conduct, to make grants for, or to contract for, projects to demonstrate comprehensive approaches to the elimination or control of acid or other mine water pollution resulting from active or abandoned mining operations and other environmental pollution affecting water quality within all or part of a watershed or river basin, including siltation from surface mining. Such projects shall demonstrate the engineering and economic feasibility and practicality of various abatement techniques which will contribute substantially to effective and practical methods of acid or other mine water pollution elimination or control, and other pollution affecting water quality, including techniques that demonstrate the engineering and economic feasibility and practicality of using sewage sludge materials and other municipal wastes to diminish or prevent pollution affecting water quality from acid, sedimentation, or other pollutants and in such projects to restore affected lands to usefulness for forestry, agriculture, recreation, or other beneficial purposes.

(b) Consistency of projects with objectives of subtitle IV of title 40

Prior to undertaking any demonstration project under this section in the Appalachian region (as defined in section 14102(a)(1) and (b) of title 40), the Appalachian Regional Commission shall determine that such demonstration project is consistent with the objectives of subtitle IV of title 40.

(c) Watershed selection

The Administrator, in selecting watersheds for the purposes of this section, shall be satisfied that the project area will not be affected adversely by the influx of acid or other mine water pollution from nearby sources.

(d) Conditions upon Federal participation

Federal participation in such projects shall be subject to the conditions—

- (1) that the State shall acquire any land or interests therein necessary for such project; and
- (2) that the State shall provide legal and practical protection to the project area to insure against any activities which will cause future acid or other mine water pollution.

(e) Authorization of appropriations

There is authorized to be appropriated \$30,000,000 to carry out the provisions of this section, which sum shall be available until expended.

(June 30, 1948, ch. 758, title I, §107, as added Pub. L. 92–500, [§2, Oct. 18, 1972](#), 86 Stat. 828.)

CODIFICATION

In subsec. (b), "section 14102(a)(1) and (b) of title 40" substituted for "section 403 of the Appalachian Regional Development Act of 1965, as amended" and "subtitle IV of title 40" substituted for "the Appalachian Regional Development Act of 1965, as amended" on authority of Pub. L. 107–217, [§5\(c\), Aug. 21, 2002](#), 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

§1257a. State demonstration programs for cleanup of abandoned mines for use as waste disposal sites; authorization of appropriations

The Administrator of the Environmental Protection Agency is authorized to make grants to States to undertake a demonstration program for the cleanup of State-owned abandoned mines which can be used as hazardous waste disposal sites. The State shall pay 10 per centum of project costs. At a minimum, the Administrator shall undertake projects under such program in the States of Ohio, Illinois, and West Virginia. There are authorized to be appropriated \$10,000,000 per fiscal year for each of the fiscal years ending September 30, 1982, September 30, 1983, and September 30, 1984, to carry out this section. Such projects shall be undertaken in accordance with all applicable laws and regulations.

(Pub. L. 96–483, [§12, Oct. 21, 1980](#), 94 Stat. 2363.)

CODIFICATION

Section was not enacted as part of the Federal Water Pollution Control Act which comprises this

chapter.

§1258. Pollution control in the Great Lakes

(a) Demonstration projects

The Administrator, in cooperation with other Federal departments, agencies, and instrumentalities is authorized to enter into agreements with any State, political subdivision, interstate agency, or other public agency, or combination thereof, to carry out one or more projects to demonstrate new methods and techniques and to develop preliminary plans for the elimination or control of pollution, within all or any part of the watersheds of the Great Lakes. Such projects shall demonstrate the engineering and economic feasibility and practicality of removal of pollutants and prevention of any polluting matter from entering into the Great Lakes in the future and other reduction and remedial techniques which will contribute substantially to effective and practical methods of pollution prevention, reduction, or elimination.

(b) Conditions of Federal participation

Federal participation in such projects shall be subject to the condition that the State, political subdivision, interstate agency, or other public agency, or combination thereof, shall pay not less than 25 per centum of the actual project costs, which payment may be in any form, including, but not limited to, land or interests therein that is needed for the project, and personal property or services the value of which shall be determined by the Administrator.

(c) Authorization of appropriations

There is authorized to be appropriated \$20,000,000 to carry out the provisions of subsections (a) and (b) of this section, which sum shall be available until expended.

(d) Lake Erie demonstration program

(1) In recognition of the serious conditions which exist in Lake Erie, the Secretary of the Army, acting through the Chief of Engineers, is directed to design and develop a demonstration waste water management program for the rehabilitation and environmental repair of Lake Erie. Prior to the initiation of detailed engineering and design, the program, along with the specific recommendations of the Chief of Engineers, and recommendations for its financing, shall be submitted to the Congress for statutory approval. This authority is in addition to, and not in lieu of, other waste water studies aimed at eliminating pollution emanating from select sources around Lake Erie.

(2) This program is to be developed in cooperation with the Environmental Protection Agency, other interested departments, agencies, and instrumentalities of the Federal Government, and the States and their political subdivisions. This program shall set forth alternative systems for managing waste water on a regional basis and shall provide local and State governments with a range of choice as to the type of system to be used for the treatment of waste water. These alternative systems shall include both advanced waste treatment technology and land disposal systems including aerated treatment-spray irrigation technology and will also include provisions for the disposal of solid wastes, including sludge. Such program should include measures to control point sources of pollution, area sources of pollution, including acid-mine drainage, urban runoff and rural runoff, and in place sources of pollution, including bottom loads, sludge banks, and polluted harbor dredgings.

(e) Authorization of appropriations for Lake Erie demonstration program

There is authorized to be appropriated \$5,000,000 to carry out the provisions of subsection (d) of this section, which sum shall be available until expended.

(June 30, 1948, ch. 758, title I, §108, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 828.)

§1259. Training grants and contracts

(a) The Administrator is authorized to make grants to or contracts with institutions of higher education, or combinations of such institutions, to assist them in planning, developing, strengthening, improving, or carrying out programs or projects for the preparation of undergraduate students to enter an occupation which involves the design, operation, and maintenance of treatment works, and other facilities whose purpose is water quality control. Such grants or contracts may include payment of all or part of the cost of programs or projects such as—

(A) planning for the development or expansion of programs or projects for training persons in the operation and maintenance of treatment works;

- (B) training and retraining of faculty members;
- (C) conduct of short-term or regular session institutes for study by persons engaged in, or preparing to engage in, the preparation of students preparing to enter an occupation involving the operation and maintenance of treatment works;
- (D) carrying out innovative and experimental programs of cooperative education involving alternate periods of full-time or part-time academic study at the institution and periods of full-time or part-time employment involving the operation and maintenance of treatment works; and
- (E) research into, and development of, methods of training students or faculty, including the preparation of teaching materials and the planning of curriculum.

(b)(1) The Administrator may pay 100 per centum of any additional cost of construction of treatment works required for a facility to train and upgrade waste treatment works operation and maintenance personnel and for the costs of other State treatment works operator training programs, including mobile training units, classroom rental, specialized instructors, and instructional material.

(2) The Administrator shall make no more than one grant for such additional construction in any State (to serve a group of States, where, in his judgment, efficient training programs require multi-State programs), and shall make such grant after consultation with and approval by the State or States on the basis of (A) the suitability of such facility for training operation and maintenance personnel for treatment works throughout such State or States; and (B) a commitment by the State agency or agencies to carry out at such facility a program of training approved by the Administrator. In any case where a grant is made to serve two or more States, the Administrator is authorized to make an additional grant for a supplemental facility in each such State.

(3) The Administrator may make such grant out of the sums allocated to a State under section 1285 of this title, except that in no event shall the Federal cost of any such training facilities exceed \$500,000.

(4) The Administrator may exempt a grant under this section from any requirement under section 1284(a)(3) of this title. Any grantee who received a grant under this section prior to enactment of the Clean Water Act of 1977 shall be eligible to have its grant increased by funds made available under such Act.

(June 30, 1948, ch. 758, title I, §109, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 829; amended Pub. L. 95-217, §10, Dec. 27, 1977, 91 Stat. 1568.)

REFERENCES IN TEXT

Prior to the date of enactment of the Clean Water Act of 1977, referred to in subsec. (b)(4), means prior to the enactment of Pub. L. 95-217, Dec. 27, 1977, 91 Stat. 1566, which was approved Dec. 27, 1977.

Such Act, referred to in subsec. (b)(4), means Pub. L. 95-217, Dec. 27, 1977, 91 Stat. 1566, as amended, known as the Clean Water Act of 1977. For complete classification of this Act to the Code, see Short Title of 1977 Amendment note set out under section 1251 of this title and Tables.

AMENDMENTS

1977—Subsec. (b)(1). Pub. L. 95-217, §10(c), (d), substituted "cost of construction of treatment works required for a facility to train and upgrade waste treatment works operation and maintenance personnel and for the costs of other State treatment works operator training programs, including mobile training units, classroom rental, specialized instructors, and instructional material" for "cost of construction of a treatment works required for a facility to train and upgrade waste treatment works operation and maintenance personnel".

Subsec. (b)(2). Pub. L. 95-217, §10(e), authorized Administrator to make an additional grant for a supplemental facility in each of the States in any case where a grant is made to serve two or more States.

Subsec. (b)(3). Pub. L. 95-217, §10(a), substituted "\$500,000" for "\$250,000".

Subsec. (b)(4). Pub. L. 95-217, §10(b), added par. (4).

§1260. Applications; allocation

(1) A grant or contract authorized by section 1259 of this title may be made only upon application to the Administrator at such time or times and containing such information as he may prescribe, except that no such application shall be approved unless it—

- (A) sets forth programs, activities, research, or development for which a grant is authorized under section

1259 of this title and describes the relation to any program set forth by the applicant in an application, if any, submitted pursuant to section 1261 of this title;

(B) provides such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the applicant under this section; and

(C) provides for making such reports, in such form and containing such information, as the Administrator may require to carry out his functions under this section, and for keeping such records and for affording such access thereto as the Administrator may find necessary to assure the correctness and verification of such reports.

(2) The Administrator shall allocate grants or contracts under section 1259 of this title in such manner as will most nearly provide an equitable distribution of the grants or contracts throughout the United States among institutions of higher education which show promise of being able to use funds effectively for the purpose of this section.

(3)(A) Payments under this section may be used in accordance with regulations of the Administrator, and subject to the terms and conditions set forth in an application approved under paragraph (1), to pay part of the compensation of students employed in connection with the operation and maintenance of treatment works, other than as an employee in connection with the operation and maintenance of treatment works or as an employee in any branch of the Government of the United States, as part of a program for which a grant has been approved pursuant to this section.

(B) Departments and agencies of the United States are encouraged, to the extent consistent with efficient administration, to enter into arrangements with institutions of higher education for the full-time, part-time, or temporary employment, whether in the competitive or excepted service, of students enrolled in programs set forth in applications approved under paragraph (1).

(June 30, 1948, ch. 758, title I, §110, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 830.)

§1261. Scholarships

(1) The Administrator is authorized to award scholarships in accordance with the provisions of this section for undergraduate study by persons who plan to enter an occupation involving the operation and maintenance of treatment works. Such scholarships shall be awarded for such periods as the Administrator may determine but not to exceed four academic years.

(2) The Administrator shall allocate scholarships under this section among institutions of higher education with programs approved under the provisions of this section for the use of individuals accepted into such programs in such manner and according to such plan as will insofar as practicable—

(A) provide an equitable distribution of such scholarships throughout the United States; and

(B) attract recent graduates of secondary schools to enter an occupation involving the operation and maintenance of treatment works.

(3) The Administrator shall approve a program of any institution of higher education for the purposes of this section only upon application by the institution and only upon his finding—

(A) that such program has a principal objective the education and training of persons in the operation and maintenance of treatment works;

(B) that such program is in effect and of high quality, or can be readily put into effect and may reasonably be expected to be of high quality;

(C) that the application describes the relation of such program to any program, activity, research, or development set forth by the applicant in an application, if any, submitted pursuant to section 1260 of this title; and

(D) that the application contains satisfactory assurances that (i) the institution will recommend to the Administrator for the award of scholarships under this section, for study in such program, only persons who have demonstrated to the satisfaction of the institution a serious intent, upon completing the program, to enter an occupation involving the operation and maintenance of treatment works, and (ii) the institution will make reasonable continuing efforts to encourage recipients of scholarships under this section, enrolled in such program, to enter occupations involving the operation and maintenance of treatment works upon completing the program.

(4)(A) The Administrator shall pay to persons awarded scholarships under this section such stipends (including such allowances for subsistence and other expenses for such persons and their dependents) as he may determine to be consistent with prevailing practices under comparable federally supported programs.

(B) The Administrator shall (in addition to the stipends paid to persons under paragraph (1)) pay to the

institution of higher education at which such person is pursuing his course of study such amount as he may determine to be consistent with prevailing practices under comparable federally supported programs.

(5) A person awarded a scholarship under the provisions of this section shall continue to receive the payments provided in this section only during such periods as the Administrator finds that he is maintaining satisfactory proficiency and devoting full time to study or research in the field in which such scholarship was awarded in an institution of higher education, and is not engaging in gainful employment other than employment approved by the Administrator by or pursuant to regulation.

(6) The Administrator shall by regulation provide that any person awarded a scholarship under this section shall agree in writing to enter and remain in an occupation involving the design, operation, or maintenance of treatment works for such period after completion of his course of studies as the Administrator determines appropriate.

(June 30, 1948, ch. 758, title I, §111, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 831.)

§1262. Definitions and authorizations

(a) As used in sections 1259 through 1262 of this title—

(1) The term "institution of higher education" means an educational institution described in the first sentence of section 1001 of title 20 (other than an institution of any agency of the United States) which is accredited by a nationally recognized accrediting agency or association approved by the Administrator for this purpose. For purposes of this subsection, the Administrator shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of training offered.

(2) The term "academic year" means an academic year or its equivalent, as determined by the Administrator.

(b) The Administrator shall annually report his activities under sections 1259 through 1262 of this title, including recommendations for needed revisions in the provisions thereof.

(c) There are authorized to be appropriated \$25,000,000 per fiscal year for the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, \$6,000,000 for the fiscal year ending September 30, 1977, \$7,000,000 for the fiscal year ending September 30, 1978, \$7,000,000 for the fiscal year ending September 30, 1979, \$7,000,000 for the fiscal year ending September 30, 1980, \$7,000,000 for the fiscal year ending September 30, 1981, \$7,000,000 for the fiscal year ending September 30, 1982, such sums as may be necessary for fiscal years 1983 through 1985, and \$7,000,000 per fiscal year for each of the fiscal years 1986 through 1990, to carry out sections 1259 through 1262 of this title.

(June 30, 1948, ch. 758, title I, §112, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 832; amended Pub. L. 93–592, §4, Jan. 2, 1975, 88 Stat. 1925; Pub. L. 95–217, §4(d), Dec. 27, 1977, 91 Stat. 1566; Pub. L. 96–483, §1(c), Oct. 21, 1980, 94 Stat. 2360; Pub. L. 100–4, title I, §101(c), Feb. 4, 1987, 101 Stat. 9; Pub. L. 105–244, title I, §102(a)(11), Oct. 7, 1998, 112 Stat. 1620.)

AMENDMENTS

1998—Subsec. (a)(1). Pub. L. 105–244 substituted "section 1001" for "section 1141".

1987—Subsec. (c). Pub. L. 100–4 struck out "and" after "1981," and inserted "such sums as may be necessary for fiscal years 1983 through 1985, and \$7,000,000 per fiscal year for each of the fiscal years 1986 through 1990," after "1982,".

1980—Subsec. (c). Pub. L. 96–483 inserted authorization of the sum of \$7,000,000 for each of fiscal years ending Sept. 30, 1981 and 1982.

1977—Subsec. (c). Pub. L. 95–217 substituted "June 30, 1975, \$6,000,000 for the fiscal year ending September 30, 1977, \$7,000,000 for the fiscal year ending September 30, 1978, \$7,000,000 for the fiscal year ending September 30, 1979, and \$7,000,000 for the fiscal year ending September 30, 1980," for "June 30, 1975,".

1975—Subsec. (c). Pub. L. 93–592 substituted "June 30, 1974, and June 30, 1975," for "and June 30, 1974,".

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105–244, see section 3 of Pub. L. 105–244, set out as a note under section 1001 of Title 20, Education.

§1263. Alaska village demonstration projects

(a) Central community facilities for safe water; elimination or control of pollution

The Administrator is authorized to enter into agreements with the State of Alaska to carry out one or more projects to demonstrate methods to provide for central community facilities for safe water and eliminate or control of pollution in those native villages of Alaska without such facilities. Such project shall include provisions for community safe water supply systems, toilets, bathing and laundry facilities, sewage disposal facilities, and other similar facilities, and educational and informational facilities and programs relating to health and hygiene. Such demonstration projects shall be for the further purpose of developing preliminary plans for providing such safe water and such elimination or control of pollution for all native villages in such State.

(b) Utilization of personnel and facilities of Department of Health and Human Services

In carrying out this section the Administrator shall cooperate with the Secretary of Health and Human Services for the purpose of utilizing such of the personnel and facilities of that Department as may be appropriate.

(c) Omitted

(d) Authorization of appropriations

There is authorized to be appropriated not to exceed \$2,000,000 to carry out this section. In addition, there is authorized to be appropriated to carry out this section not to exceed \$200,000 for the fiscal year ending September 30, 1978, and \$220,000 for the fiscal year ending September 30, 1979.

(e) Study to develop comprehensive program for achieving sanitation services; report to Congress

The Administrator is authorized to coordinate with the Secretary of the Department of Health and Human Services, the Secretary of the Department of Housing and Urban Development, the Secretary of the Department of the Interior, the Secretary of the Department of Agriculture, and the heads of any other departments or agencies he may deem appropriate to conduct a joint study with representatives of the State of Alaska and the appropriate Native organizations (as defined in Public Law 92–203) to develop a comprehensive program for achieving adequate sanitation services in Alaska villages. This study shall be coordinated with the programs and projects authorized by sections 1254(q) and 1255(e)(2) of this title. The Administrator shall submit a report of the results of the study, together with appropriate supporting data and such recommendations as he deems desirable, to the Committee on Environment and Public Works of the Senate and to the Committee on Public Works and Transportation of the House of Representatives not later than December 31, 1979. The Administrator shall also submit recommended administrative actions, procedures, and any proposed legislation necessary to implement the recommendations of the study no later than June 30, 1980.

(f) Technical, financial, and management assistance

The Administrator is authorized to provide technical, financial and management assistance for operation and maintenance of the demonstration projects constructed under this section, until such time as the recommendations of subsection (e) of this section are implemented.

(g) "Village" and "sanitation services" defined

For the purpose of this section, the term "village" shall mean an incorporated or unincorporated community with a population of ten to six hundred people living within a two-mile radius. The term "sanitation services" shall mean water supply, sewage disposal, solid waste disposal and other services necessary to maintain generally accepted standards of personal hygiene and public health.

(June 30, 1948, ch. 758, title I, §113, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 832; amended Pub. L. 95–217, §11, Dec. 27, 1977, 91 Stat. 1568; Pub. L. 96–88, title V, §509(b), Oct. 17, 1979, 93 Stat. 695.)

REFERENCES IN TEXT

Public Law 92–203, referred to in subsec. (e), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688, as amended, known as the Alaska Native Claims Settlement Act, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

CODIFICATION

Subsec. (c) authorized the Administrator to report to Congress the results of the demonstration project accompanied by his recommendations for the establishment of a statewide project not later than July 1, 1973.

AMENDMENTS

1977—Subsec. (d). Pub. L. 95–217, §11(b), authorized additional appropriations of not to exceed \$200,000 for the fiscal year ending Sept. 30, 1978, and \$220,000, for the fiscal year ending Sept. 30, 1979, to carry out this section.

Subsecs. (e) to (g). Pub. L. 95–217, §11(a), added subsecs. (e), (f), and (g).

CHANGE OF NAME

"Secretary of Health and Human Services" substituted for "Secretary of Health, Education, and Welfare" in subsec. (b), and "Secretary of the Department of Health and Human Services" substituted for "Secretary of the Department of Health, Education, and Welfare" in subsec. (e), pursuant to section 509(b) of Pub. L. 96–88 which is classified to section 3508(b) of Title 20, Education.

Committee on Public Works and Transportation of House of Representatives treated as referring to Committee on Transportation and Infrastructure of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

CORPS CAPABILITY STUDY, ALASKA

Pub. L. 104–303, [title IV, §401, Oct. 12, 1996](#), 110 Stat. 3740, provided that: "Not later than 18 months after the date of the enactment of this Act [Oct. 12, 1996], the Secretary shall report to Congress on the advisability and capability of the Corps of Engineers to implement rural sanitation projects for rural and Native villages in Alaska."

§1263a. Grants to Alaska to improve sanitation in rural and Native villages

(a) In general

The Administrator of the Environmental Protection Agency may make grants to the State of Alaska for the benefit of rural and Native villages in Alaska to pay the Federal share of the cost of—

- (1) the development and construction of public water systems and wastewater systems to improve the health and sanitation conditions in the villages; and
- (2) training, technical assistance, and educational programs relating to the operation and management of sanitation services in rural and Native villages.

(b) Federal share

The Federal share of the cost of the activities described in subsection (a) of this section shall be 50 percent.

(c) Administrative expenses

The State of Alaska may use an amount not to exceed 4 percent of any grant made available under this subsection ¹ for administrative expenses necessary to carry out the activities described in subsection (a) of this section.

(d) Consultation with State of Alaska

The Administrator shall consult with the State of Alaska on a method of prioritizing the allocation of grants under subsection (a) of this section according to the needs of, and relative health and sanitation conditions in, each eligible village.

(e) Authorization of appropriations

There are authorized to be appropriated to carry out this section \$40,000,000 for each of fiscal years 2001 through 2005.

(Pub. L. 104–182, [title III, §303, Aug. 6, 1996](#), 110 Stat. 1683; Pub. L. 106–457, [title IX, §903, Nov. 7, 2000](#), 114 Stat. 1982.)

CODIFICATION

Section was enacted as part of the Safe Drinking Water Act Amendments of 1996, and not as

part of the Federal Water Pollution Control Act which comprises this chapter.

AMENDMENTS

2000—Subsec. (e). Pub. L. 106–457 substituted "to carry out this section \$40,000,000 for each of fiscal years 2001 through 2005" for "\$15,000,000 for each of the fiscal years 1997 through 2000 to carry out this section".

¹ So in original. Probably should be "section".

§1264. Omitted

CODIFICATION

Section, act June 30, 1948, ch. 758, title I, §114, as added Oct. 18, 1972, Pub. L. 92–500, §2, 86 Stat. 833, authorized the Administrator, in consultation with the Tahoe Regional Planning Agency, the Secretary of Agriculture, other Federal agencies, representatives of State and local governments, and members of the public, to conduct a thorough and complete study on the need of extending Federal oversight and control in order to preserve the fragile ecology of Lake Tahoe and to report the results of this study to Congress not later than one year after Oct. 18, 1972.

§1265. In-place toxic pollutants

The Administrator is directed to identify the location of in-place pollutants with emphasis on toxic pollutants in harbors and navigable waterways and is authorized, acting through the Secretary of the Army, to make contracts for the removal and appropriate disposal of such materials from critical port and harbor areas. There is authorized to be appropriated \$15,000,000 to carry out the provisions of this section, which sum shall be available until expended.

(June 30, 1948, ch. 758, title I, §115, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 833.)

§1266. Hudson River reclamation demonstration project

(a) The Administrator is authorized to enter into contracts and other agreements with the State of New York to carry out a project to demonstrate methods for the selective removal of polychlorinated biphenyls contaminating bottom sediments of the Hudson River, treating such sediments as required, burying such sediments in secure landfills, and installing monitoring systems for such landfills. Such demonstration project shall be for the purpose of determining the feasibility of indefinite storage in secure landfills of toxic substances and of ascertaining the improvement of the rate of recovery of a toxic contaminated national waterway. No pollutants removed pursuant to this paragraph shall be placed in any landfill unless the Administrator first determines that disposal of the pollutants in such landfill would provide a higher standard of protection of the public health, safety, and welfare than disposal of such pollutants by any other method including, but not limited to, incineration or a chemical destruction process.

(b) The Administrator is authorized to make grants to the State of New York to carry out this section from funds allotted to such State under section 1285(a) of this title, except that the amount of any such grant shall be equal to 75 per centum of the cost of the project and such grant shall be made on condition that non-Federal sources provide the remainder of the cost of such project. The authority of this section shall be available until September 30, 1983. Funds allotted to the State of New York under section 1285(a) of this title shall be available under this subsection only to the extent that funds are not available, as determined by the Administrator, to the State of New York for the work authorized by this section under section 1265 or 1321 of this title or a comprehensive hazardous substance response and clean up fund. Any funds used under the authority of this subsection shall be deducted from any estimate of the needs of the State of New York prepared under section 1375(b) of this title. The Administrator may not obligate or expend more than \$20,000,000 to carry out this section.

(June 30, 1948, ch. 758, title I, §116, as added Pub. L. 96–483, §10, Oct. 21, 1980, 94 Stat. 2363; amended Pub. L. 105–362, title V, §501(d)(2)(B), Nov. 10, 1998, 112 Stat. 3284; Pub. L. 107–303, title III, §302(b)(1), Nov. 27, 2002, 116 Stat. 2361.)

AMENDMENTS

2002—Subsec. (b). Pub. L. 107–303 repealed Pub. L. 105–362, §501(d)(2)(B). See 1998 Amendment note below.

1998—Subsec. (b). Pub. L. 105–362, §501(d)(2)(B), which directed the substitution of "section 1375 of this title" for "section 1375(b) of this title" in penultimate sentence, was repealed by Pub. L. 107–303. See Effective Date of 2002 Amendment note below.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–303 effective Nov. 10, 1998, and Federal Water Pollution Act (33 U.S.C. 1251 et seq.) to be applied and administered on and after Nov. 27, 2002, as if amendments made by section 501(a)–(d) of Pub. L. 105–362 had not been enacted, see section 302(b) of Pub. L. 107–303, set out as a note under section 1254 of this title.

§1267. Chesapeake Bay

(a) Definitions

In this section, the following definitions apply:

(1) Administrative cost

The term "administrative cost" means the cost of salaries and fringe benefits incurred in administering a grant under this section.

(2) Chesapeake Bay Agreement

The term "Chesapeake Bay Agreement" means the formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem and the living resources of the Chesapeake Bay ecosystem and signed by the Chesapeake Executive Council.

(3) Chesapeake Bay ecosystem

The term "Chesapeake Bay ecosystem" means the ecosystem of the Chesapeake Bay and its watershed.

(4) Chesapeake Bay Program

The term "Chesapeake Bay Program" means the program directed by the Chesapeake Executive Council in accordance with the Chesapeake Bay Agreement.

(5) Chesapeake Executive Council

The term "Chesapeake Executive Council" means the signatories to the Chesapeake Bay Agreement.

(6) Signatory jurisdiction

The term "signatory jurisdiction" means a jurisdiction of a signatory to the Chesapeake Bay Agreement.

(b) Continuation of Chesapeake Bay Program

(1) In general

In cooperation with the Chesapeake Executive Council (and as a member of the Council), the Administrator shall continue the Chesapeake Bay Program.

(2) Program Office

(A) In general

The Administrator shall maintain in the Environmental Protection Agency a Chesapeake Bay Program Office.

(B) Function

The Chesapeake Bay Program Office shall provide support to the Chesapeake Executive Council by—

- (i) implementing and coordinating science, research, modeling, support services, monitoring, data collection, and other activities that support the Chesapeake Bay Program;
- (ii) developing and making available, through publications, technical assistance, and other appropriate means, information pertaining to the environmental quality and living resources of the Chesapeake Bay ecosystem;
- (iii) in cooperation with appropriate Federal, State, and local authorities, assisting the signatories to the Chesapeake Bay Agreement in developing and implementing specific action plans to carry out the

responsibilities of the signatories to the Chesapeake Bay Agreement;

(iv) coordinating the actions of the Environmental Protection Agency with the actions of the appropriate officials of other Federal agencies and State and local authorities in developing strategies to—

- (I) improve the water quality and living resources in the Chesapeake Bay ecosystem; and
- (II) obtain the support of the appropriate officials of the agencies and authorities in achieving the objectives of the Chesapeake Bay Agreement; and

(v) implementing outreach programs for public information, education, and participation to foster stewardship of the resources of the Chesapeake Bay.

(c) Interagency agreements

The Administrator may enter into an interagency agreement with a Federal agency to carry out this section.

(d) Technical assistance and assistance grants

(1) In general

In cooperation with the Chesapeake Executive Council, the Administrator may provide technical assistance, and assistance grants, to nonprofit organizations, State and local governments, colleges, universities, and interstate agencies to carry out this section, subject to such terms and conditions as the Administrator considers appropriate.

(2) Federal share

(A) In general

Except as provided in subparagraph (B), the Federal share of an assistance grant provided under paragraph (1) shall be determined by the Administrator in accordance with guidance issued by the Administrator.

(B) Small watershed grants program

The Federal share of an assistance grant provided under paragraph (1) to carry out an implementing activity under subsection (g)(2) of this section shall not exceed 75 percent of eligible project costs, as determined by the Administrator.

(3) Non-Federal share

An assistance grant under paragraph (1) shall be provided on the condition that non-Federal sources provide the remainder of eligible project costs, as determined by the Administrator.

(4) Administrative costs

Administrative costs shall not exceed 10 percent of the annual grant award.

(e) Implementation and monitoring grants

(1) In general

If a signatory jurisdiction has approved and committed to implement all or substantially all aspects of the Chesapeake Bay Agreement, on the request of the chief executive of the jurisdiction, the Administrator—

(A) shall make a grant to the jurisdiction for the purpose of implementing the management mechanisms established under the Chesapeake Bay Agreement, subject to such terms and conditions as the Administrator considers appropriate; and

(B) may make a grant to a signatory jurisdiction for the purpose of monitoring the Chesapeake Bay ecosystem.

(2) Proposals

(A) In general

A signatory jurisdiction described in paragraph (1) may apply for a grant under this subsection for a fiscal year by submitting to the Administrator a comprehensive proposal to implement management mechanisms established under the Chesapeake Bay Agreement.

(B) Contents

A proposal under subparagraph (A) shall include—

- (i) a description of proposed management mechanisms that the jurisdiction commits to take within a specified time period, such as reducing or preventing pollution in the Chesapeake Bay and its watershed or meeting applicable water quality standards or established goals and objectives under the Chesapeake Bay Agreement; and
- (ii) the estimated cost of the actions proposed to be taken during the fiscal year.

(3) Approval

If the Administrator finds that the proposal is consistent with the Chesapeake Bay Agreement and the national goals established under section 1251(a) of this title, the Administrator may approve the proposal for an award.

(4) Federal share

The Federal share of a grant under this subsection shall not exceed 50 percent of the cost of implementing the management mechanisms during the fiscal year.

(5) Non-Federal share

A grant under this subsection shall be made on the condition that non-Federal sources provide the remainder of the costs of implementing the management mechanisms during the fiscal year.

(6) Administrative costs

Administrative costs shall not exceed 10 percent of the annual grant award.

(7) Reporting

On or before October 1 of each fiscal year, the Administrator shall make available to the public a document that lists and describes, in the greatest practicable degree of detail—

- (A) all projects and activities funded for the fiscal year;
- (B) the goals and objectives of projects funded for the previous fiscal year; and
- (C) the net benefits of projects funded for previous fiscal years.

(f) Federal facilities and budget coordination**(1) Subwatershed planning and restoration**

A Federal agency that owns or operates a facility (as defined by the Administrator) within the Chesapeake Bay watershed shall participate in regional and subwatershed planning and restoration programs.

(2) Compliance with agreement

The head of each Federal agency that owns or occupies real property in the Chesapeake Bay watershed shall ensure that the property, and actions taken by the agency with respect to the property, comply with the Chesapeake Bay Agreement, the Federal Agencies Chesapeake Ecosystem Unified Plan, and any subsequent agreements and plans.

(3) Budget coordination**(A) In general**

As part of the annual budget submission of each Federal agency with projects or grants related to restoration, planning, monitoring, or scientific investigation of the Chesapeake Bay ecosystem, the head of the agency shall submit to the President a report that describes plans for the expenditure of the funds under this section.

(B) Disclosure to the Council

The head of each agency referred to in subparagraph (A) shall disclose the report under that subparagraph with the Chesapeake Executive Council as appropriate.

(g) Chesapeake Bay Program**(1) Management strategies**

The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain—

- (A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed;
- (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem;
- (C) the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal of reducing or eliminating the input of chemical contaminants from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources of the Chesapeake Bay ecosystem or on human health;
- (D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories for wetlands, riparian forests, and other types of habitat associated with the Chesapeake Bay ecosystem; and

(E) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem.

(2) Small watershed grants program

The Administrator, in cooperation with the Chesapeake Executive Council, shall—

- (A) establish a small watershed grants program as part of the Chesapeake Bay Program; and
- (B) offer technical assistance and assistance grants under subsection (d) of this section to local governments and nonprofit organizations and individuals in the Chesapeake Bay region to implement—
 - (i) cooperative tributary basin strategies that address the water quality and living resource needs in the Chesapeake Bay ecosystem; and
 - (ii) locally based protection and restoration programs or projects within a watershed that complement the tributary basin strategies, including the creation, restoration, protection, or enhancement of habitat associated with the Chesapeake Bay ecosystem.

(h) Study of Chesapeake Bay Program

(1) In general

Not later than April 22, 2003, and every 5 years thereafter, the Administrator, in coordination with the Chesapeake Executive Council, shall complete a study and submit to Congress a comprehensive report on the results of the study.

(2) Requirements

The study and report shall—

- (A) assess the state of the Chesapeake Bay ecosystem;
- (B) compare the current state of the Chesapeake Bay ecosystem with its state in 1975, 1985, and 1995;
- (C) assess the effectiveness of management strategies being implemented on November 7, 2000, and the extent to which the priority needs are being met;
- (D) make recommendations for the improved management of the Chesapeake Bay Program either by strengthening strategies being implemented on November 7, 2000, or by adopting new strategies; and
- (E) be presented in such a format as to be readily transferable to and usable by other watershed restoration programs.

(i) Special study of living resource response

(1) In general

Not later than 180 days after November 7, 2000, the Administrator shall commence a 5-year special study with full participation of the scientific community of the Chesapeake Bay to establish and expand understanding of the response of the living resources of the Chesapeake Bay ecosystem to improvements in water quality that have resulted from investments made through the Chesapeake Bay Program.

(2) Requirements

The study shall—

- (A) determine the current status and trends of living resources, including grasses, benthos, phytoplankton, zooplankton, fish, and shellfish;
- (B) establish to the extent practicable the rates of recovery of the living resources in response to improved water quality condition;
- (C) evaluate and assess interactions of species, with particular attention to the impact of changes within and among trophic levels; and
- (D) recommend management actions to optimize the return of a healthy and balanced ecosystem in response to improvements in the quality and character of the waters of the Chesapeake Bay.

(j) Authorization of appropriations

There is authorized to be appropriated to carry out this section \$40,000,000 for each of fiscal years 2001 through 2005. Such sums shall remain available until expended.

(June 30, 1948, ch. 758, title I, §117, as added Pub. L. 100–4, [title I, §103, Feb. 4, 1987](#), 101 Stat. 10; amended Pub. L. 106–457, [title II, §203, Nov. 7, 2000](#), 114 Stat. 1967.)

CODIFICATION

November 7, 2000, referred to in subsecs. (h)(2)(C), (D), and (i)(1), was in the original "the date of enactment of this section", which was translated as meaning the date of enactment of Pub. L. 106–457, which amended this section generally, to reflect the probable intent of Congress.

AMENDMENTS

2000—Pub. L. 106–457 amended section generally, substituting subsecs. (a) to (j) for former subsecs. (a) to (d), which related to continuation of the Chesapeake Bay Program and establishment and maintenance in the Environmental Protection Agency of an office, division, or branch of Chesapeake Bay Programs, interstate development plan grants, progress reports from grant recipient States, and authorization of appropriations.

CHESAPEAKE BAY ACCOUNTABILITY AND RECOVERY

Pub. L. 113–273, [Dec. 18, 2014](#), 128 Stat. 2967, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Chesapeake Bay Accountability and Recovery Act of 2014'.

"SEC. 2. DEFINITIONS.

"In this Act:

"(1) **ADMINISTRATOR.**—The term 'Administrator' means the Administrator of the Environmental Protection Agency.

"(2) **CHESAPEAKE BAY STATE.**—The term 'Chesapeake Bay State' or 'State' means any of—

"(A) the States of Maryland, West Virginia, Delaware, and New York;

"(B) the Commonwealths of Virginia and Pennsylvania; and

"(C) the District of Columbia.

"(3) **CHESAPEAKE BAY WATERSHED.**—The term 'Chesapeake Bay watershed' means all tributaries, backwaters, and side channels, including watersheds, draining into the Chesapeake Bay.

"(4) **CHESAPEAKE EXECUTIVE COUNCIL.**—The term 'Chesapeake Executive Council' has the meaning given the term by section 117(a) of the Federal Water Pollution Control Act (33 U.S.C. 1267(a)).

"(5) **CHIEF EXECUTIVE.**—The term 'chief executive' means, in the case of a State or Commonwealth, the Governor of the State or Commonwealth and, in the case of the District of Columbia, the Mayor of the District of Columbia.

"(6) **DIRECTOR.**—The term 'Director' means the Director of the Office of Management and Budget.

"(7) **FEDERAL RESTORATION ACTIVITY.**—

"(A) **IN GENERAL.**—The term 'Federal restoration activity' means a Federal program or project carried out under Federal authority in existence as of the date of enactment of this Act [Dec. 18, 2014] with the express intent to directly protect, conserve, or restore living resources, habitat, water resources, or water quality in the Chesapeake Bay watershed, including programs or projects that provide financial and technical assistance to promote responsible land use, stewardship, and community engagement in the Chesapeake Bay watershed.

"(B) **CATEGORIZATION.**—Federal restoration activities may be categorized as follows:

"(i) Physical restoration.

"(ii) Planning.

"(iii) Feasibility studies.

"(iv) Scientific research.

"(v) Monitoring.

"(vi) Education.

"(vii) Infrastructure development.

"(8) **STATE RESTORATION ACTIVITY.**—

"(A) **IN GENERAL.**—The term 'State restoration activity' means any State program or project carried out under State authority that directly or indirectly protect[s], conserve[s], or restore[s] living resources, habitat, water resources, or water quality in the Chesapeake Bay watershed, including programs or projects that promote responsible land use, stewardship, and community engagement in the Chesapeake Bay watershed.

"(B) **CATEGORIZATION.**—State restoration activities may be categorized as follows:

"(i) Physical restoration.

"(ii) Planning.

"(iii) Feasibility studies.

"(iv) Scientific research.

"(v) Monitoring.

"(vi) Education.

"(vii) Infrastructure development.

"SEC. 3. CHESAPEAKE BAY CROSSCUT BUDGET.

"(a) IN GENERAL.—The Director, in consultation with the Chesapeake Executive Council, the chief executive of each Chesapeake Bay State, and the Chesapeake Bay Commission, shall submit to Congress a financial report containing—

"(1) an interagency crosscut budget that displays, as applicable—

"(A) the proposed funding for any Federal restoration activity to be carried out in the succeeding fiscal year, including any planned interagency or intra-agency transfer, for each of the Federal agencies that carry out restoration activities;

"(B) to the extent that information is available, the estimated funding for any State restoration activity to be carried out in the succeeding fiscal year;

"(C) all expenditures for Federal restoration activities from the preceding 2 fiscal years, the current fiscal year, and the succeeding fiscal year;

"(D) all expenditures, to the extent that information is available, for State restoration activities during the equivalent time period described in subparagraph (C); and

"(E) a section that identifies and evaluates, based on need and appropriateness, specific opportunities to consolidate similar programs and activities within the budget and recommendations to Congress for legislative action to streamline, consolidate, or eliminate similar programs and activities within the budget;

"(2) a detailed accounting of all funds received and obligated by each Federal agency for restoration activities during the current and preceding fiscal years, including the identification of funds that were transferred to a Chesapeake Bay State for restoration activities;

"(3) to the extent that information is available, a detailed accounting from each State of all funds received and obligated from a Federal agency for restoration activities during the current and preceding fiscal years; and

"(4) a description of each of the proposed Federal and State restoration activities to be carried out in the succeeding fiscal year (corresponding to those activities listed in subparagraphs (A) and (B) of paragraph (1)), including—

"(A) the project description;

"(B) the current status of the project;

"(C) the Federal or State statutory or regulatory authority, program, or responsible agency;

"(D) the authorization level for appropriations;

"(E) the project timeline, including benchmarks;

"(F) references to project documents;

"(G) descriptions of risks and uncertainties of project implementation;

"(H) a list of coordinating entities;

"(I) a description of the funding history for the project;

"(J) cost sharing; and

"(K) alignment with the existing Chesapeake Bay Agreement, Chesapeake Executive Council goals and priorities, and Annual Action Plan required by section 205 of Executive Order 13508 (33 U.S.C. 1267 note; relating to Chesapeake Bay protection and restoration).

"(b) MINIMUM FUNDING LEVELS.—In describing restoration activities in the report required under subsection (a), the Director shall only include—

"(1) for the first 3 years that the report is required, descriptions of—

"(A) Federal restoration activities that have funding amounts greater than or equal to \$300,000; and

"(B) State restoration activities that have funding amounts greater than or equal to \$300,000; and

"(2) for every year thereafter, descriptions of—

"(A) Federal restoration activities that have funding amounts greater than or equal to \$100,000; and

"(B) State restoration activities that have funding amounts greater than or equal to \$100,000.

"(c) DEADLINE.—The Director shall submit to Congress the report required by subsection (a) not

later than September 30 of each year.

"(d) **REPORT.**—Copies of the report required by subsection (a) shall be submitted to the Committees on Appropriations, Natural Resources, Energy and Commerce, and Transportation and Infrastructure of the House of Representatives and the Committees on Appropriations, Environment and Public Works, and Commerce, Science, and Transportation of the Senate.

"(e) **EFFECTIVE DATE.**—This section shall apply beginning with the first fiscal year after the date of enactment of this Act [Dec. 18, 2014].

"SEC. 4. INDEPENDENT EVALUATOR FOR THE CHESAPEAKE BAY PROGRAM.

"(a) **IN GENERAL.**—There shall be an Independent Evaluator for restoration activities in the Chesapeake Bay watershed, who shall review and report on—

"(1) restoration activities; and

"(2) any related topics that are suggested by the Chesapeake Executive Council.

"(b) **APPOINTMENT.**—

"(1) **IN GENERAL.**—Not later than 30 days after the date of submission of nominees by the Chesapeake Executive Council, the Independent Evaluator shall be appointed by the Administrator from among nominees submitted by the Chesapeake Executive Council with the consultation of the scientific community.

"(2) **NOMINATIONS.**—The Chesapeake Executive Council may nominate for consideration as Independent Evaluator a science-based institution of higher education.

"(3) **REQUIREMENTS.**—The Administrator shall only select as Independent Evaluator a nominee that the Administrator determines demonstrates excellence in marine science, policy evaluation, or other studies relating to complex environmental restoration activities.

"(c) **REPORTS.**—Not later than 180 days after the date of appointment and once every 2 years thereafter, the Independent Evaluator shall submit to Congress a report describing the findings and recommendations of reviews conducted under subsection (a).

"SEC. 5. PROHIBITION ON NEW FUNDING.

"No additional funds are authorized to be appropriated to carry out this Act."

FINDINGS AND PURPOSES

Pub. L. 106–457, title II, §202, Nov. 7, 2000, 114 Stat. 1967, provided that:

"(a) **FINDINGS.**—Congress finds that—

"(1) the Chesapeake Bay is a national treasure and a resource of worldwide significance;

"(2) over many years, the productivity and water quality of the Chesapeake Bay and its watershed were diminished by pollution, excessive sedimentation, shoreline erosion, the impacts of population growth and development in the Chesapeake Bay watershed, and other factors;

"(3) the Federal Government (acting through the Administrator of the Environmental Protection Agency), the Governor of the State of Maryland, the Governor of the Commonwealth of Virginia, the Governor of the Commonwealth of Pennsylvania, the Chairperson of the Chesapeake Bay Commission, and the mayor of the District of Columbia, as Chesapeake Bay Agreement signatories, have committed to a comprehensive cooperative program to achieve improved water quality and improvements in the productivity of living resources of the Bay;

"(4) the cooperative program described in paragraph (3) serves as a national and international model for the management of estuaries; and

"(5) there is a need to expand Federal support for monitoring, management, and restoration activities in the Chesapeake Bay and the tributaries of the Bay in order to meet and further the original and subsequent goals and commitments of the Chesapeake Bay Program.

"(b) **PURPOSES.**—The purposes of this title [amending this section and enacting provisions set out as a note under section 1251 of this title] are—

"(1) to expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay; and

"(2) to achieve the goals established in the Chesapeake Bay Agreement."

NUTRIENT LOADING RESULTING FROM DREDGED MATERIAL DISPOSAL

Pub. L. 106–53, title IV, §457, Aug. 17, 1999, 113 Stat. 332, provided that:

"(a) **STUDY.**—The Secretary shall conduct a study of nutrient loading that occurs as a result of

discharges of dredged material into open-water sites in the Chesapeake Bay.

"(b) *REPORT*.—Not later than 18 months after the date of enactment of this Act [Aug. 17, 1999], the Secretary shall submit to Congress a report on the results of the study."

Ex. ORD. NO. 13508. CHESAPEAKE BAY PROTECTION AND RESTORATION

Ex. Ord. No. 13508, May 12, 2009, 74 F.R. 23099, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America and in furtherance of the purposes of the Clean Water Act of 1972, as amended (33 U.S.C. 1251 *et seq.*), and other laws, and to protect and restore the health, heritage, natural resources, and social and economic value of the Nation's largest estuarine ecosystem and the natural sustainability of its watershed, it is hereby ordered as follows:

PART 1—PREAMBLE

The Chesapeake Bay is a national treasure constituting the largest estuary in the United States and one of the largest and most biologically productive estuaries in the world. The Federal Government has nationally significant assets in the Chesapeake Bay and its watershed in the form of public lands, facilities, military installations, parks, forests, wildlife refuges, monuments, and museums.

Despite significant efforts by Federal, State, and local governments and other interested parties, water pollution in the Chesapeake Bay prevents the attainment of existing State water quality standards and the "fishable and swimmable" goals of the Clean Water Act. At the current level and scope of pollution control within the Chesapeake Bay's watershed, restoration of the Chesapeake Bay is not expected for many years. The pollutants that are largely responsible for pollution of the Chesapeake Bay are nutrients, in the form of nitrogen and phosphorus, and sediment. These pollutants come from many sources, including sewage treatment plants, city streets, development sites, agricultural operations, and deposition from the air onto the waters of the Chesapeake Bay and the lands of the watershed.

Restoration of the health of the Chesapeake Bay will require a renewed commitment to controlling pollution from all sources as well as protecting and restoring habitat and living resources, conserving lands, and improving management of natural resources, all of which contribute to improved water quality and ecosystem health. The Federal Government should lead this effort. Executive departments and agencies (agencies), working in collaboration, can use their expertise and resources to contribute significantly to improving the health of the Chesapeake Bay. Progress in restoring the Chesapeake Bay also will depend on the support of State and local governments, the enterprise of the private sector, and the stewardship provided to the Chesapeake Bay by all the people who make this region their home.

PART 2—SHARED FEDERAL LEADERSHIP, PLANNING, AND ACCOUNTABILITY

SEC. 201. *Federal Leadership Committee*. In order to begin a new era of shared Federal leadership with respect to the protection and restoration of the Chesapeake Bay, a Federal Leadership Committee (Committee) for the Chesapeake Bay is established to oversee the development and coordination of programs and activities, including data management and reporting, of agencies participating in protection and restoration of the Chesapeake Bay. The Committee shall manage the development of strategies and program plans for the watershed and ecosystem of the Chesapeake Bay and oversee their implementation. The Committee shall be chaired by the Administrator of the Environmental Protection Agency (EPA), or the Administrator's designee, and include senior representatives of the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Homeland Security (DHS), the Interior (DOI), Transportation (DOT), and such other agencies as determined by the Committee. Representatives serving on the Committee shall be officers of the United States.

SEC. 202. *Reports on Key Challenges to Protecting and Restoring the Chesapeake Bay*. Within 120 days from the date of this order, the agencies identified in this section as the lead agencies shall prepare and submit draft reports to the Committee making recommendations for accomplishing the following steps to protect and restore the Chesapeake Bay:

(a) define the next generation of tools and actions to restore water quality in the Chesapeake Bay and describe the changes to be made to regulations, programs, and policies to implement these

actions;

(b) target resources to better protect the Chesapeake Bay and its tributary waters, including resources under the Food Security Act of 1985 as amended, the Clean Water Act, and other laws;

(c) strengthen storm water management practices at Federal facilities and on Federal lands within the Chesapeake Bay watershed and develop storm water best practices guidance;

(d) assess the impacts of a changing climate on the Chesapeake Bay and develop a strategy for adapting natural resource programs and public infrastructure to the impacts of a changing climate on water quality and living resources of the Chesapeake Bay watershed;

(e) expand public access to waters and open spaces of the Chesapeake Bay and its tributaries from Federal lands and conserve landscapes and ecosystems of the Chesapeake Bay watershed;

(f) strengthen scientific support for decisionmaking to restore the Chesapeake Bay and its watershed, including expanded environmental research and monitoring and observing systems; and

(g) develop focused and coordinated habitat and research activities that protect and restore living resources and water quality of the Chesapeake Bay and its watershed.

The EPA shall be the lead agency for subsection (a) of this section and the development of the storm water best practices guide under subsection (c). The USDA shall be the lead agency for subsection (b). The DOD shall lead on storm water management practices at Federal facilities and on Federal lands under subsection (c). The DOI and the DOC shall share the lead on subsections (d), (f), and (g), and the DOI shall be lead on subsection (e). The lead agencies shall provide final reports to the Committee within 180 days of the date of this order.

SEC. 203. *Strategy for Protecting and Restoring the Chesapeake Bay.* The Committee shall prepare and publish a strategy for coordinated implementation of existing programs and projects to guide efforts to protect and restore the Chesapeake Bay. The strategy shall, to the extent permitted by law:

(a) define environmental goals for the Chesapeake Bay and describe milestones for making progress toward attainment of these goals;

(b) identify key measureable indicators of environmental condition and changes that are critical to effective Federal leadership;

(c) describe the specific programs and strategies to be implemented, including the programs and strategies described in draft reports developed under section 202 of this order;

(d) identify the mechanisms that will assure that governmental and other activities, including data collection and distribution, are coordinated and effective, relying on existing mechanisms where appropriate; and

(e) describe a process for the implementation of adaptive management principles, including a periodic evaluation of protection and restoration activities.

The Committee shall review the draft reports submitted by lead agencies under section 202 of this order and, in consultation with relevant State agencies, suggest appropriate revisions to the agency that provided the draft report. It shall then integrate these reports into a coordinated strategy for restoration and protection of the Chesapeake Bay consistent with the requirements of this order. Together with the final reports prepared by the lead agencies, the draft strategy shall be published for public review and comment within 180 days of the date of this order and a final strategy shall be published within 1 year. To the extent practicable and authorized under their existing authorities, agencies may begin implementing core elements of restoration and protection programs and strategies, in consultation with the Committee, as soon as possible and prior to release of a final strategy.

SEC. 204. *Collaboration with State Partners.* In preparing the reports under section 202 and the strategy under section 203, the lead agencies and the Committee shall consult extensively with the States of Virginia, Maryland, Pennsylvania, West Virginia, New York, and Delaware and the District of Columbia. The goal of this consultation is to ensure that Federal actions to protect and restore the Chesapeake Bay are closely coordinated with actions by State and local agencies in the watershed and that the resources, authorities, and expertise of Federal, State, and local agencies are used as efficiently as possible for the benefit of the Chesapeake Bay's water quality and ecosystem and habitat health and viability.

SEC. 205. *Annual Action Plan and Progress Report.* Beginning in 2010, the Committee shall publish an annual Chesapeake Bay Action Plan (Action Plan) describing how Federal funding proposed in the President's Budget will be used to protect and restore the Chesapeake Bay during the upcoming fiscal year. This plan will be accompanied by an Annual Progress Report reviewing indicators of

environmental conditions in the Chesapeake Bay, assessing implementation of the Action Plan during the preceding fiscal year, and recommending steps to improve progress in restoring and protecting the Chesapeake Bay. The Committee shall consult with stakeholders (including relevant State agencies) and members of the public in developing the Action Plan and Annual Progress Report.

SEC. 206. *Strengthen Accountability.* The Committee, in collaboration with State agencies, shall ensure that an independent evaluator periodically reports to the Committee on progress toward meeting the goals of this order. The Committee shall ensure that all program evaluation reports, including data on practice or system implementation and maintenance funded through agency programs, as appropriate, are made available to the public by posting on a website maintained by the Chair of the Committee.

PART 3—RESTORE CHESAPEAKE BAY WATER QUALITY

SEC. 301. *Water Pollution Control Strategies.* In preparing the report required by subsection 202(a) of this order, the Administrator of the EPA (Administrator) shall, after consulting with appropriate State agencies, examine how to make full use of its authorities under the Clean Water Act to protect and restore the Chesapeake Bay and its tributary waters and, as appropriate, shall consider revising any guidance and regulations. The Administrator shall identify pollution control strategies and actions authorized by the EPA's existing authorities to restore the Chesapeake Bay that:

- (a) establish a clear path to meeting, as expeditiously as practicable, water quality and environmental restoration goals for the Chesapeake Bay;
- (b) are based on sound science and reflect adaptive management principles;
- (c) are performance oriented and publicly accountable;
- (d) apply innovative and cost-effective pollution control measures;
- (e) can be replicated in efforts to protect other bodies of water, where appropriate; and
- (f) build on the strengths and expertise of Federal, State, and local governments, the private sector, and citizen organizations.

SEC. 302. *Elements of EPA Reports.* The strategies and actions identified by the Administrator of the EPA in preparing the report under subsection 202(a) shall include, to the extent permitted by law:

- (a) using Clean Water Act tools, including strengthening existing permit programs and extending coverage where appropriate;
- (b) establishing new, minimum standards of performance where appropriate, including:
 - (i) establishing a schedule for the implementation of key actions in cooperation with States, local governments, and others;
 - (ii) constructing watershed-based frameworks that assign pollution reduction responsibilities to pollution sources and maximize the reliability and cost-effectiveness of pollution reduction programs; and
 - (iii) implementing a compliance and enforcement strategy.

PART 4—AGRICULTURAL PRACTICES TO PROTECT THE CHESAPEAKE BAY

SEC. 401. In developing recommendations for focusing resources to protect the Chesapeake Bay in the report required by subsection 202(b) of this order, the Secretary of Agriculture shall, as appropriate, concentrate the USDA's working lands and land retirement programs within priority watersheds in counties in the Chesapeake Bay watershed. These programs should apply priority conservation practices that most efficiently reduce nutrient and sediment loads to the Chesapeake Bay, as identified by USDA and EPA data and scientific analysis. The Secretary of Agriculture shall work with State agriculture and conservation agencies in developing the report.

PART 5—REDUCE WATER POLLUTION FROM FEDERAL LANDS AND FACILITIES

SEC. 501. Agencies with land, facilities, or installation management responsibilities affecting ten or more acres within the watershed of the Chesapeake Bay shall, as expeditiously as practicable and to the extent permitted by law, implement land management practices to protect the Chesapeake Bay and its tributary waters consistent with the report required by section 202 of this order and as described in guidance published by the EPA under section 502.

SEC. 502. The Administrator of the EPA shall, within 1 year of the date of this order and after consulting with the Committee and providing for public review and comment, publish guidance for

Federal land management in the Chesapeake Bay watershed describing proven, cost-effective tools and practices that reduce water pollution, including practices that are available for use by Federal agencies.

PART 6—PROTECT CHESAPEAKE BAY AS THE CLIMATE CHANGES

SEC. 601. The Secretaries of Commerce and the Interior shall, to the extent permitted by law, organize and conduct research and scientific assessments to support development of the strategy to adapt to climate change impacts on the Chesapeake Bay watershed as required in section 202 of this order and to evaluate the impacts of climate change on the Chesapeake Bay in future years. Such research should include assessment of:

- (a) the impact of sea level rise on the aquatic ecosystem of the Chesapeake Bay, including nutrient and sediment load contributions from stream banks and shorelines;
- (b) the impacts of increasing temperature, acidity, and salinity levels of waters in the Chesapeake Bay;
- (c) the impacts of changing rainfall levels and changes in rainfall intensity on water quality and aquatic life;
- (d) potential impacts of climate change on fish, wildlife, and their habitats in the Chesapeake Bay and its watershed; and
- (e) potential impacts of more severe storms on Chesapeake Bay resources.

PART 7—EXPAND PUBLIC ACCESS TO THE CHESAPEAKE BAY AND CONSERVE LANDSCAPES AND ECOSYSTEMS

SEC. 701. (a) Agencies participating in the Committee shall assist the Secretary of the Interior in development of the report addressing expanded public access to the waters of the Chesapeake Bay and conservation of landscapes and ecosystems required in subsection 202(e) of this order by providing to the Secretary:

- (i) a list and description of existing sites on agency lands and facilities where public access to the Chesapeake Bay or its tributary waters is offered;
- (ii) a description of options for expanding public access at these agency sites;
- (iii) a description of agency sites where new opportunities for public access might be provided;
- (iv) a description of safety and national security issues related to expanded public access to Department of Defense installations;
- (v) a description of landscapes and ecosystems in the Chesapeake Bay watershed that merit recognition for their historical, cultural, ecological, or scientific values; and
- (vi) options for conserving these landscapes and ecosystems.

(b) In developing the report addressing expanded public access on agency lands to the waters of the Chesapeake Bay and options for conserving landscapes and ecosystems in the Chesapeake Bay, as required in subsection 202(e) of this order, the Secretary of the Interior shall coordinate any recommendations with State and local agencies in the watershed and programs such as the Captain John Smith Chesapeake National Historic Trail, the Chesapeake Bay Gateways and Watertrails Network, and the Star-Spangled Banner National Historic Trail.

PART 8—MONITORING AND DECISION SUPPORT FOR ECOSYSTEM MANAGEMENT

SEC. 801. The Secretaries of Commerce and the Interior shall, to the extent permitted by law, organize and conduct their monitoring, research, and scientific assessments to support decisionmaking for the Chesapeake Bay ecosystem and to develop the report addressing strengthening environmental monitoring of the Chesapeake Bay and its watershed required in section 202 of this order. This report will assess existing monitoring programs and gaps in data collection, and shall also include the following topics:

- (a) the health of fish and wildlife in the Chesapeake Bay watershed;
- (b) factors affecting changes in water quality and habitat conditions; and
- (c) using adaptive management to plan, monitor, evaluate, and adjust environmental management actions.

PART 9—LIVING RESOURCES PROTECTION AND RESTORATION

SEC. 901. The Secretaries of Commerce and the Interior shall, to the extent permitted by law, identify and prioritize critical living resources of the Chesapeake Bay and its watershed, conduct collaborative research and habitat protection activities that address expected outcomes for these species, and develop a report addressing these topics as required in section 202 of this order. The Secretaries of Commerce and the Interior shall coordinate agency activities related to living resources in estuarine waters to ensure maximum benefit to the Chesapeake Bay resources.

PART 10—EXCEPTIONS

SEC. 1001. The heads of agencies may authorize exceptions to this order, in the following circumstances:

- (a) during time of war or national emergency;
- (b) when necessary for reasons of national security;
- (c) during emergencies posing an unacceptable threat to human health or safety or to the marine environment and admitting of no other feasible solution; or
- (d) in any case that constitutes a danger to human life or a real threat to vessels, aircraft, platforms, or other man-made structures at sea, such as cases of *force majeure* caused by stress of weather or other act of God.

PART 11—GENERAL PROVISIONS

SEC. 1101. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) authority granted by law to a department, agency, or the head thereof; or
- (ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

§1268. Great Lakes

(a) Findings, purpose, and definitions

(1) Findings

The Congress finds that—

- (A) the Great Lakes are a valuable national resource, continuously serving the people of the United States and other nations as an important source of food, fresh water, recreation, beauty, and enjoyment;
- (B) the United States should seek to attain the goals embodied in the Great Lakes Water Quality Agreement of 1978, as amended by the Water Quality Agreement of 1987 and any other agreements and amendments, with particular emphasis on goals related to toxic pollutants; and
- (C) the Environmental Protection Agency should take the lead in the effort to meet those goals, working with other Federal agencies and State and local authorities.

(2) Purpose

It is the purpose of this section to achieve the goals embodied in the Great Lakes Water Quality Agreement of 1978, as amended by the Water Quality Agreement of 1987 and any other agreements and amendments, through improved organization and definition of mission on the part of the Agency, funding of State grants for pollution control in the Great Lakes area, and improved accountability for implementation of such agreement.

(3) Definitions

For purposes of this section, the term—

- (A) "Agency" means the Environmental Protection Agency;
- (B) "Great Lakes" means Lake Ontario, Lake Erie, Lake Huron (including Lake St. Clair), Lake Michigan, and Lake Superior, and the connecting channels (Saint Mary's River, Saint Clair River, Detroit River, Niagara River, and Saint Lawrence River to the Canadian Border);
- (C) "Great Lakes System" means all the streams, rivers, lakes, and other bodies of water within the

drainage basin of the Great Lakes;

(D) "Program Office" means the Great Lakes National Program Office established by this section;

(E) "Research Office" means the Great Lakes Research Office established by subsection (d) of this section;

(F) "area of concern" means a geographic area located within the Great Lakes, in which beneficial uses are impaired and which has been officially designated as such under Annex 2 of the Great Lakes Water Quality Agreement;

(G) "Great Lakes States" means the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin;

(H) "Great Lakes Water Quality Agreement" means the bilateral agreement, between the United States and Canada which was signed in 1978 and amended by the Protocol of 1987;

(I) "Lakewide Management Plan" means a written document which embodies a systematic and comprehensive ecosystem approach to restoring and protecting the beneficial uses of the open waters of each of the Great Lakes, in accordance with article VI and Annex 2 of the Great Lakes Water Quality Agreement;

(J) "Remedial Action Plan" means a written document which embodies a systematic and comprehensive ecosystem approach to restoring and protecting the beneficial uses of areas of concern, in accordance with article VI and Annex 2 of the Great Lakes Water Quality Agreement;

(K) "site characterization" means a process for monitoring and evaluating the nature and extent of sediment contamination in accordance with the Environmental Protection Agency's guidance for the assessment of contaminated sediment in an area of concern located wholly or partially within the United States; and

(L) "potentially responsible party" means an individual or entity that may be liable under any Federal or State authority that is being used or may be used to facilitate the cleanup and protection of the Great Lakes.

(b) Great Lakes National Program Office

The Great Lakes National Program Office (previously established by the Administrator) is hereby established within the Agency. The Program Office shall be headed by a Director who, by reason of management experience and technical expertise relating to the Great Lakes, is highly qualified to direct the development of programs and plans on a variety of Great Lakes issues. The Great Lakes National Program Office shall be located in a Great Lakes State.

(c) Great Lakes management

(1) Functions

The Program Office shall—

(A) in cooperation with appropriate Federal, State, tribal, and international agencies, and in accordance with section 1251(e) of this title, develop and implement specific action plans to carry out the responsibilities of the United States under the Great Lakes Water Quality Agreement of 1978, as amended by the Water Quality Agreement of 1987 and any other agreements and amendments; ¹

(B) establish a Great Lakes system-wide surveillance network to monitor the water quality of the Great Lakes, with specific emphasis on the monitoring of toxic pollutants;

(C) serve as the liaison with, and provide information to, the Canadian members of the International Joint Commission and the Canadian counterpart to the Agency;

(D) coordinate actions of the Agency (including actions by headquarters and regional offices thereof) aimed at improving Great Lakes water quality; and

(E) coordinate actions of the Agency with the actions of other Federal agencies and State and local authorities, so as to ensure the input of those agencies and authorities in developing water quality strategies and obtain the support of those agencies and authorities in achieving the objectives of such agreement.

(2) Great Lakes water quality guidance

(A) By June 30, 1991, the Administrator, after consultation with the Program Office, shall publish in the Federal Register for public notice and comment proposed water quality guidance for the Great Lakes System. Such guidance shall conform with the objectives and provisions of the Great Lakes Water Quality Agreement, shall be no less restrictive than the provisions of this chapter and national water quality criteria and guidance, shall specify numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife, and shall provide guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System.

(B) By June 30, 1992, the Administrator, in consultation with the Program Office, shall publish in the Federal Register, pursuant to this section and the Administrator's authority under this chapter, final water

quality guidance for the Great Lakes System.

(C) Within two years after such Great Lakes guidance is published, the Great Lakes States shall adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with such guidance. If a Great Lakes State fails to adopt such standards, policies, and procedures, the Administrator shall promulgate them not later than the end of such two-year period. When reviewing any Great Lakes State's water quality plan, the agency shall consider the extent to which the State has complied with the Great Lakes guidance issued pursuant to this section.

(3) Remedial Action Plans

(A) For each area of concern for which the United States has agreed to draft a Remedial Action Plan, the Program Office shall ensure that the Great Lakes State in which such area of concern is located—

- (i) submits a Remedial Action Plan to the Program Office by June 30, 1991;
- (ii) submits such Remedial Action Plan to the International Joint Commission by January 1, 1992; and
- (iii) includes such Remedial Action Plans within the State's water quality plan by January 1, 1993.

(B) For each area of concern for which Canada has agreed to draft a Remedial Action Plan, the Program Office shall, pursuant to subparagraph (c)(1)(C) of this section, work with Canada to assure the submission of such Remedial Action Plans to the International Joint Commission by June 30, 1991, and to finalize such Remedial Action Plans by January 1, 1993.

(C) For any area of concern designated as such subsequent to November 16, 1990, the Program Office shall (i) if the United States has agreed to draft the Remedial Action Plan, ensure that the Great Lakes State in which such area of concern is located submits such Plan to the Program Office within two years of the area's designation, submits it to the International Joint Commission no later than six months after submitting it to the Program Office, and includes such Plan in the State's water quality plan no later than one year after submitting it to the Commission; and (ii) if Canada has agreed to draft the Remedial Action Plan, work with Canada, pursuant to subparagraph (c)(1)(C) of this section, to ensure the submission of such Plan to the International Joint Commission within two years of the area's designation and the finalization of such Plan no later than eighteen months after submitting it to such Commission.

(D) The Program Office shall compile formal comments on individual Remedial Action Plans made by the International Joint Commission pursuant to section 4(d) of Annex 2 of the Great Lakes Water Quality Agreement and, upon request by a member of the public, shall make such comments available for inspection and copying. The Program Office shall also make available, upon request, formal comments made by the Environmental Protection Agency on individual Remedial Action Plans.

(E) REPORT.—Not later than 1 year after November 27, 2002, the Administrator shall submit to Congress a report on such actions, time periods, and resources as are necessary to fulfill the duties of the Agency relating to oversight of Remedial Action Plans under—

- (i) this paragraph; and
- (ii) the Great Lakes Water Quality Agreement.

(4) Lakewide Management Plans

The Administrator, in consultation with the Program Office shall—

- (A) by January 1, 1992, publish in the Federal Register a proposed Lakewide Management Plan for Lake Michigan and solicit public comments;
- (B) by January 1, 1993, submit a proposed Lakewide Management Plan for Lake Michigan to the International Joint Commission for review; and
- (C) by January 1, 1994, publish in the Federal Register a final Lakewide Management Plan for Lake Michigan and begin implementation.

Nothing in this subparagraph shall preclude the simultaneous development of Lakewide Management Plans for the other Great Lakes.

(5) Spills of oil and hazardous materials

The Program Office, in consultation with the Coast Guard, shall identify areas within the Great Lakes which are likely to experience numerous or voluminous spills of oil or other hazardous materials from land based facilities, vessels, or other sources and, in consultation with the Great Lakes States, shall identify weaknesses in Federal and State programs and systems to prevent and respond to such spills. This information shall be included on at least a biennial basis in the report required by this section.

(6) 5-year plan and program

The Program Office shall develop, in consultation with the States, a five-year plan and program for reducing the amount of nutrients introduced into the Great Lakes. Such program shall incorporate any management program for reducing nutrient runoff from nonpoint sources established under section 1329 of

this title and shall include a program for monitoring nutrient runoff into, and ambient levels in, the Great Lakes.

(7) 5-year study and demonstration projects

(A) The Program Office shall carry out a five-year study and demonstration projects relating to the control and removal of toxic pollutants in the Great Lakes, with emphasis on the removal of toxic pollutants from bottom sediments. In selecting locations for conducting demonstration projects under this paragraph, priority consideration shall be given to projects at the following locations: Saginaw Bay, Michigan; Sheboygan Harbor, Wisconsin; Grand Calumet River, Indiana; Ashtabula River, Ohio; and Buffalo River, New York.

(B) The Program Office shall—

- (i) by December 31, 1990, complete chemical, physical, and biological assessments of the contaminated sediments at the locations selected for the study and demonstration projects;
- (ii) by December 31, 1990, announce the technologies that will be demonstrated at each location and the numerical standard of protection intended to be achieved at each location;
- (iii) by December 31, 1992, complete full or pilot scale demonstration projects on site at each location of promising technologies to remedy contaminated sediments; and
- (iv) by December 31, 1993, issue a final report to Congress on its findings.

(C) The Administrator, after providing for public review and comment, shall publish information concerning the public health and environmental consequences of contaminants in Great Lakes sediment. Information published pursuant to this subparagraph shall include specific numerical limits to protect health, aquatic life, and wildlife from the bioaccumulation of toxins. The Administrator shall, at a minimum, publish information pursuant to this subparagraph within 2 years of November 16, 1990.

(8) Administrator's responsibility

The Administrator shall ensure that the Program Office enters into agreements with the various organizational elements of the Agency involved in Great Lakes activities and the appropriate State agencies specifically delineating—

- (A) the duties and responsibilities of each such element in the Agency with respect to the Great Lakes;
- (B) the time periods for carrying out such duties and responsibilities; and
- (C) the resources to be committed to such duties and responsibilities.

(9) Budget item

The Administrator shall, in the Agency's annual budget submission to Congress, include a funding request for the Program Office as a separate budget line item.

(10) Confined disposal facilities

(A) The Administrator, in consultation with the Assistant Secretary of the Army for Civil Works, shall develop and implement, within one year of November 16, 1990, management plans for every Great Lakes confined disposal facility.

(B) The plan shall provide for monitoring of such facilities, including—

- (i) water quality at the site and in the area of the site;
 - (ii) sediment quality at the site and in the area of the site;
 - (iii) the diversity, productivity, and stability of aquatic organisms at the site and in the area of the site;
- and
- (iv) such other conditions as the Administrator deems appropriate.

(C) The plan shall identify the anticipated use and management of the site over the following twenty-year period including the expected termination of dumping at the site, the anticipated need for site management, including pollution control, following the termination of the use of the site.

(D) The plan shall identify a schedule for review and revision of the plan which shall not be less frequent than five years after adoption of the plan and every five years thereafter.

(11) Remediation of sediment contamination in areas of concern

(A) In general

In accordance with this paragraph, the Administrator, acting through the Program Office, may carry out projects that meet the requirements of subparagraph (B).

(B) Eligible projects

A project meets the requirements of this subparagraph if the project is to be carried out in an area of concern located wholly or partially in the United States and the project—

- (i) monitors or evaluates contaminated sediment;
- (ii) subject to subparagraph (D), implements a plan to remediate contaminated sediment, including activities to restore aquatic habitat that are carried out in conjunction with a project for the remediation of contaminated sediment; or
- (iii) prevents further or renewed contamination of sediment.

(C) Priority

In selecting projects to carry out under this paragraph, the Administrator shall give priority to a project that—

- (i) constitutes remedial action for contaminated sediment;
- (ii)(I) has been identified in a Remedial Action Plan submitted under paragraph (3); and
- (II) is ready to be implemented;
- (iii) will use an innovative approach, technology, or technique that may provide greater environmental benefits, or equivalent environmental benefits at a reduced cost; or
- (iv) includes remediation to be commenced not later than 1 year after the date of receipt of funds for the project.

(D) Limitations

The Administrator may not carry out a project under this paragraph for remediation of contaminated sediments located in an area of concern—

- (i) if an evaluation of remedial alternatives for the area of concern has not been conducted, including a review of the short-term and long-term effects of the alternatives on human health and the environment;
- (ii) if the Administrator determines that the area of concern is likely to suffer significant further or renewed contamination from existing sources of pollutants causing sediment contamination following completion of the project;
- (iii) unless each non-Federal sponsor for the project has entered into a written project agreement with the Administrator under which the party agrees to carry out its responsibilities and requirements for the project; or
- (iv) unless the Administrator provides assurance that the Agency has conducted a reasonable inquiry to identify potentially responsible parties connected with the site.

(E) Non-Federal share

(i) In general

The non-Federal share of the cost of a project carried out under this paragraph shall be at least 35 percent.

(ii) In-kind contributions

(I) In general

The non-Federal share of the cost of a project carried out under this paragraph may include the value of an in-kind contribution provided by a non-Federal sponsor.

(II) Credit

A project agreement described in subparagraph (D)(iii) may provide, with respect to a project, that the Administrator shall credit toward the non-Federal share of the cost of the project the value of an in-kind contribution made by the non-Federal sponsor, if the Administrator determines that the material or service provided as the in-kind contribution is integral to the project.

(III) Work performed before project agreement

In any case in which a non-Federal sponsor is to receive credit under subclause (II) for the cost of work carried out by the non-Federal sponsor and such work has not been carried out by the non-Federal sponsor as of October 8, 2008, the Administrator and the non-Federal sponsor shall enter into an agreement under which the non-Federal sponsor shall carry out such work, and only work carried out following the execution of the agreement shall be eligible for credit.

(IV) Limitation

Credit authorized under this clause for a project carried out under this paragraph—

- (aa) shall not exceed the non-Federal share of the cost of the project; and
- (bb) shall not exceed the actual and reasonable costs of the materials and services provided by the non-Federal sponsor, as determined by the Administrator.

(V) Inclusion of certain contributions

In this subparagraph, the term "in-kind contribution" may include the costs of planning (including data collection), design, construction, and materials that are provided by the non-Federal sponsor for implementation of a project under this paragraph.

(iii) Treatment of credit between projects

Any credit provided under this subparagraph towards the non-Federal share of the cost of a project carried out under this paragraph may be applied towards the non-Federal share of the cost of any other project carried out under this paragraph by the same non-Federal sponsor for a site within the same area of concern.

(iv) Non-Federal share

The non-Federal share of the cost of a project carried out under this paragraph—

(I) may include monies paid pursuant to, or the value of any in-kind contribution performed under, an administrative order on consent or judicial consent decree; but

(II) may not include any funds paid pursuant to, or the value of any in-kind contribution performed under, a unilateral administrative order or court order.

(v) Operation and maintenance

The non-Federal share of the cost of the operation and maintenance of a project carried out under this paragraph shall be 100 percent.

(F) Site characterization

(i) In general

The Administrator, in consultation with any affected State or unit of local government, shall carry out at Federal expense the site characterization of a project under this paragraph for the remediation of contaminated sediment.

(ii) Limitation

For purposes of clause (i), the Administrator may carry out one site assessment per discrete site within a project at Federal expense.

(G) Coordination

In carrying out projects under this paragraph, the Administrator shall coordinate with the Secretary of the Army, and with the Governors of States in which the projects are located, to ensure that Federal and State assistance for remediation in areas of concern is used as efficiently as practicable.

(H) Authorization of appropriations

(i) In general

In addition to other amounts authorized under this section, there is authorized to be appropriated to carry out this paragraph \$50,000,000 for each of fiscal years 2004 through 2010.

(ii) Availability

Funds made available under clause (i) shall remain available until expended.

(iii) Allocation of funds

Not more than 20 percent of the funds appropriated pursuant to clause (i) for a fiscal year may be used to carry out subparagraph (F).

(12) Public information program

(A) In general

The Administrator, acting through the Program Office and in coordination with States, Indian tribes, local governments, and other entities, may carry out a public information program to provide information relating to the remediation of contaminated sediment to the public in areas of concern that are located wholly or partially in the United States.

(B) Authorization of appropriations

There is authorized to be appropriated to carry out this paragraph \$1,000,000 for each of fiscal years 2004 through 2010.

(d) Great Lakes research

(1) Establishment of Research Office

There is established within the National Oceanic and Atmospheric Administration the Great Lakes Research Office.

(2) Identification of issues

The Research Office shall identify issues relating to the Great Lakes resources on which research is needed. The Research Office shall submit a report to Congress on such issues before the end of each fiscal year which shall identify any changes in the Great Lakes system ² with respect to such issues.

(3) Inventory

The Research Office shall identify and inventory Federal, State, university, and tribal environmental research programs (and, to the extent feasible, those of private organizations and other nations) relating to the Great Lakes system,² and shall update that inventory every four years.

(4) Research exchange

The Research Office shall establish a Great Lakes research exchange for the purpose of facilitating the rapid identification, acquisition, retrieval, dissemination, and use of information concerning research projects which are ongoing or completed and which affect the Great Lakes System.

(5) Research program

The Research Office shall develop, in cooperation with the Coordination Office, a comprehensive environmental research program and data base for the Great Lakes system.² The data base shall include, but not be limited to, data relating to water quality, fisheries, and biota.

(6) Monitoring

The Research Office shall conduct, through the Great Lakes Environmental Research Laboratory, the National Sea Grant College program, other Federal laboratories, and the private sector, appropriate research and monitoring activities which address priority issues and current needs relating to the Great Lakes.

(7) Location

The Research Office shall be located in a Great Lakes State.

(e) Research and management coordination**(1) Joint plan**

Before October 1 of each year, the Program Office and the Research Office shall prepare a joint research plan for the fiscal year which begins in the following calendar year.

(2) Contents of plan

Each plan prepared under paragraph (1) shall—

(A) identify all proposed research dedicated to activities conducted under the Great Lakes Water Quality Agreement of 1978, as amended by the Water Quality Agreement of 1987 and any other agreements and amendments,;³

(B) include the Agency's assessment of priorities for research needed to fulfill the terms of such Agreement; and

(C) identify all proposed research that may be used to develop a comprehensive environmental data base for the Great Lakes System and establish priorities for development of such data base.

(3) Health research report

(A) Not later than September 30, 1994, the Program Office, in consultation with the Research Office, the Agency for Toxic Substances and Disease Registry, and Great Lakes States shall submit to the Congress a report assessing the adverse effects of water pollutants in the Great Lakes System on the health of persons in Great Lakes States and the health of fish, shellfish, and wildlife in the Great Lakes System. In conducting research in support of this report, the Administrator may, where appropriate, provide for research to be conducted under cooperative agreements with Great Lakes States.

(B) There is authorized to be appropriated to the Administrator to carry out this section not to exceed \$3,000,000 for each of fiscal years 1992, 1993, and 1994.

(f) Interagency cooperation

The head of each department, agency, or other instrumentality of the Federal Government which is engaged in, is concerned with, or has authority over programs relating to research, monitoring, and planning to maintain, enhance, preserve, or rehabilitate the environmental quality and natural resources of the Great Lakes, including the Chief of Engineers of the Army, the Chief of the Soil Conservation Service, the Commandant of the Coast Guard, the Director of the Fish and Wildlife Service, and the Administrator of the National Oceanic and Atmospheric Administration, shall submit an annual report to the Administrator with respect to the activities of that agency or office affecting compliance with the Great Lakes Water Quality Agreement of 1978, as amended by the Water Quality Agreement of 1987 and any other agreements and

amendments,.³

(g) Relationship to existing Federal and State laws and international treaties

Nothing in this section shall be construed—

(1) to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the Federal Government or of any State government, or of any tribe, nor any powers, jurisdiction, or prerogatives of any international body created by treaty with authority relating to the Great Lakes; or

(2) to affect any other Federal or State authority that is being used or may be used to facilitate the cleanup and protection of the Great Lakes.

(h) Authorizations of Great Lakes appropriations

There are authorized to be appropriated to the Administrator to carry out this section not to exceed—

(1) \$11,000,000 per fiscal year for the fiscal years 1987, 1988, 1989, and 1990, and \$25,000,000 for fiscal year 1991;

(2) such sums as are necessary for each of fiscal years 1992 through 2003; and

(3) \$25,000,000 for each of fiscal years 2004 through 2008.

(June 30, 1948, ch. 758, title I, §118, as added Pub. L. 100–4, title I, §104, Feb. 4, 1987, 101 Stat. 11; amended Pub. L. 100–688, title I, §1008, Nov. 18, 1988, 102 Stat. 4151; Pub. L. 101–596, title I, §§101–106, Nov. 16, 1990, 104 Stat. 3000–3004; Pub. L. 107–303, title I, §§102–105, Nov. 27, 2002, 116 Stat. 2355–2358; Pub. L. 110–365, §2, 3, Oct. 8, 2008, 122 Stat. 4021; Pub. L. 113–188, title VII, §701, Nov. 26, 2014, 128 Stat. 2019.)

CODIFICATION

November 16, 1990, referred to in subsec. (c)(3)(C), (7)(C), was in the original "the enactment of this Act", and "the date of the enactment of this title" which were translated as meaning the date of enactment of Pub. L. 101–596, title I of which enacted subsec. (c)(3), (7)(C), to reflect the probable intent of Congress.

AMENDMENTS

2014—Subsec. (c)(10) to (13). Pub. L. 113–188 redesignated pars. (11) to (13) as (10) to (12), respectively, and struck out former par. (10) which required submission of annual comprehensive reports.

2008—Subsec. (a)(3)(K), (L). Pub. L. 110–365, §2, added subpars. (K) and (L).

Subsec. (c)(12)(B)(ii). Pub. L. 110–365, §3(a), substituted "sediment, including activities to restore aquatic habitat that are carried out in conjunction with a project for the remediation of contaminated sediment" for "sediment".

Subsec. (c)(12)(D). Pub. L. 110–365, §3(b)(1), substituted "Limitations" for "Limitation" in heading.

Subsec. (c)(12)(D)(iii), (iv). Pub. L. 110–365, §3(b)(2)–(4), added cls. (iii) and (iv).

Subsec. (c)(12)(E)(ii). Pub. L. 110–365, §3(c), amended cl. (ii) generally. Prior to amendment, text read as follows: "The non-Federal share of the cost of a project carried out under this paragraph may include the value of in-kind services contributed by a non-Federal sponsor."

Subsec. (c)(12)(E)(iii). Pub. L. 110–365, §3(d)(2), added cl. (iii). Former cl. (iii) redesignated (iv).

Subsec. (c)(12)(E)(iv). Pub. L. 110–365, §3(d)(1), (3), redesignated cl. (iii) as (iv) and substituted "contribution" for "service" in two places. Former cl. (iv) redesignated (v).

Subsec. (c)(12)(E)(v). Pub. L. 110–365, §3(d)(1), redesignated cl. (iv) as (v).

Subsec. (c)(12)(F). Pub. L. 110–365, §3(e), amended subpar. (F) generally. Prior to amendment, text read as follows: "The Administrator may not carry out a project under this paragraph unless the non-Federal sponsor enters into such agreements with the Administrator as the Administrator may require to ensure that the non-Federal sponsor will maintain its aggregate expenditures from all other sources for remediation programs in the area of concern in which the project is located at or above the average level of such expenditures in the 2 fiscal years preceding the date on which the project is initiated."

Subsec. (c)(12)(H)(i). Pub. L. 110–365, §3(f)(1), added cl. (i) and struck out former cl. (i). Prior to amendment, text read as follows: "In addition to other amounts authorized under this section, there is authorized to be appropriated to carry out this paragraph \$50,000,000 for each of fiscal years 2004 through 2008."

Subsec. (c)(12)(H)(iii). Pub. L. 110–365, §3(f)(2), added cl. (iii).

Subsec. (c)(13)(B). Pub. L. 110–365, §3(g), substituted "2010" for "2008".

2002—Subsec. (c)(3)(E). Pub. L. 107–303, §102, added subpar. (E).

Subsec. (c)(12), (13). Pub. L. 107–303, §103, added pars. (12) and (13).

Subsec. (g). Pub. L. 107–303, §104, substituted "construed—" for "construed to affect", inserted "(1) to affect" before "the jurisdiction", substituted "Lakes; or" for "Lakes.", and added par. (2).

Subsec. (h). Pub. L. 107–303, §105, substituted "not to exceed—" for "not to exceed \$11,000,000", inserted "(1) \$11,000,000" before "per fiscal year for", substituted "1991;" for "1991.", added pars. (2) and (3), and struck out former last sentence which read as follows: "Of the amounts appropriated each fiscal year—

"(1) 40 percent shall be used by the Great Lakes National Program Office on demonstration projects on the feasibility of controlling and removing toxic pollutants;

"(2) 7 percent shall be used by the Great Lakes National Program Office for the program of nutrient monitoring; and

"(3) 30 percent or \$3,300,000, whichever is the lesser, shall be transferred to the National Oceanic and Atmospheric Administration for use by the Great Lakes Research Office."

1990—Subsec. (a)(3)(F) to (J). Pub. L. 101–596, §103, added subpars. (F) to (J).

Subsec. (c)(2) to (11). Pub. L. 101–596, §§101, 102, 104, added pars. (2) to (5) after par. (1) and renumbered existing paragraphs accordingly, which was executed by renumbering pars. (2) to (6) as (6) to (10), respectively, redesignated existing provisions of par. (7) as subpar. (A) and added subpars. (B) and (C), and added par. (11).

Subsec. (e)(3). Pub. L. 101–596, §106, added par. (3).

Subsec. (h). Pub. L. 101–596, §105, substituted "and 1990, and \$25,000,000 for fiscal year 1991" for "1990, and 1991" in introductory provisions and inserted "or \$3,300,000, whichever is the lesser," after "30 percent" in par. (3).

1988—Subsecs. (a)(1)(B), (2), (c)(1)(A), (6)(A), (D), (e)(2)(A), (f). Pub. L. 100–688 inserted ", as amended by the Water Quality Agreement of 1987 and any other agreements and amendments," after "the Great Lakes Water Quality Agreement of 1978".

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

FUNDS CONTRIBUTED BY A NON-FEDERAL SPONSOR

Pub. L. 108–447, [div. I, title III, Dec. 8, 2004](#), 118 Stat. 3332, provided in part that: "The Administrator [of the Environmental Protection Agency] may hereafter receive and use funds contributed by a non-Federal sponsor as its share of the cost of a project to carry out a project under paragraph (c)(12) [now (c)(11)] of section 118 of the Federal Water Pollution Control Act [33 U.S.C. 1268(c)(11)], as amended."

GREAT LAKES REMEDIAL ACTION PLANS AND SEDIMENT REMEDIATION

Pub. L. 101–640, [title IV, §401, Nov. 28, 1990](#), 104 Stat. 4644, as amended by Pub. L. 104–303, [title V, §515, Oct. 12, 1996](#), 110 Stat. 3763; Pub. L. 106–53, [title V, §505, Aug. 17, 1999](#), 113 Stat. 338; Pub. L. 106–541, [title III, §344, Dec. 11, 2000](#), 114 Stat. 2613; Pub. L. 110–114, [title V, §5012, Nov. 8, 2007](#), 121 Stat. 1195, provided that:

"(a) GREAT LAKES REMEDIAL ACTION PLANS.—

"(1) IN GENERAL.—The Secretary may provide technical, planning, and engineering assistance to State and local governments and nongovernmental entities designated by a State or local government in the development and implementation of remedial action plans for Areas of Concern in the Great Lakes identified under the Great Lakes Water Quality Agreement of 1978.

"(2) NON-FEDERAL SHARE.—

"(A) IN GENERAL.—Non-Federal interests shall contribute, in cash or by providing in-kind contributions, 35 percent of costs of activities for which assistance is provided under paragraph (1).

"(B) CONTRIBUTIONS BY ENTITIES.—Nonprofit public or private entities may contribute all or a

portion of the non-Federal share.

"(b) SEDIMENT REMEDIATION PROJECTS.—

"(1) IN GENERAL.—The Secretary, in consultation with the Administrator of the Environmental Protection Agency (acting through the Great Lakes National Program Office), may conduct pilot- and full-scale projects of promising technologies to remediate contaminated sediments in freshwater coastal regions in the Great Lakes basin. The Secretary shall conduct not fewer than 3 full-scale projects under this subsection.

"(2) SITE SELECTION FOR PROJECTS.—In selecting the sites for the technology projects, the Secretary shall give priority consideration to Saginaw Bay, Michigan, Sheboygan Harbor, Wisconsin, Grand Calumet River, Indiana, Ashtabula River, Ohio, Buffalo River, New York, and Duluth-Superior Harbor, Minnesota and Wisconsin.

"(3) NON-FEDERAL SHARE.—Non-Federal interests shall contribute 35 percent of costs of projects under this subsection. Such costs may be paid in cash or by providing in-kind contributions.

"(c) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Secretary to carry out this section \$10,000,000 for each of fiscal years 2001 through 2012."

EX. ORD. NO. 13340. ESTABLISHMENT OF GREAT LAKES INTERAGENCY TASK FORCE AND PROMOTION OF A REGIONAL COLLABORATION OF NATIONAL SIGNIFICANCE FOR THE GREAT LAKES

Ex. Ord. No. 13340, May 18, 2004, 69 F.R. 29043, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to help establish a regional collaboration of national significance for the Great Lakes, it is hereby ordered as follows:

SECTION 1. Policy. The Great Lakes are a national treasure constituting the largest freshwater system in the world. The United States and Canada have made great progress addressing past and current environmental impacts to the Great Lakes ecology. The Federal Government is committed to making progress on the many significant challenges that remain. Along with numerous State, tribal, and local programs, over 140 Federal programs help fund and implement environmental restoration and management activities throughout the Great Lakes system. A number of intergovernmental bodies are providing leadership in the region to address environmental and resource management issues in the Great Lakes system. These activities would benefit substantially from more systematic collaboration and better integration of effort. It is the policy of the Federal Government to support local and regional efforts to address environmental challenges and to encourage local citizen and community stewardship. To this end, the Federal Government will partner with the Great Lakes States, tribal and local governments, communities, and other interests to establish a regional collaboration to address nationally significant environmental and natural resource issues involving the Great Lakes. It is the further policy of the Federal Government that its executive departments and agencies will ensure that their programs are funding effective, coordinated, and environmentally sound activities in the Great Lakes system.

SEC. 2. Definitions. For purposes of this order:

(a) "Great Lakes" means Lake Ontario, Lake Erie, Lake Huron (including Lake Saint Clair), Lake Michigan, and Lake Superior, and the connecting channels (Saint Marys River, Saint Clair River, Detroit River, Niagara River, and Saint Lawrence River to the Canadian Border).

(b) "Great Lakes system" means all the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes.

SEC. 3. Great Lakes Interagency Task Force.

(a) Task Force Purpose. To further the policy described in section 1 of this order, there is established, within the Environmental Protection Agency for administrative purposes, the "Great Lakes Interagency Task Force" (Task Force) to:

(i) Help convene and establish a process for collaboration among the members of the Task Force and the members of the Working Group that is established in paragraph b(ii) of this section, with the Great Lakes States, local communities, tribes, regional bodies, and other interests in the Great Lakes region regarding policies, strategies, plans, programs, projects, activities, and priorities for the Great Lakes system.

(ii) Collaborate with Canada and its provinces and with bi-national bodies involved in the Great Lakes region regarding policies, strategies, projects, and priorities for the Great Lakes

system.

(iii) Coordinate the development of consistent Federal policies, strategies, projects, and priorities for addressing the restoration and protection of the Great Lakes system and assisting in the appropriate management of the Great Lakes system.

(iv) Develop outcome-based goals for the Great Lakes system relying upon, among other things, existing data and science-based indicators of water quality and related environmental factors. These goals shall focus on outcomes such as cleaner water, sustainable fisheries, and biodiversity of the Great Lakes system and ensure that Federal policies, strategies, projects, and priorities support measurable results.

(v) Exchange information regarding policies, strategies, projects, and activities of the agencies represented on the Task Force related to the Great Lakes system.

(vi) Work to coordinate government action associated with the Great Lakes system.

(vii) Ensure coordinated Federal scientific and other research associated with the Great Lakes system.

(viii) Ensure coordinated government development and implementation of the Great Lakes portion of the Global Earth Observation System of Systems.

(ix) Provide assistance and support to agencies represented on the Task Force in their activities related to the Great Lakes system.

(x) Submit a report to the President by May 31, 2005, and thereafter as appropriate, that summarizes the activities of the Task Force and provides any recommendations that would, in the judgment of the Task Force, advance the policy set forth in section 1 of this order.

(b) Membership and Operation.

(i) The Task Force shall consist exclusively of the following officers of the United States: the Administrator of the Environmental Protection Agency (who shall chair the Task Force), the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Secretary of Homeland Security, the Secretary of the Army, and the Chairman of the Council on Environmental Quality. A member of the Task Force may designate, to perform the Task Force functions of the member, any person who is part of the member's department, agency, or office and who is either an officer of the United States appointed by the President or a full-time employee serving in a position with pay equal to or greater than the minimum rate payable for GS-15 of the General Schedule. The Task Force shall report to the President through the Chairman of the Council on Environmental Quality.

(ii) The Task Force shall establish a "Great Lakes Regional Working Group" (Working Group) composed of the appropriate regional administrator or director with programmatic responsibility for the Great Lakes system for each agency represented on the Task Force including: the Great Lakes National Program Office of the Environmental Protection Agency; the United States Fish and Wildlife Service, National Park Service, and United States Geological Survey within the Department of the Interior; the Natural Resources Conservation Service and the Forest Service of the Department of Agriculture; the National Oceanic and Atmospheric Administration of the Department of Commerce; the Department of Housing and Urban Development; the Department of Transportation; the Coast Guard within the Department of Homeland Security; and the Army Corps of Engineers within the Department of the Army. The Working Group will coordinate and make recommendations on how to implement the policies, strategies, projects, and priorities of the Task Force.

(c) Management Principles for Regional Collaboration of National Significance. To further the policy described in section 1, the Task Force shall recognize and apply key principles and foster conditions to ensure successful collaboration. To that end, the Environmental Protection Agency will coordinate the development of a set of principles of successful collaboration.

SEC. 4. *Great Lakes National Program Office.* The Great Lakes National Program Office of the Environmental Protection Agency shall assist the Task Force and the Working Group in the performance of their functions. The Great Lakes National Program Manager shall serve as chair of the Working Group.

SEC. 5. *Preservation of Authority.* Nothing in this order shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, regulatory, and legislative proposals. Nothing in this order shall be construed to affect the statutory authority or obligations of any Federal agency or any bi-national agreement with

Canada.

SEC. 6. *Judicial Review.* This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

¹ So in original.

² So in original. Probably should be capitalized.

³ So in original.

§1268a. Great Lakes restoration activities report

(a) For purposes of this section the following definitions apply:

(1) The terms "Great Lakes" and "Great Lakes State" have the same meanings as such terms have in section 1962d–22 of title 42.

(2) The term "Great Lakes restoration activities" means any Federal or State activity primarily or entirely within the Great Lakes watershed that seeks to improve the overall health of the Great Lakes ecosystem.

(b) Hereafter, not later than 45 days after submission of the budget of the President to Congress, the Director of the Office of Management and Budget, in coordination with the Governor of each Great Lakes State and the Great Lakes Interagency Task Force, shall submit to the appropriate authorizing and appropriating committees of the Senate and the House of Representatives a financial report, certified by the Secretary of each agency that has budget authority for Great Lakes restoration activities, containing—

(1) an interagency budget crosscut report that—

(A) displays the budget proposed, including any planned interagency or intra-agency transfer, for each of the Federal agencies that carries out Great Lakes restoration activities in the upcoming fiscal year, separately reporting the amount of funding to be provided under existing laws pertaining to the Great Lakes ecosystem; and

(B) identifies all expenditures in each of the 5 prior fiscal years by the Federal Government and State governments for Great Lakes restoration activities;

(2) a detailed accounting of all funds received and obligated by all Federal agencies and, to the extent available, State agencies using Federal funds, for Great Lakes restoration activities during the current and previous fiscal years;

(3) a budget for the proposed projects (including a description of the project, authorization level, and project status) to be carried out in the upcoming fiscal year with the Federal portion of funds for activities; and

(4) a listing of all projects to be undertaken in the upcoming fiscal year with the Federal portion of funds for activities.

(Pub. L. 113–76, div. E, title VII, §738, Jan. 17, 2014, 128 Stat. 238.)

CODIFICATION

Section was enacted as part of the Financial Services and General Government Appropriations Act, 2014, and also as part of the Consolidated Appropriations Act, 2014, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

§1269. Long Island Sound

(a) Office of Management Conference of the Long Island Sound Study

The Administrator shall continue the Management Conference of the Long Island Sound Study (hereinafter referred to as the "Conference") as established pursuant to section 1330 of this title, and shall establish an office (hereinafter referred to as the "Office") to be located on or near Long Island Sound.

(b) Administration and staffing of Office

The Office shall be headed by a Director, who shall be detailed by the Administrator, following consultation with the Administrators of EPA regions I and II, from among the employees of the Agency who are in civil service. The Administrator shall delegate to the Director such authority and detail such additional staff as may be necessary to carry out the duties of the Director under this section.

(c) Duties of Office

The Office shall assist the Management Conference of the Long Island Sound Study in carrying out its goals. Specifically, the Office shall—

(1) assist and support the implementation of the Comprehensive Conservation and Management Plan for Long Island Sound developed pursuant to section 1330 of this title, including efforts to establish, within the process for granting watershed general permits, a system for promoting innovative methodologies and technologies that are cost-effective and consistent with the goals of the Plan;

(2) conduct or commission studies deemed necessary for strengthened implementation of the Comprehensive Conservation and Management Plan including, but not limited to—

(A) population growth and the adequacy of wastewater treatment facilities,

(B) the use of biological methods for nutrient removal in sewage treatment plants,

(C) contaminated sediments, and dredging activities,

(D) nonpoint source pollution abatement and land use activities in the Long Island Sound watershed,

(E) wetland protection and restoration,

(F) atmospheric deposition of acidic and other pollutants into Long Island Sound,

(G) water quality requirements to sustain fish, shellfish, and wildlife populations, and the use of indicator species to assess environmental quality,

(H) State water quality programs, for their adequacy pursuant to implementation of the Comprehensive Conservation and Management Plan, and

(I) options for long-term financing of wastewater treatment projects and water pollution control programs.

(3) coordinate the grant, research and planning programs authorized under this section;

(4) coordinate activities and implementation responsibilities with other Federal agencies which have jurisdiction over Long Island Sound and with national and regional marine monitoring and research programs established pursuant to the Marine Protection, Research, and Sanctuaries Act [16 U.S.C. 1431 et seq., 1447 et seq.; 33 U.S.C. 1401 et seq., 2801 et seq.];

(5) provide administrative and technical support to the conference;

(6) collect and make available to the public publications, and other forms of information the conference determines to be appropriate, relating to the environmental quality of Long Island Sound;

(7) not more than two years after the date of the issuance of the final Comprehensive Conservation and Management Plan for Long Island Sound under section 1330 of this title, and biennially thereafter, issue a report to the Congress which—

(A) summarizes the progress made by the States in implementing the Comprehensive Conservation and Management Plan;

(B) summarizes any modifications to the Comprehensive Conservation and Management Plan in the twelve-month period immediately preceding such report; and

(C) incorporates specific recommendations concerning the implementation of the Comprehensive Conservation and Management Plan; and

(8) convene conferences and meetings for legislators from State governments and political subdivisions thereof for the purpose of making recommendations for coordinating legislative efforts to facilitate the environmental restoration of Long Island Sound and the implementation of the Comprehensive Conservation and Management Plan.

(d) Grants

(1) The Administrator is authorized to make grants for projects and studies which will help implement the Long Island Sound Comprehensive Conservation and Management Plan. Special emphasis shall be given to implementation, research and planning, enforcement, and citizen involvement and education.

(2) State, interstate, and regional water pollution control agencies, and other public or nonprofit private agencies, institutions, and organizations held to be eligible for grants pursuant to this subsection.

(3) Citizen involvement and citizen education grants under this subsection shall not exceed 95 per centum of the costs of such work. All other grants under this subsection shall not exceed 50 per centum of the research, studies, or work. All grants shall be made on the condition that the non-Federal share of such costs are provided from non-Federal sources.

(e) Assistance to distressed communities**(1) Eligible communities**

For the purposes of this subsection, a distressed community is any community that meets affordability criteria established by the State in which the community is located, if such criteria are developed after public review and comment.

(2) Priority

In making assistance available under this section for the upgrading of wastewater treatment facilities, the Administrator may give priority to a distressed community.

(f) Authorizations

(1) There is authorized to be appropriated to the Administrator for the implementation of this section, other than subsection (d) of this section, such sums as may be necessary for each of the fiscal years 2001 through 2010.

(2) There is authorized to be appropriated to the Administrator for the implementation of subsection (d) of this section not to exceed \$40,000,000 for each of fiscal years 2001 through 2010.

(June 30, 1948, ch. 758, title I, §119, as added Pub. L. 101–596, [title II, §202, Nov. 16, 1990](#), 104 Stat. 3004; amended Pub. L. 104–303, [title V, §583, Oct. 12, 1996](#), 110 Stat. 3791; Pub. L. 106–457, [title IV, §§402–404, Nov. 7, 2000](#), 114 Stat. 1973; Pub. L. 109–137, [§1, Dec. 22, 2005](#), 119 Stat. 2646.)

REFERENCES IN TEXT

The Marine Protection, Research, and Sanctuaries Act, referred to in subsec. (c)(4), probably means the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92–532, [Oct. 23, 1972](#), 86 Stat. 1052, as amended, which is classified generally to chapters 32 (§1431 et seq.) and 32A (§1447 et seq.) of Title 16, Conservation, and chapters 27 (§1401 et seq.) and 41 (§2801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1401 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–137 substituted "2010" for "2005" in pars. (1) and (2).

2000—Subsec. (c)(1). Pub. L. 106–457, §402, inserted before semicolon at end ", including efforts to establish, within the process for granting watershed general permits, a system for promoting innovative methodologies and technologies that are cost-effective and consistent with the goals of the Plan".

Subsec. (e). Pub. L. 106–457, §403(2), added subsec. (e). Former subsec. (e) redesignated (f).

Subsec. (f). Pub. L. 106–457, §§403(1), 404, redesignated subsec. (e) as (f) and substituted "2001 through 2005" for "1991 through 2001" in par. (1) and "not to exceed \$40,000,000 for each of fiscal years 2001 through 2005" for "not to exceed \$3,000,000 for each of the fiscal years 1991 through 2001" in par. (2).

1996—Subsec. (e). Pub. L. 104–303 substituted "2001" for "1996" in pars. (1) and (2).

LONG ISLAND SOUND STEWARDSHIP

Pub. L. 109–359, [Oct. 16, 2006](#), 120 Stat. 2049, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Long Island Sound Stewardship Act of 2006'.

"SEC. 2. FINDINGS AND PURPOSE.

"(a) **FINDINGS.**—Congress finds that—

"(1) Long Island Sound is a national treasure of great cultural, environmental, and ecological importance;

"(2) 8,000,000 people live within the Long Island Sound watershed and 28,000,000 people (approximately 10 percent of the population of the United States) live within 50 miles of Long Island Sound;

"(3) activities that depend on the environmental health of Long Island Sound contribute more than \$5,000,000,000 each year to the regional economy;

"(4) the portion of the shoreline of Long Island Sound that is accessible to the general public (estimated at less than 20 percent of the total shoreline) is not adequate to serve the needs of the

people living in the area;

"(5) existing shoreline facilities are in many cases overburdened and underfunded;

"(6) large parcels of open space already in public ownership are strained by the effort to balance the demand for recreation with the needs of sensitive natural resources;

"(7) approximately 1/3 of the tidal marshes of Long Island Sound have been filled, and much of the remaining marshes have been ditched, diked, or impounded, reducing the ecological value of the marshes; and

"(8) much of the remaining exemplary natural landscape is vulnerable to further development.

"(b) PURPOSE.—The purpose of this Act is to establish the Long Island Sound Stewardship Initiative to identify, protect, and enhance upland sites within the Long Island Sound ecosystem with significant ecological, educational, open space, public access, or recreational value through a bi-State network of sites best exemplifying these values.

"SEC. 3. DEFINITIONS.

"In this Act, the following definitions apply:

"(1) ADMINISTRATOR.—The term 'Administrator' means the Administrator of the Environmental Protection Agency.

"(2) ADVISORY COMMITTEE.—The term 'Advisory Committee' means the Long Island Sound Stewardship Advisory Committee established by section 8.

"(3) REGION.—The term 'Region' means the Long Island Sound Stewardship Initiative Region established by section 4(a).

"(4) STATE.—The term 'State' means each of the States of Connecticut and New York.

"(5) STEWARDSHIP.—The term 'stewardship' means land acquisition, land conservation agreements, site planning, plan implementation, land and habitat management, public access improvements, site monitoring, and other activities designed to enhance and preserve natural resource-based recreation and ecological function of upland areas.

"(6) STEWARDSHIP SITE.—The term 'stewardship site' means any area of State, local, or tribal government, or privately owned land within the Region that is designated by the Administrator under section 5(a).

"(7) SYSTEMATIC SITE SELECTION.—The term 'systematic site selection' means a process of selecting stewardship sites that—

"(A) has explicit goals, methods, and criteria;

"(B) produces feasible, repeatable, and defensible results;

"(C) provides for consideration of natural, physical, and biological patterns;

"(D) addresses replication, connectivity, species viability, location, and public recreation values;

"(E) uses geographic information systems technology and algorithms to integrate selection criteria; and

"(F) will result in achieving the goals of stewardship site selection at the lowest cost.

"(8) QUALIFIED APPLICANTS.—The term 'qualified applicant' means a non-Federal person that owns title to property located within the borders of the Region.

"(9) THREAT.—The term 'threat' means a threat that is likely to destroy or seriously degrade a conservation target or a recreation area.

"SEC. 4. LONG ISLAND SOUND STEWARDSHIP INITIATIVE REGION.

"(a) ESTABLISHMENT.—There is established in the States of Connecticut and New York the Long Island Sound Stewardship Initiative Region.

"(b) BOUNDARIES.—The Region consists of the immediate coastal upland areas along—

"(1) Long Island Sound between mean high water and the inland boundary, as described on the map entitled 'Long Island Sound Stewardship Region' and dated April 21, 2004; and

"(2) the Peconic Estuary as described on the map entitled 'Peconic Estuary Program Study Area Boundaries' and included in the Comprehensive Conservation and Management Plan for the Peconic Estuary Program and dated November 15, 2001.

"SEC. 5. DESIGNATION OF STEWARDSHIP SITES.

"(a) IN GENERAL.—The Administrator may designate a stewardship site in accordance with this Act any area that contributes to accomplishing the purpose of this Act.

"(b) PUBLICATION OF LIST OF RECOMMENDED SITES.—The Administrator shall—

"(1) publish in the Federal Register and make available in general circulation in the States of Connecticut and New York the list of sites recommended by the Advisory Committee; and

"(2) provide a 90-day period for—

"(A) the submission of public comment on the list; and

"(B) an opportunity for owners of such sites to decline designation of such sites as stewardship sites.

"(c) **OPINION REGARDING OWNER'S RESPONSIBILITIES.**—The Administrator may not designate an area as a stewardship site under this Act unless the Administrator provides to the owner of the area, and the owner acknowledges to the Administrator receipt of, a comprehensive opinion in plain English setting forth expressly the responsibility of the owner that arises from such designation.

"(d) **DESIGNATION OF STEWARDSHIP SITES.**—Not later than 150 days after receiving from the Advisory Committee its list of recommended sites, the Administrator—

"(1) shall review the recommendations of the Advisory Committee; and

"(2) may designate as a stewardship site any site included in the list.

"SEC. 6. RECOMMENDATIONS BY ADVISORY COMMITTEE.

"(a) **IN GENERAL.**—The Advisory Committee shall—

"(1) in accordance with this section, evaluate applications—

"(A) for designation of areas as stewardship sites;

"(B) to develop management plans to address threats to stewardship sites; and

"(C) to act on opportunities to protect and enhance stewardship sites;

"(2) develop recommended guidelines, criteria, schedules, and due dates for the submission of applications and the evaluation by the Advisory Committee of information to recommend areas for designation as stewardship sites that fulfill terms of a multi-year management plan;

"(3) recommend to the Administrator a list of sites for designation as stewardship sites that further the purpose of this Act;

"(4) develop management plans to address threats to stewardship sites;

"(5) raise awareness of the values of and threats to stewardship sites;

"(6) recommend that the Administrator award grants to qualified applicants; and

"(7) recommend to the Administrator ways to leverage additional resources for improved stewardship of the Region.

"(b) **IDENTIFICATION OF SITES.**—

"(1) **IN GENERAL.**—Any qualified applicant may submit an application to the Advisory Committee to have a site recommended to the Administrator for designation as a stewardship site.

"(2) **IDENTIFICATION.**—The Advisory Committee shall review each application submitted under this subsection to determine whether the site exhibits values that promote the purpose of this Act.

"(3) **NATURAL RESOURCE-BASED RECREATION AREAS.**—In reviewing an application for recommendation of a recreation area for designation as a stewardship site, the Advisory Committee may use a selection technique that includes consideration of—

"(A) public access;

"(B) community support;

"(C) high population density;

"(D) environmental justice (as defined in section 385.3 of title 33, Code of Federal Regulations (or successor regulations));

"(E) open spaces; and

"(F) cultural, historic, and scenic characteristics.

"(4) **NATURAL AREAS WITH ECOLOGICAL VALUE.**—In reviewing an application for recommendation of a natural area with ecological value for designation as a stewardship site, the Advisory Committee may use a selection technique that includes consideration of—

"(A) measurable conservation targets for the Region; and

"(B) prioritizing new sites using systematic site selection, which shall include consideration of—

"(i) ecological uniqueness;

"(ii) species viability;

"(iii) habitat heterogeneity;

"(iv) size;

"(v) quality;

- "(vi) open spaces;
- "(vii) land cover;
- "(viii) scientific, research, or educational value; and
- "(ix) threats.

"(5) DEVIATION FROM PROCESS.—The Advisory Committee may accept an application to recommend a site other than as provided in this subsection, if the Advisory Committee—

"(A) determines that the site makes significant ecological or recreational contributions to the Region; and

"(B) provides to the Administrator the reasons for deviating from the process otherwise described in this subsection.

"(c) SUBMISSION OF LIST OF RECOMMENDED SITES.—

"(1) IN GENERAL.—After completion of the site identification process set forth in subsection (b), the Advisory Committee shall submit to the Administrator its list of sites recommended for designation as stewardship sites.

"(2) LIMITATION.—The Advisory Committee shall not include a site in the list submitted under this subsection unless, prior to submission of the list, the owner of the site is—

"(A) notified of the inclusion of the site in the list; and

"(B) allowed to decline inclusion of the site in the list.

"(3) PUBLIC COMMENT.—In identifying sites for inclusion in the list, the Advisory Committee shall provide an opportunity for submission of, and consider, public comments.

"SEC. 7. GRANTS AND ASSISTANCE.

"(a) IN GENERAL.—The Administrator may provide grants, subject to the availability of appropriations, and other assistance for projects to fulfill the purpose of this Act.

"(b) FEDERAL SHARE.—The Federal share of the cost of an activity carried out using any assistance or grant under this Act shall not exceed 60 percent of the total cost of the activity.

"SEC. 8. LONG ISLAND SOUND STEWARDSHIP ADVISORY COMMITTEE.

"(a) ESTABLISHMENT.—There is established a committee to be known as the 'Long Island Sound Stewardship Advisory Committee'.

"(b) MEMBERSHIP.—

"(1) IN GENERAL.—The Administrator may appoint the members of the Advisory Committee in accordance with this subsection and the guidance in section 320(c) of the Federal Water Pollution Control Act (33 U.S.C. 1330(c)), except that the Governor of each State may appoint 2 members of the Advisory Committee.

"(2) ADDITIONAL MEMBERS.—In addition to the other members appointed under this subsection, the Advisory Committee may include—

"(A) a representative of the Regional Plan Association;

"(B) a representative of marine trade organizations; and

"(C) a representative of private landowner interests.

"(3) CONSIDERATION OF INTERESTS.—In appointing members of the Advisory Committee, the Administrator shall consider—

"(A) Federal, State, and local government interests and tribal interests;

"(B) the interests of nongovernmental organizations;

"(C) academic interests;

"(D) private interests including land, agriculture, and business interests; and

"(E) recreational and commercial fishing interests.

"(4) CHAIRPERSON.—In addition to the other members appointed under this subsection, the Administrator may appoint as a member of the Advisory Committee an individual to serve as the Chairperson, who may be the Director of the Long Island Sound Office of the Environmental Protection Agency.

"(5) COMPLETION OF APPOINTMENTS.—The Administrator shall complete the appointment of all members of the Advisory Committee by not later than 180 days after the date of enactment of this Act [Oct. 16, 2006].

"(A) [sic] VACANCIES.—A vacancy on the Advisory Committee—

"(i) shall be filled not later than 90 days after the vacancy occurs;

"(ii) shall not affect the powers of the Advisory Committee; and

"(iii) shall be filled in the same manner as the original appointment was made.

"(c) TERM.—

"(1) IN GENERAL.—A member of the Advisory Committee shall be appointed for a term of 4 years.

"(2) MULTIPLE TERMS.—An individual may be appointed as a member of the Advisory Committee for more than 1 term.

"(d) POWERS.—The Advisory Committee may hold such hearings, meet and act at such times and places, take such testimony, and receive such evidence as the Advisory Committee considers advisable to carry out this Act.

"(e) MEETINGS.—

"(1) IN GENERAL.—The Advisory Committee shall meet at the call of the Chairperson, but no fewer than 4 times each year.

"(2) INITIAL MEETING.—Not later than 30 days after the date on which all members of the Advisory Committee have been appointed, the Chairperson shall call the initial meeting of the Advisory Committee.

"(3) QUORUM.—A majority of the members of the Advisory Committee shall constitute a quorum, but a lesser number of members may hold hearings.

"(f) ADAPTIVE MANAGEMENT.—

"(1) IN GENERAL.—The Advisory Committee shall use an adaptive management framework to identify the best policy initiatives and actions through—

"(A) definition of strategic goals;

"(B) definition of policy options for methods to achieve strategic goals;

"(C) establishment of measures of success;

"(D) identification of uncertainties;

"(E) development of informative models of policy implementation;

"(F) separation of the landscape into geographic units;

"(G) monitoring key responses at different spatial and temporal scales; and

"(H) evaluation of outcomes and incorporation into management strategies.

"(2) APPLICATION OF ADAPTIVE MANAGEMENT FRAMEWORK.—The Advisory Committee shall apply the adaptive management framework to the process for making recommendations under subsections (b) through (f) of section 6 to the Administrator regarding sites that should be designated as stewardship sites.

"(3) ADAPTIVE MANAGEMENT.—The adaptive management framework required by this subsection shall consist of a scientific process—

"(A) for—

"(i) developing predictive models;

"(ii) making management policy decisions based upon the model outputs;

"(iii) revising the management policies as data become available with which to evaluate the policies; and

"(iv) acknowledging uncertainty, complexity, and variance in the spatial and temporal aspects of natural systems; and

"(B) that requires that management be viewed as experimental.

"(g) TERMINATION OF ADVISORY COMMITTEE.—The Advisory Committee shall terminate on December 31, 2011.

"SEC. 9. REPORTS.

"(a) ADMINISTRATOR.—The Administrator shall publish and make available to the public on the Internet and in paper form—

"(1) not later than 1 year after the date of enactment of this Act [Oct. 16, 2006], a report that

—

"(A) assesses the role of this Act in protecting the Long Island Sound;

"(B) establishes in coordination with the Advisory Committee guidelines, criteria, schedules, and due dates for evaluating information to designate stewardship sites;

"(C) includes information about any grants that are available for the purchase of land or property rights to protect stewardship sites; and

"(D) accounts for funds received and expended during the previous fiscal year;

"(2) an update of such report, at least every other year; and

"(3) information on funding and any new stewardship sites more frequently than every other

year.

"(b) **ADVISORY COMMITTEE.**—

"(1) **REPORT.**—For each of fiscal years 2007 through 2011, the Advisory Committee shall submit to the Administrator and the decisionmaking body of the Long Island Sound Study Management Conference established under section 320 of the Federal Water Pollution Control Act (33 U.S.C. 1330), an annual report that contains—

"(A) a detailed statement of the findings and conclusions of the Advisory Committee since the last report under this subsection;

"(B) a description of all sites recommended by the Advisory Committee to the Administrator for designation as stewardship sites;

"(C) the recommendations of the Advisory Committee for such legislation and administrative actions as the Advisory Committee considers appropriate; and

"(D) in accordance with paragraph (2), the recommendations of the Advisory Committee for the awarding of grants.

"(2) **RECOMMENDATION FOR GRANTS.**—

"(A) **IN GENERAL.**—The Advisory Committee shall recommend that the Administrator award grants to qualified applicants to help to secure and improve the open space, public access, or ecological values of stewardship sites, through—

"(i) purchase of the property of a stewardship site;

"(ii) purchase of relevant property rights to a stewardship site; or

"(iii) entering into any other binding legal arrangement that ensures that the values of a stewardship site are sustained, including entering into an arrangement with a land manager or property owner to develop or implement a management plan that is necessary for the conservation of natural resources.

"(B) **EQUITABLE DISTRIBUTION OF FUNDS.**—The Advisory Committee shall exert due diligence to ensure that its recommendations result in an equitable distribution of funds between the States.

"SEC. 10. PRIVATE PROPERTY PROTECTION; NO REGULATORY AUTHORITY.

"(a) **ACCESS TO PRIVATE PROPERTY.**—Nothing in this Act—

"(1) requires any private property owner to allow public access (including Federal, State, or local government access) to the private property; or

"(2) modifies the application of any provision of Federal, State, or local law with regard to public access to or use of private property, except as entered into by voluntary agreement of the owner or custodian of the property.

"(b) **LIABILITY.**—Establishment of the Region does not create any liability, or have any effect on any liability under any other law, of any private property owner with respect to any person injured on the private property.

"(c) **RECOGNITION OF AUTHORITY TO CONTROL LAND USE.**—Nothing in this Act modifies the authority of Federal, State, or local governments to regulate land use.

"(d) **PARTICIPATION OF PRIVATE PROPERTY OWNERS NOT REQUIRED.**—Nothing in this Act requires the owner of any private property located within the boundaries of the Region to participate in any land conservation, financial or technical assistance, or other programs established under this Act.

"(e) **PURCHASE OF LAND OR INTEREST IN LAND FROM WILLING SELLERS ONLY.**—Funds appropriated to carry out this Act may be used to purchase land or interests in land only from willing sellers.

"(f) **MANNER OF ACQUISITION.**—All acquisitions of land under this Act shall be made in a voluntary manner and shall not be the result of forced takings.

"(g) **EFFECT OF ESTABLISHMENT.**—

"(1) **IN GENERAL.**—The boundaries of the Region represent the area within which Federal funds appropriated for the purpose of this Act may be expended.

"(2) **REGULATORY AUTHORITY.**—The establishment of the Region and the boundaries of the Region do not provide any regulatory authority not in existence immediately before the enactment of this Act [Oct. 16, 2006] on land use in the Region by any management entity, except for such property rights as may be purchased from or donated by the owner of the property (including public lands donated by a State or local government).

"SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

"(a) **IN GENERAL.**—There is authorized to be appropriated to the Administrator \$25,000,000 for each of fiscal years 2007 through 2011 to carry out this Act, including for—

- "(1) acquisition of land and interests in land;
- "(2) development and implementation of site management plans;
- "(3) site enhancements to reduce threats or promote stewardship; and
- "(4) administrative expenses of the Advisory Committee and the Administrator.

"(b) **USE OF FUNDS.**—Amounts made available to the Administrator under this section each fiscal year shall be used by the Administrator after reviewing the recommendations included in the annual reports of the Advisory Committee under section 9.

"(c) **AUTHORIZATION OF GIFTS, DEVISES, AND BEQUESTS FOR SYSTEM.**—In furtherance of the purpose of this Act, the Administrator may accept and use any gift, devise, or bequest of real or personal property, proceeds therefrom, or interests therein, to carry out this Act. Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude, if such terms are considered by the Administrator to be in accordance with law and compatible with the purpose for which acceptance is sought.

"(d) **LIMITATION ON ADMINISTRATIVE COSTS.**—Of the amount available each fiscal year to carry out this Act, not more than 8 percent may be used for administrative costs."

§1270. Lake Champlain Basin Program

(a) Establishment

(1) In general

There is established a Lake Champlain Management Conference to develop a comprehensive pollution prevention, control, and restoration plan for Lake Champlain. The Administrator shall convene the management conference within ninety days of November 16, 1990.

(2) Implementation

The Administrator—

(A) may provide support to the State of Vermont, the State of New York, and the New England Interstate Water Pollution Control Commission for the implementation of the Lake Champlain Basin Program; and

(B) shall coordinate actions of the Environmental Protection Agency under subparagraph (A) with the actions of other appropriate Federal agencies.

(b) Membership

The Members of the Management Conference shall be comprised of—

- (1) the Governors of the States of Vermont and New York;
- (2) each interested Federal agency, not to exceed a total of five members;
- (3) the Vermont and New York Chairpersons of the Vermont, New York, Quebec Citizens Advisory Committee for the Environmental Management of Lake Champlain;
- (4) four representatives of the State legislature of Vermont;
- (5) four representatives of the State legislature of New York;
- (6) six persons representing local governments having jurisdiction over any land or water within the Lake Champlain basin, as determined appropriate by the Governors; and
- (7) eight persons representing affected industries, nongovernmental organizations, public and private educational institutions, and the general public, as determined appropriate by the trigovernmental Citizens Advisory Committee for the Environmental Management of Lake Champlain, but not to be current members of the Citizens Advisory Committee.

(c) Technical Advisory Committee

(1) The Management Conference shall, not later than one hundred and twenty days after November 16, 1990, appoint a Technical Advisory Committee.

(2) Such Technical Advisory Committee shall consist of officials of: appropriate departments and agencies of the Federal Government; the State governments of New York and Vermont; and governments of political subdivisions of such States; and public and private research institutions.

(d) Research program

The Management Conference shall establish a multi-disciplinary environmental research program for Lake Champlain. Such research program shall be planned and conducted jointly with the Lake Champlain Research Consortium.

(e) Pollution prevention, control, and restoration plan

(1) Not later than three years after November 16, 1990, the Management Conference shall publish a pollution prevention, control, and restoration plan for Lake Champlain.

(2) The Plan developed pursuant to this section shall—

(A) identify corrective actions and compliance schedules addressing point and nonpoint sources of pollution necessary to restore and maintain the chemical, physical, and biological integrity of water quality, a balanced, indigenous population of shellfish, fish and wildlife, recreational, and economic activities in and on the lake;

(B) incorporate environmental management concepts and programs established in State and Federal plans and programs in effect at the time of the development of such plan;

(C) clarify the duties of Federal and State agencies in pollution prevention and control activities, and to the extent allowable by law, suggest a timetable for adoption by the appropriate Federal and State agencies to accomplish such duties within a reasonable period of time;

(D) describe the methods and schedules for funding of programs, activities, and projects identified in the Plan, including the use of Federal funds and other sources of funds;

(E) include a strategy for pollution prevention and control that includes the promotion of pollution prevention and management practices to reduce the amount of pollution generated in the Lake Champlain basin; and

(F) be reviewed and revised, as necessary, at least once every 5 years, in consultation with the Administrator and other appropriate Federal agencies.

(3) The Administrator, in cooperation with the Management Conference, shall provide for public review and comment on the draft Plan. At a minimum, the Management Conference shall conduct one public meeting to hear comments on the draft plan in the State of New York and one such meeting in the State of Vermont.

(4) Not less than one hundred and twenty days after the publication of the Plan required pursuant to this section, the Administrator shall approve such plan if the plan meets the requirements of this section and the Governors of the States of New York and Vermont concur.

(5) Upon approval of the plan, such plan shall be deemed to be an approved management program for the purposes of section 1329(h) of this title and such plan shall be deemed to be an approved comprehensive conservation and management plan pursuant to section 1330 of this title.

(f) Grant assistance

(1) The Administrator may, in consultation with participants in the Lake Champlain Basin Program, make grants to State, interstate, and regional water pollution control agencies, and public or nonprofit agencies, institutions, and organizations.

(2) Grants under this subsection shall be made for assisting research, surveys, studies, and modeling and technical and supporting work necessary for the development and implementation of the Plan.

(3) The amount of grants to any person under this subsection for a fiscal year shall not exceed 75 per centum of the costs of such research, survey, study and work and shall be made available on the condition that non-Federal share of such costs are provided from non-Federal sources.

(4) The Administrator may establish such requirements for the administration of grants as he determines to be appropriate.

(g) Definitions

In this section:

(1) Lake Champlain Basin Program

The term "Lake Champlain Basin Program" means the coordinated efforts among the Federal Government, State governments, and local governments to implement the Plan.

(2) Lake Champlain drainage basin

The term "Lake Champlain drainage basin" means all or part of Clinton, Franklin, Hamilton, Warren, Essex, and Washington counties in the State of New York and all or part of Franklin, Grand Isle, Chittenden, Addison, Rutland, Bennington, Lamoille, Orange, Washington, Orleans, and Caledonia counties in Vermont, that contain all of the streams, rivers, lakes, and other bodies of water, including wetlands, that drain into Lake Champlain.

(3) Plan

The term "Plan" means the plan developed under subsection (e) of this section.

(h) No effect on certain authority

Nothing in this section—

(1) affects the jurisdiction or powers of—

(A) any department or agency of the Federal Government or any State government; or
 (B) any international organization or entity related to Lake Champlain created by treaty or memorandum to which the United States is a signatory;

(2) provides new regulatory authority for the Environmental Protection Agency; or
 (3) affects section 304 of the Great Lakes Critical Programs Act of 1990 (Public Law 101–596; 33 U.S.C. 1270 note).

(i) Authorization

There are authorized to be appropriated to the Environmental Protection Agency to carry out this section—

- (1) \$2,000,000 for each of fiscal years 1991, 1992, 1993, 1994, and 1995;
- (2) such sums as are necessary for each of fiscal years 1996 through 2003; and
- (3) \$11,000,000 for each of fiscal years 2004 through 2008.

(June 30, 1948, ch. 758, title I, §120, as added Pub. L. 101–596, title III, §303, Nov. 16, 1990, 104 Stat. 3006; amended Pub. L. 107–303, title II, §202, Nov. 27, 2002, 116 Stat. 2358.)

AMENDMENTS

2002—Pub. L. 107–303, §202(1), substituted "Lake Champlain Basin Program" for "Lake Champlain Management Conference" in section catchline.

Subsec. (a). Pub. L. 107–303, §202(1), (2), designated existing provisions as par. (1), inserted heading, and added par. (2).

Subsec. (d). Pub. L. 107–303, §202(3), struck out par. (1) designation before "The Management".

Subsec. (e)(1). Pub. L. 107–303, §202(4)(A), struck out "(hereafter in this section referred to as the 'Plan') after 'restoration plan'".

Subsec. (e)(2)(F). Pub. L. 107–303, §202(4)(B), added subpar. (F).

Subsec. (f)(1). Pub. L. 107–303, §202(5)(A), substituted "participants in the Lake Champlain Basin Program," for "the Management Conference,".

Subsec. (f)(2). Pub. L. 107–303, §202(5)(B), substituted "development and implementation of the Plan" for "development of the Plan and for retaining expert consultants in support of litigation undertaken by the State of New York and the State of Vermont to compel cleanup or obtain cleanup damage costs from persons responsible for pollution of Lake Champlain".

Subsec. (g). Pub. L. 107–303, §202(6)(A), substituted "Definitions" for " 'Lake Champlain drainage basin' defined" in subsec. heading, inserted introductory provisions, added par. (1), inserted par. (2) designation and heading after par. (1) and inserted "The term" before " 'Lake Champlain drainage".

Subsec. (g)(2). Pub. L. 107–303, §202(6)(B), inserted "Hamilton," after "Franklin," and "Bennington," after "Rutland,".

Subsec. (g)(3). Pub. L. 107–303, §202(6)(C), added par. (3).

Subsec. (h). Pub. L. 107–303, §202(7), added subsec. (h) and struck out heading and text of former subsec. (h). Text read as follows: "Nothing in this section shall be construed so as to affect the jurisdiction or powers of—

"(1) any department or agency of the Federal Government or any State government; or

"(2) any international organization or entity related to Lake Champlain created by treaty or memorandum to which the United States is a signatory."

Subsec. (i). Pub. L. 107–303, §202(8), substituted "section—" for "section \$2,000,000", inserted " (1) \$2,000,000" before "for each of fiscal years 1991,", substituted "1995;" for "1995.", and added pars. (2) and (3).

FEDERAL PROGRAM COORDINATION

Section 304 of Pub. L. 101–596, as amended by Pub. L. 104–127, title III, §336(a)(2)(F), Apr. 4, 1996, 110 Stat. 1005, provided that:

"(a) DESIGNATION OF LAKE CHAMPLAIN AS A PRIORITY AREA UNDER THE ENVIRONMENTAL QUALITY INCENTIVES PROGRAM.—

"(1) IN GENERAL.—Notwithstanding any other provision of law, the Lake Champlain basin, as defined under section 120(h) of the Federal Water Pollution Control Act [33 U.S.C. 1270(h)], shall be designated by the Secretary of Agriculture as a priority area under the environmental quality incentives program established under chapter 4 of subtitle D of title XII of the Food Security Act of 1985 [16 U.S.C. 3839aa et seq.].

"(2) TECHNICAL ASSISTANCE REIMBURSEMENT.—To carry out the purposes of this subsection, the

technical assistance reimbursement from the Agricultural Stabilization and Conservation Service authorized under the Soil Conservation and Domestic Allotment Act [16 U.S.C. 590a et seq.], shall be increased from 5 per centum to 10 per centum.

"(3) COMPREHENSIVE AGRICULTURAL MONITORING.—The Secretary, in consultation with the Management Conference and appropriate State and Federal agencies, shall develop a comprehensive agricultural monitoring and evaluation network for all major drainages within the Lake Champlain basin.

"(4) ALLOCATION OF FUNDS.—In allocating funds under this subsection, the Secretary of Agriculture shall consult with the Management Conference established under section 120 of the Federal Water Pollution Control Act and to the extent allowable by law, allocate funds to those agricultural enterprises located at sites that the Management Conference determines to be priority sites, on the basis of a concern for ensuring implementation of nonpoint source pollution controls throughout the Lake Champlain basin.

"(b) COOPERATION OF THE UNITED STATES GEOLOGICAL SURVEY OF THE DEPARTMENT OF THE INTERIOR.—For the purpose of enhancing and expanding basic data collection and monitoring in operation in the Lake Champlain basin, as defined under section 120 of the Federal Water Pollution Control Act [33 U.S.C. 1270], the Secretary of the Interior, acting through the heads of water resources divisions of the New York and New England districts of the United States Geological Survey, shall—

"(1) in cooperation with appropriate universities and private research institutions, and the appropriate officials of the appropriate departments and agencies of the States of New York and Vermont, develop an integrated geographic information system of the Lake Champlain basin;

"(2) convert all partial recording sites in the Lake Champlain basin to continuous monitoring stations with full gauging capabilities and status; and

"(3) establish such additional continuous monitoring station sites in the Lake Champlain basin as are necessary to carry out basic data collection and monitoring, as defined by the Secretary of the Interior, including groundwater mapping, and water quality and sediment data collection.

"(c) COOPERATION OF THE UNITED STATES FISH AND WILDLIFE SERVICE OF THE DEPARTMENT OF THE INTERIOR.—

"(1) RESOURCE CONSERVATION PROGRAM.—The Secretary of the Interior, acting through the United States Fish and Wildlife Service, in cooperation with the Lake Champlain Fish and Wildlife Management Cooperative and the Management Conference established pursuant to this subsection shall—

"(A) establish and implement a fisheries resources restoration, development and conservation program, including dedicating a level of hatchery production within the Lake Champlain basin at or above the level that existed immediately preceding the date of enactment of this Act [Nov. 16, 1990]; and

"(B) conduct a wildlife species and habitat assessment survey in the Lake Champlain basin, including—

"(i) a survey of Federal threatened and endangered species, listed or proposed for listing under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), New York State and State of Vermont threatened and endangered species and other species of special concern, migratory nongame species of management concern, and national resources plan species;

"(ii) a survey of wildlife habitats such as islands, wetlands, and riparian areas; and

"(iii) a survey of migratory bird populations breeding, migrating and wintering within the Lake Champlain basin.

"(2) To accomplish the purposes of paragraph (1), the Director of the United States Fish and Wildlife Service is authorized to carry out activities related to—

"(A) controlling sea lampreys and other nonindigenous aquatic animal nuisances;

"(B) improving the health of fishery resources;

"(C) conducting investigations about and assessing the status of fishery resources, and disseminating that information to all interested parties; and

"(D) conducting and periodically updating a survey of the fishery resources and their habitats and food chains in the Lake Champlain basin.

"(d) AUTHORIZATIONS.—(1) There is authorized to be appropriated to the Department of Agriculture \$2,000,000 for each of fiscal years 1991, 1992, 1993, 1994, and 1995 to carry out subsection (a) of this section.

"(2) There is authorized to be appropriated to the Department of [the] Interior \$1,000,000 for each

of fiscal years 1991, 1992, 1993, 1994, and 1995 to carry out subsections (b) and (c) of this section."

§1271. Sediment survey and monitoring

(a) Survey

(1) In general

The Administrator, in consultation with the Administrator of the National Oceanic and Atmospheric Administration and the Secretary, shall conduct a comprehensive national survey of data regarding aquatic sediment quality in the United States. The Administrator shall compile all existing information on the quantity, chemical and physical composition, and geographic location of pollutants in aquatic sediment, including the probable source of such pollutants and identification of those sediments which are contaminated pursuant to section 501(b)(4).¹

(2) Report

Not later than 24 months after October 31, 1992, the Administrator shall report to the Congress the findings, conclusions, and recommendations of such survey, including recommendations for actions necessary to prevent contamination of aquatic sediments and to control sources of contamination.

(b) Monitoring

(1) In general

The Administrator, in consultation with the Administrator of the National Oceanic and Atmospheric Administration and the Secretary, shall conduct a comprehensive and continuing program to assess aquatic sediment quality. The program conducted pursuant to this subsection shall, at a minimum—

(A) identify the location of pollutants in aquatic sediment;

(B) identify the extent of pollutants in sediment and those sediments which are contaminated pursuant to section 501(b)(4); ¹

(C) establish methods and protocols for monitoring the physical, chemical, and biological effects of pollutants in aquatic sediment and of contaminated sediment;

(D) develop a system for the management, storage, and dissemination of data concerning aquatic sediment quality;

(E) provide an assessment of aquatic sediment quality trends over time;

(F) identify locations where pollutants in sediment may pose a threat to the quality of drinking water supplies, fisheries resources, and marine habitats; and

(G) establish a clearing house for information on technology, methods, and practices available for the remediation, decontamination, and control of sediment contamination.

(2) Report

The Administrator shall submit to Congress a report on the findings of the monitoring under paragraph (1) on the date that is 2 years after the date specified in subsection (a)(2) of this section and biennially thereafter.

(Pub. L. 102–580, [title V, §503, Oct. 31, 1992](#), 106 Stat. 4865.)

REFERENCES IN TEXT

Section 501(b)(4), referred to in subsecs. (a)(1) and (b)(1)(B), means section 501(b)(4) of Pub. L. 102–580, which is set out below.

CODIFICATION

Section was enacted as part of the Water Resources Development Act of 1992 and also as part of the National Contaminated Sediment Assessment and Management Act, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

AVAILABILITY OF CONTAMINATED SEDIMENTS INFORMATION

Pub. L. 102–580, [title III, §327, Oct. 31, 1992](#), 106 Stat. 4851, directed Secretary to conduct national study on information that was currently available on contaminated sediments of surface waters of United States and compile information obtained for the purpose of identifying location and nature of contaminated sediments and, not later than 1 year after Oct. 31, 1992, to transmit to Congress a report on the results of the study.

NATIONAL CONTAMINATED SEDIMENT ASSESSMENT AND MANAGEMENT; SHORT TITLE; DEFINITIONS; TASK FORCE

Pub. L. 102–580, title V, §§501, 502, Oct. 31, 1992, 106 Stat. 4864, provided that:

"SEC. 501. SHORT TITLE AND DEFINITIONS.

"(a) **SHORT TITLE.**—This title [enacting this section, amending sections 1412 to 1416, 1420, and 1421 of this title, and enacting provisions set out below] may be cited as the 'National Contaminated Sediment Assessment and Management Act'.

"(b) **DEFINITIONS.**—For the purposes of sections 502 and 503 of this title [enacting this section and provisions set out below]—

"(1) the term 'aquatic sediment' means sediment underlying the navigable waters of the United States;

"(2) the term 'navigable waters' has the same meaning as in section 502(7) of the Federal Water Pollution Control Act (33 U.S.C. 1362(7));

"(3) the term 'pollutant' has the same meaning as in section 502(6) of the Federal Water Pollution Control Act (33 U.S.C. 1362(6)); except that such term does not include dredge spoil, rock, sand, or cellar dirt;

"(4) the term 'contaminated sediment' means aquatic sediment which—

"(A) contains chemical substances in excess of appropriate geochemical, toxicological or sediment quality criteria or measures; or

"(B) is otherwise considered by the Administrator to pose a threat to human health or the environment; and

"(5) the term 'Administrator' means the Administrator of the Environmental Protection Agency.

"SEC. 502. NATIONAL CONTAMINATED SEDIMENT TASK FORCE.

"(a) **ESTABLISHMENT.**—There is established a National Contaminated Sediment Task Force (hereinafter referred to in this section as the 'Task Force'). The Task Force shall—

"(1) advise the Administrator and the Secretary in the implementation of this title;

"(2) review and comment on reports concerning aquatic sediment quality and the extent and seriousness of aquatic sediment contamination throughout the Nation;

"(3) review and comment on programs for the research and development of aquatic sediment restoration methods, practices, and technologies;

"(4) review and comment on the selection of pollutants for development of aquatic sediment criteria and the schedule for the development of such criteria;

"(5) advise appropriate officials in the development of guidelines for restoration of contaminated sediment;

"(6) make recommendations to appropriate officials concerning practices and measures—

"(A) to prevent the contamination of aquatic sediments; and

"(B) to control sources of sediment contamination; and

"(7) review and assess the means and methods for locating and constructing permanent, cost-effective long-term disposal sites for the disposal of dredged material that is not suitable for ocean dumping (as determined under the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.) [also 16 U.S.C. 1431 et seq., 1447 et seq.; 33 U.S.C. 2801 et seq.]).

"(b) **MEMBERSHIP.**—

"(1) **IN GENERAL.**—The membership of the Task Force shall include 1 representative of each of the following:

"(A) The Administrator.

"(B) The Secretary.

"(C) The National Oceanic and Atmospheric Administration.

"(D) The United States Fish and Wildlife Service.

"(E) The Geological Survey [now United States Geological Survey].

"(F) The Department of Agriculture.

"(2) **ADDITIONAL MEMBERS.**—Additional members of the Task Force shall be jointly selected by the Administrator and the Secretary, and shall include—

"(A) not more than 3 representatives of States;

"(B) not more than 3 representatives of ports, agriculture, and manufacturing; and

"(C) not more than 3 representatives of public interest organizations with a demonstrated interest in aquatic sediment contamination.

"(3) COCHAIRMAN.—The Administrator and the Secretary shall serve as cochairmen of the Task Force.

"(4) CLERICAL AND TECHNICAL ASSISTANCE.—Such clerical and technical assistance as may be necessary to discharge the duties of the Task Force shall be provided by the personnel of the Environmental Protection Agency and the Army Corps of Engineers.

"(5) COMPENSATION FOR ADDITIONAL MEMBERS.—The additional members of the Task Force selected under paragraph (2) shall, while attending meetings or conferences of the Task Force, be compensated at a rate to be fixed by the cochairmen, but not to exceed the daily equivalent of the base rate of pay in effect for grade GS–15 of the General Schedule under section 5332 of title 5, United States Code, for each day (including travel time) during which they are engaged in the actual performance of duties vested in the Task Force. While away from their homes or regular places of business in the performance of services for the Task Force, such members shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5, United States Code.

"(c) REPORT.—Within 2 years after the date of the enactment of this Act [Oct. 31, 1992], the Task Force shall submit to Congress a report stating the findings and recommendations of the Task Force."

AUTHORIZATION OF APPROPRIATIONS

Pub. L. 102–580, title V, §509(b), Oct. 31, 1992, 106 Stat. 4870, provided that: "There is authorized to be appropriated to the Administrator to carry out sections 502 and 503 [enacting this section and provisions set out above] such sums as may be necessary."

"SECRETARY" DEFINED

Secretary means the Secretary of the Army, see section 3 of Pub. L. 102–580, set out as a note under section 2201 of this title.

¹ See References in Text note below.

§1271a. Research and development program

(a) In general

In coordination with other Federal, State, and local officials, the Administrator of the Environmental Protection Agency may conduct research on the development and use of innovative approaches, technologies, and techniques for the remediation of sediment contamination in areas of concern that are located wholly or partially in the United States.

(b) Authorization of appropriations

(1) In general

In addition to any amounts authorized under other provisions of law, there is authorized to be appropriated to carry out this section \$3,000,000 for each of fiscal years 2004 through 2010.

(2) Availability

Funds appropriated under paragraph (1) shall remain available until expended.

(Pub. L. 107–303, title I, §106, Nov. 27, 2002, 116 Stat. 2358; Pub. L. 110–365, §4, Oct. 8, 2008, 122 Stat. 4023.)

CODIFICATION

Section was enacted as part of the Great Lakes Legacy Act of 2002, and also as part of the Great Lakes and Lake Champlain Act of 2002, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

AMENDMENTS

2008—Subsec. (b)(1). Pub. L. 110–365 added par. (1) and struck out former par. (1). Prior to amendment, text read as follows: "In addition to amounts authorized under other laws, there is authorized to be appropriated to carry out this section \$3,000,000 for each of fiscal years 2004 through 2008."

§1272. Environmental dredging

(a) Operation and maintenance of navigation projects

Whenever necessary to meet the requirements of the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the Secretary, in consultation with the Administrator of the Environmental Protection Agency, may remove and remediate, as part of operation and maintenance of a navigation project, contaminated sediments outside the boundaries of and adjacent to the navigation channel.

(b) Nonproject specific

(1) In general

The Secretary may remove and remediate contaminated sediments from the navigable waters of the United States for the purpose of environmental enhancement and water quality improvement if such removal and remediation is requested by a non-Federal sponsor and the sponsor agrees to pay 35 percent of the cost of such removal and remediation.

(2) Maximum amount

The Secretary may not expend more than \$50,000,000 in a fiscal year to carry out this subsection.

(c) Joint plan requirement

The Secretary may only remove and remediate contaminated sediments under subsection (b) of this section in accordance with a joint plan developed by the Secretary and interested Federal, State, and local government officials. Such plan must include an opportunity for public comment, a description of the work to be undertaken, the method to be used for dredged material disposal, the roles and responsibilities of the Secretary and non-Federal sponsors, and identification of sources of funding.

(d) Disposal costs

Costs of disposal of contaminated sediments removed under this section shall be a ¹/₁ shared as a cost of construction.

(e) Limitation on statutory construction

Nothing in this section shall be construed to affect the rights and responsibilities of any person under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. 9601 et seq.].

(f) Priority work

In carrying out this section, the Secretary shall give priority to work in the following areas:

- (1) Brooklyn Waterfront, New York.
- (2) Buffalo Harbor and River, New York.
- (3) Ashtabula River, Ohio.
- (4) Mahoning River, Ohio.
- (5) Lower Fox River, Wisconsin.
- (6) Passaic River and Newark Bay, New Jersey.
- (7) Snake Creek, Bixby, Oklahoma.
- (8) Willamette River, Oregon.

(g) Nonprofit entities

Notwithstanding section 1962d–5b of title 42, for any project carried out under this section, a non-Federal sponsor may include a nonprofit entity, with the consent of the affected local government.

(Pub. L. 101–640, [title III, §312](#), Nov. 28, 1990, 104 Stat. 4639; Pub. L. 104–303, [title II, §205](#), Oct. 12, 1996, 110 Stat. 3679; Pub. L. 106–53, [title II, §224](#), Aug. 17, 1999, 113 Stat. 297; Pub. L. 106–541, [title II, §210\(a\)](#), Dec. 11, 2000, 114 Stat. 2592.)

REFERENCES IN TEXT

The Federal Water Pollution Control Act, referred to in subsec. (a), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, [§2](#), Oct. 18, 1972, 86 Stat. 816, which is classified generally to this chapter (§1251 et seq.). For complete classification of this Act to the Code, see Short Title

note set out under section 1251 of this title and Tables.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to in subsec. (e), is Pub. L. 96–510, [Dec. 11, 1980](#), 94 Stat. 2767, as amended, which is classified principally to chapter 103 (§9601 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of Title 42 and Tables.

CODIFICATION

Section was formerly set out as a note under section 1252 of this title.

Section was enacted as part of the Water Resources Development Act of 1990, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

AMENDMENTS

2000—Subsec. (g). Pub. L. 106–541 added subsec. (g).

1999—Subsec. (b)(1). Pub. L. 106–53, §224(1)(A), substituted "35 percent" for "50 percent".

Subsec. (b)(2). Pub. L. 106–53, §224(1)(B), substituted "\$50,000,000" for "\$20,000,000".

Subsec. (d). Pub. L. 106–53, §224(2), substituted "shared as a cost of construction" for "non-Federal responsibility".

Subsec. (f)(6) to (8). Pub. L. 106–53, §224(3), added pars. (6) to (8).

1996—Subsec. (a). Pub. L. 104–303, §205(1), inserted "and remediate" after "remove".

Subsec. (b)(1). Pub. L. 104–303, §205(1), (2)(A), inserted "and remediate" after "remove" and inserted "and remediation" after "removal" in two places.

Subsec. (b)(2). Pub. L. 104–303, §205(2)(B), substituted "\$20,000,000" for "\$10,000,000".

Subsec. (c). Pub. L. 104–303, §205(1), inserted "and remediate" after "remove".

Subsec. (f). Pub. L. 104–303, §205(3), added subsec. (f) and struck out heading and text of former subsec. (f). Text read as follows: "This section shall not be effective after the last day of the 5-year period beginning on November 28, 1990; except that the Secretary may complete any project commenced under this section on or before such last day."

¹ So in original. The word "a" probably should not appear.

§1273. Lake Pontchartrain Basin

(a) Establishment of restoration program

The Administrator shall establish within the Environmental Protection Agency the Lake Pontchartrain Basin Restoration Program.

(b) Purpose

The purpose of the program shall be to restore the ecological health of the Basin by developing and funding restoration projects and related scientific and public education projects.

(c) Duties

In carrying out the program, the Administrator shall—

(1) provide administrative and technical assistance to a management conference convened for the Basin under section 1330 of this title;

(2) assist and support the activities of the management conference, including the implementation of recommendations of the management conference;

(3) support environmental monitoring of the Basin and research to provide necessary technical and scientific information;

(4) develop a comprehensive research plan to address the technical needs of the program;

(5) coordinate the grant, research, and planning programs authorized under this section; and

(6) collect and make available to the public publications, and other forms of information the management conference determines to be appropriate, relating to the environmental quality of the Basin.

(d) Grants

The Administrator may make grants to pay not more than 75 percent of the costs—

(1) for restoration projects and studies recommended by a management conference convened for the Basin under section 1330 of this title; and

(2) for public education projects recommended by the management conference.

(e) Definitions

In this section, the following definitions apply:

(1) Basin

The term "Basin" means the Lake Pontchartrain Basin, a 5,000 square mile watershed encompassing 16 parishes in the State of Louisiana and 4 counties in the State of Mississippi.

(2) Program

The term "program" means the Lake Pontchartrain Basin Restoration Program established under subsection (a) of this section.

(f) Authorization of appropriations

(1) In general

There is authorized to be appropriated to carry out this section \$20,000,000 for each of fiscal years 2001 through 2012 and the amount appropriated for fiscal year 2009 for each of fiscal years 2013 through 2017. Such sums shall remain available until expended.

(2) Public education projects

Not more than 15 percent of the amount appropriated pursuant to paragraph (1) in a fiscal year may be expended on grants for public education projects under subsection (d)(2) of this section.

(June 30, 1948, ch. 758, title I, §121, as added Pub. L. 106–457, title V, §502, Nov. 7, 2000, 114 Stat. 1973; amended Pub. L. 109–392, §1, Dec. 12, 2006, 120 Stat. 2703; Pub. L. 112–237, §1, Dec. 28, 2012, 126 Stat. 1628.)

PRIOR PROVISIONS

Another section 121 of act June 30, 1948, was renumbered section 122 and is classified to section 1274 of this title.

AMENDMENTS

2012—Subsec. (d). Pub. L. 112–237, §1(1), inserted "to pay not more than 75 percent of the costs" after "make grants" in introductory provisions.

Subsec. (f)(1). Pub. L. 112–237, §1(2), substituted "2012 and the amount appropriated for fiscal year 2009 for each of fiscal years 2013 through 2017" for "2011".

2006—Subsec. (f)(1). Pub. L. 109–392 substituted "2011" for "2005".

MANAGEMENT CONFERENCE

Pub. L. 110–114, title V, §5084, Nov. 8, 2007, 121 Stat. 1228, provided that: "For purposes of carrying out section 121 of the Federal Water Pollution Control Act (33 U.S.C. 1273), the Lake Pontchartrain, Louisiana, basin stakeholders conference convened by the Environmental Protection Agency, National Oceanic and Atmospheric Administration, and United States Geological Survey on February 25, 2002, shall be treated as being a management conference convened under section 320 of such Act (33 U.S.C. 1330)."

§1274. Watershed pilot projects

(a) In general

The Administrator, in coordination with the States, may provide technical assistance and grants to a municipality or municipal entity to carry out pilot projects relating to the following areas:

(1) Watershed management of wet weather discharges

The management of municipal combined sewer overflows, sanitary sewer overflows, and stormwater discharges, on an integrated watershed or subwatershed basis for the purpose of demonstrating the effectiveness of a unified wet weather approach.

(2) Stormwater best management practices

The control of pollutants from municipal separate storm sewer systems for the purpose of demonstrating and determining controls that are cost-effective and that use innovative technologies to manage, reduce,

treat, recapture, or reuse municipal stormwater, including techniques that utilize infiltration, evapotranspiration, and reuse of stormwater onsite.

(3) Watershed partnerships

Efforts of municipalities and property owners to demonstrate cooperative ways to address nonpoint sources of pollution to reduce adverse impacts on water quality.

(4) Integrated water resource plan

The development of an integrated water resource plan for the coordinated management and protection of surface water, ground water, and stormwater resources on a watershed or subwatershed basis to meet the objectives, goals, and policies of this chapter.

(5) Municipality-wide stormwater management planning

The development of a municipality-wide plan that identifies the most effective placement of stormwater technologies and management approaches, to reduce water quality impairments from stormwater on a municipality-wide basis.

(6) Increased resilience of treatment works

Efforts to assess future risks and vulnerabilities of publicly owned treatment works to manmade or natural disasters, including extreme weather events and sea-level rise, and to carry out measures, on a systemwide or area-wide basis, to increase the resiliency of publicly owned treatment works.

(b) Administration

The Administrator, in coordination with the States, shall provide municipalities participating in a pilot project under this section the ability to engage in innovative practices, including the ability to unify separate wet weather control efforts under a single permit.

(c) Report to Congress

Not later than October 1, 2015, the Administrator shall transmit to Congress a report on the results of the pilot projects conducted under this section and their possible application nationwide.

(June 30, 1948, ch. 758, title I, §122, formerly §121, as added Pub. L. 106–554, §1(a)(4) [div. B, title I, §112(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A–225; renumbered §122, Pub. L. 109–392, §2, Dec. 12, 2006, 120 Stat. 2703; amended Pub. L. 113–121, title V, §5011, June 10, 2014, 128 Stat. 1327.)

AMENDMENTS

2014—Pub. L. 113–121, §5011(1), struck out "Wet weather" before "Watershed" in section catchline.

Subsec. (a). Pub. L. 113–121, §5011(2)(A), in introductory provisions, substituted "to a municipality or municipal entity" for "for treatment works" and struck out "of wet weather discharge control" after "the following areas".

Subsec. (a)(2). Pub. L. 113–121, §5011(2)(B), substituted "to manage, reduce, treat, recapture, or reuse municipal stormwater, including techniques that utilize infiltration, evapotranspiration, and reuse of stormwater onsite" for "in reducing such pollutants from stormwater discharges".

Subsec. (a)(3) to (6). Pub. L. 113–121, §5011(2)(C), added pars. (3) to (6).

Subsecs. (c), (d). Pub. L. 113–121, §5011(3)–(5), redesignated subsec. (d) as (c), substituted "October 1, 2015," for "5 years after December 21, 2000," and struck out former subsec. (c) which authorized appropriations to carry out this section.

Relevant Congressional Committees Table of Contents

Relevant Congressional Committees	
House Committee on Natural Resources.....	
Subcommittee on Federal Lands	
House Committee on Transportation and Infrastructure.....	
Subcommittee on Water Resources and Environment	
House Committee on Appropriations	
Subcommittee on Interior, Environment, and Related Agencies	
Senate Committee on Energy and Natural Resources.....	
Subcommittee on Public Lands, Forests, and Mining.....	
Senate Committee on Environment and Public Works	
Subcommittee on Fisheries, Water, and Wildlife	
Senate Committee on Appropriations	
Subcommittee on Interior, Environment, and Related Agencies	

United States House of Representatives Committee on Natural Resources



The House Committee on Natural Resources, chaired by Rob Bishop of Utah, considers legislation related to American energy production, mineral lands and mining, fisheries and wildlife, public lands, oceans, Native Americans, irrigation and reclamation. The Committee is comprised of 44 Representatives, 26 Republicans and 18 Democrats.

The Committee is divided into five subcommittees:

- **Subcommittee on Energy and Mineral Resources:** The Subcommittee is responsible for issues of mineral resources, mining interests and most of the U.S. Geological Survey.
- **Subcommittee on Federal Lands:** The Subcommittee is responsible for all issues pertaining to wildlife resources, fisheries, oceanography, and insular areas.
- **Subcommittee on Indian, Insular and Alaska Native Affairs:** The Subcommittee is responsible for all matters regarding Native Americans, including the 565 federally recognized tribes and Alaska Native Corporations, and nearly 1.9 million American Indians.
- **Subcommittee on Oversight and Investigations:** The Subcommittee is responsible for all matters related to the National Park System, public lands, monuments and objects of interests.
- **Subcommittee on Water, Power and Oceans:** The Subcommittee is responsible for matters concerning America's water resources, generation of electric power from federal water projects and interstate water issues.

Jurisdiction of the House Committee on Natural Resources includes the following areas:

- Fisheries and wildlife, including research, restoration, refuges, and conservation.
- Forest reserves and national parks created from the public domain.
- Forfeiture of land grants and alien ownership, including alien ownership of mineral lands.
- Geological Survey.
- International fishing agreements.
- Interstate compacts relating to apportionment of waters for irrigation purposes.
- Irrigation and reclamation, including water supply for reclamation projects and easements of public lands for irrigation projects; and acquisition of private lands when necessary to complete irrigation projects.
- Native Americans generally, including the care and allotment of Native American lands and general and special measures relating to claims that are paid out of Native American funds.
- Insular possessions of the United States generally (except those affecting the revenue and appropriations).
- Military parks and battlefields, national cemeteries administered by the Secretary of the Interior, parks within the District of Columbia, and the erection of monuments to the memory of individuals.
- Mineral land laws and claims and entries thereunder.
- Mineral resources of public lands.
- Mining interests generally.
- Mining schools and experimental stations.
- Marine affairs, including coastal zone management (except for measures relating to oil and other pollution of navigable waters).
- Oceanography.
- Petroleum conservation on public lands and conservation of the radium supply in the United States.
- Preservation of prehistoric ruins and objects of interest on the public domain.
- Public lands generally, including entry, easements, and grazing thereon.
- Relations of the United States with Native Americans and Native American tribes.
- Trans-Alaska Oil Pipeline (except ratemaking).

The House Committee on Natural Resources membership consists of 47 Representatives, 26 Republicans and 21 Democrats, listed in order of seniority.

Republicans



Rob Bishop

CHAIRMAN

Utah, 1st District

Seniority

2



Don Young

Alaska, At-large
Chairman,
Subcommittee: Indian,
Insular, and Alaska Native
Affairs

3



Louie Gohmert

Texas, 1st District
Chairman, Subcommittee:
Oversight and
Investigations

4



Doug Lamborn

Colorado, 5th District
Chairman,
Subcommittee: Energy &
Mineral Resources

5

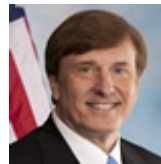


Rob Wittman

Virginia, 1st District

Seniority

6



John Fleming

Louisiana, 4th District
Chairman,
Subcommittee: Water,
Power, and Oceans

7



Tom McClintock

California, 4th District
Chairman,
Subcommittee:
Federal Lands

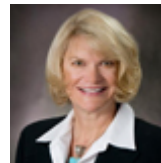
8



**Glenn 'GT'
Thompson**

*Pennsylvania, 5th
District*

9



Cynthia Lummis

Wyoming, At-large

10



Dan Benishek
Michigan, 1st District

11



Jeff Duncan
South Carolina, 3rd District

12



Paul Gosar
Arizona, 4th District

13



Raúl Labrador
Idaho, 1st District

14



Doug LaMalfa
California, 1st District

15



Jeff Denham
California, 10th District

16



Paul Cook
California, 8th District

17



Bruce Westerman
Arkansas, 4th District

18



Garret Graves
Louisiana, 6th District

19



Dan Newhouse
Washington, 4th District

20



Ryan Zinke
Montana, At-large

21



Jody Hice
Georgia, 10th

22



**Amata Coleman
Radewagen**
*American Samoa, At-
large*

23



Tom MacArthur
New Jersey, 3rd District

24



Alex Mooney
*West Virginia,
2nd District*

25



Cresent Hardy
Nevada, 4th District

Democrats



Raúl M. Grijalva

RANKING MEMBER

Arizona, 7th District

Senority

2



Grace F. Napolitano
California, 38th District

3



Madeleine Z. Bordallo
Guam, At-large

4



Jim Costa
California, 20th District

5



Gregorio Kilili Camacho Sablan
Northern Mariana Islands, At-large

Senority

6



Niki Tsongas
Massachusetts, 3rd District
Ranking Member,
Subcommittee: Federal Lands

7



Pedro Pierluisi
Puerto Rico, At-large

8



Jared Huffman
California, 2nd District
Ranking Member,
Subcommittee: Water, Power, and Oceans

9



Raul Ruiz
California, 36th District
Ranking Member,
Subcommittee: Indian, Insular, and Alaska Native Affairs

10



Alan Lowenthal
California, 47th District
Ranking Member,
Subcommittee: Energy
and Mineral Resources

11



Matt Cartwright
Pennsylvania, 17th District

12



Don Beyer
Virginia, 8th District

13



Norma Torres
California, 35th District

14



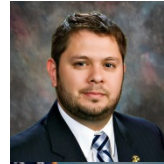
Debbie Dingell
Michigan, 12th District
Ranking Member,
Subcommittee:
Oversight and
Investigations

15



Mark Takai
Hawaii, 1st District

16



Ruben Gallego
Arizona, 7th District

17



Lois Capps
California, 24th District

18



Jared Polis
Colorado, 2nd District

19



Lacy Clay, Jr.
Missouri, 1st District

Subcommittee on Federal Lands

The Subcommittee on Federal Lands is responsible for all matters related to the National Park System, U.S. Forests, public lands and national monuments.

<u>Republicans</u>		<u>Democrats</u>	
<u>Seniority</u>		<u>Seniority</u>	
1	 Tom McClintock CHAIRMAN <i>California, 4th District</i>	1	 Niki Tsongas RANKING MEMBER <i>Massachusetts, 3rd District</i>
2	 Don Young <i>Alaska, At-large</i>	2	 Matt Cartwright <i>Pennsylvania, 17th District</i>
3	 Louie Gohmert <i>Texas, 1st District</i>	3	 Don Beyer <i>Virginia, 8th District</i>
4	 Glenn 'GT' Thompson <i>Pennsylvania, 5th District</i>	4	 Pedro Pierluisi <i>Puerto Rico, At-large</i>
5	 Cynthia Lummis <i>Wyoming, At-large</i>	5	 Jared Huffman <i>California, 2nd District</i>
6	 Raúl Labrador <i>Idaho, 1st District</i>	6	 Mark Takai <i>Hawaii, 1st District</i>
7	 Doug LaMalfa <i>California, 1st District</i>	7	 Alan Lowenthal <i>California, 47th District</i>
8	 Bruce Westerman <i>Arkansas, 4th District</i>	8	 Debbie Dingell <i>Michigan, 12th District</i>
9	 Dan Newhouse <i>Washington, 4th District</i>	9	 Lois Capps <i>California, 24th District</i>

10



Ryan Zinke
Montana, At-large

10



Jared Polis
Colorado, 2nd District

11



Jody Hice
Georgia, 10th

12



Tom MacArthur
New Jersey, 3rd District

13



Cresent Hardy
Nevada, 4th District

United States House of Representatives Committee on Transportation & Infrastructure



The Transportation and Infrastructure Committee has jurisdiction over all modes of transportation: aviation, maritime and waterborne transportation, highways, bridges, mass transit, and railroads. The Committee also has jurisdiction over other aspects of our national infrastructure, such as clean water and waste water management, the transport of resources by pipeline, flood damage reduction, the management of federally owned real estate and public buildings, the development of economically depressed rural and urban areas, disaster preparedness and response, and hazardous materials transportation.

The Committee's broad oversight portfolio includes many federal agencies, including the Department of Transportation, the U.S. Coast Guard, Amtrak, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the Army Corps of Engineers, and others.

Throughout the United States, there are more than four million miles of public roads, 19,700 civil airports, and over 138,000 miles of freight rail. Amtrak maintains billions of dollars in infrastructure assets, and 726 public transit agencies receive federal assistance. The General Services Administration owns or leases 9,600 assets and maintains an inventory of more than 362 million square feet of space. There are approximately 1,700 miles of levees, 650 dams and

383 major lakes and reservoirs, 12,000 miles of commercial inland channels, and 75 hydropower generating facilities owned by the federal government. The United States also operates and maintains waterways leading to 926 coastal, Great Lakes, and inland harbors and 241 individual lock chambers at 195 sites nationwide.

The Transportation and Infrastructure Committee is one of the largest committees in Congress, comprised of 35 Republicans and 25 Democrats.

The Committee includes six subcommittees:

Subcommittee on Aviation

The Subcommittee on Aviation has jurisdiction over all aspects of civil aviation, including safety, infrastructure, labor, commerce, and international issues. All programs of the Federal Aviation Administration (FAA) except for research activities are within the purview of the Subcommittee.

The Aviation Subcommittee is also traditionally the lead subcommittee with jurisdiction over the National Transportation Safety Board (NTSB), the federal agency responsible for investigating civil aviation accidents and other transportation accidents. The Essential Air Service program, which ensures commercial air service to smaller communities, the war risk insurance program, which provides insurance coverage for commercial flights to high-risk parts of the world, the National Mediation Board (NMB), and passenger and cargo commercial space transportation also fall within the purview of the Aviation Subcommittee.

Subcommittee on the Coast Guard and Maritime transportation

The Coast Guard enforces the laws of the United States on waters under U.S. jurisdiction and on the high seas. The service's many missions include search and rescue, illegal drug and migrant interdiction, oil spill prevention and response, maritime safety and security, maintaining aids to navigation, icebreaking, and enforcement of U.S. fisheries and marine pollution laws.

The Subcommittee also has jurisdiction over regulation of ocean shipping and the merchant marine, except as it relates to national security.

Subcommittee on Economic Development, Public Buildings, and Emergency Management

The Subcommittee conducts oversight of programs addressing the federal management of emergencies and natural disasters, including the Federal Emergency Management Agency and the Department of Homeland Security's other disaster management responsibilities; the Robert T. Stafford Disaster Relief and Assistance Act and its mitigation, preparedness, response and recovery programs; the Post-Katrina Emergency Management Reform Act; and several first responder programs.

The Subcommittee has jurisdiction over agencies and programs promoting economic development in communities suffering economic distress, such as the Economic Development Administration, the Appalachian Regional Commission, and several other commissions.

The Subcommittee also is responsible for oversight of public buildings, federal real estate programs and the Public Buildings Service (PBS) of the General Services Administration (GSA), which is the civilian landlord of the federal government.

Subcommittee on Highways and Transit

The Subcommittee on Highways and Transit has responsibility for the development of national surface transportation policy, construction and improvement of highway and transit facilities, implementation of safety and research programs, and regulation of commercial motor vehicle operations. Within this scope of responsibilities, the Subcommittee has jurisdiction over many U.S. Department of Transportation (DOT) programs.

The foremost legislative product of the Subcommittee is the reauthorization of the Federal surface transportation programs. The Moving Ahead for Progress in the 21st Century Act (MAP-21)—the latest reauthorization of these programs—was enacted in the summer of 2012.

Subcommittee on Railroads, Pipelines, and Hazardous Materials

The Subcommittee on Railroads, Pipelines and Hazardous Materials has jurisdiction over the economic and safety regulation of railroads and the agencies that administer those regulations. Economic regulation is administered by the three-member Surface Transportation Board (STB). This independent agency also has the authority to address national emergencies as they affect the nation's rail transportation system.

The Federal Railroad Administration (FRA) is responsible for administering railroad safety laws, railroad infrastructure and development programs, possesses responsibilities relevant to homeland security, and has federal oversight of Amtrak.

The Subcommittee also has jurisdiction over the benefit but not revenue aspects of railroad retirement and unemployment systems, as well as rail labor relations. The transportation of hazardous materials and the issue of pipeline safety also fall under the scope of this subcommittee.

Subcommittee on Water Resources and Environment

The jurisdiction of the Subcommittee on Water Resources and Environment consists generally of matters relating to water resources development, conservation and management, water pollution control and water infrastructure, and hazardous waste cleanup. A number of agencies administer programs that address one or more of these issues; two agencies in

particular, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), oversee the larger programs of concern to the Subcommittee.

Through its Civil Works Program, the Corps constructs projects for the purposes of navigation, flood control, beach erosion control and shoreline protection, hydroelectric power, recreation, water supply, environmental protection, restoration and enhancement, and fish and wildlife mitigation.

EPA has the primary responsibility for carrying out the Federal Water Pollution Control Act, commonly known as the Clean Water Act. This act provides for a major federal/state program to protect, restore, and maintain the quality of the nation's waters. Although EPA is responsible for carrying out the Act, significant parts of the program may be administered by the states if approved by EPA.

Republicans



Bill Shuster

CHAIRMAN

Pennsylvania, 9th District

Senority

2



Don Young
Alaska, At-large

3



John Duncan Jr.
Tennessee, 2nd District

4



John L. Mica
Florida, 7th District

5



Frank A. LoBiondo
New Jersey, 2nd District
Chairman
Subcommittee: Aviation

Senority

6



Sam Graves
Missouri, 6th District
Chairman
Subcommittee:
Highways and Transit

7



Candice Miller
Michigan, 10th District

8



Duncan Hunter
California, 52nd District
Chairman
Subcommittee: Coast
Guard and Maritime
Transportation

9



**Eric "Rick"
Crawford**
Arkansas, 1st District

10



Lou Barletta

Pennsylvania, 11th District
Chairman
Subcommittee: Economic Development, Public Buildings, and Emergency Management

11



Blake Farenthold

Texas, 2th District

12



Bob Gibbs

Ohio, 7th District
Chairman
Subcommittee: Water Resources and Environment

13



Richard Hanna

New York, 22nd District

14



Daniel Webster

Florida, 10th District

15



Jeff Denham

California, 10th District
Chairman
Subcommittee: Railroads, Pipelines, and Hazardous Materials

16



Reid Ribble

Wisconsin, 8th District

17



Thomas Massie

Kentucky, 4th District

18



Tom Rice

South Carolina, 7th District

19



Mark Meadows

North Carolina, 11th District

20



Scott Gordon Perry

Pennsylvania, 4th District

21



Rodney Davis

Illinois, 13th District

22



Mark Sanford

South Carolina, 1st District

23



Rob Woodall

Georgia, 7th District

24



Todd Rokita

Indiana, 4th District

25



John Katko

New York, 14th District

26



Brian Babin

Texas, 36th District

27



Crescent Hardy

Nevada, 4th District

28



Ryan Costello

Pennsylvania, 6th District

29



Garret Graves

Louisiana, 6th District

30



Mimi Walters

California, 45th District

31



Barbara Comstock

Virginia, 10th District

32



Carlos Cubelo

Florida, 26th District

33



David Rouzer

North Carolina, 7th District

34



Lee Zeldin

New York, 1st District

Democrats



Peter DeFazio

RANKING MEMBER

Oregon, 4th District

Seniority

2



**Eleanor Holmes
Norton**

*District of Columbia,
At-large
Ranking Member,
Subcommittee: Highways
and Transit*

3



Jerry Nadler

New York, 10th District

4



Corrine Brown

Florida, 5th District

5



**Eddie Bernice
Johnson**

Texas, 30th District

Seniority

6



Elijah Cummings

Maryland, 7th District

7



Rick Larsen

*Washington, 2nd
District
Ranking Member,
Subcommittee:
Aviation*

8



Mike Capuano

*Massachusetts, 7th
District
Ranking Member,
Subcommittee:
Railroads, Pipelines,
and Hazardous
Materials*

9



Grace Napolitano

*California, 32nd District
Ranking Member,
Subcommittee: Water
Resources and
Environment*

10



Dan Lipinski
Illinois, 3rd District

11



Steve Cohen
Tennessee, 9th District

12



Albio Sires
New Jersey, 8th District

13



Donna Edwards
Maryland, 4th District

14



John Garamendi
California, 3rd District
Ranking Member,
Subcommittee: Coast
Guard & Maritime
Transportation

15



André Carson
Indiana, 7th District
Ranking Member,
Subcommittee: Economic
Development, Public
Buildings, and Emergency
Management

16



Janice Hahn
California, 44th District

17



Rick Nolan
Minnesota, 8th District

18



Ann Kirkpatrick
Arizona, 1st District

19



Dina Titus
Nevada, 1st District

20



**Sean Patrick
Maloney**
New York, 18th District

21



Elizabeth Esty
Connecticut, 5th District

22



Lois Frankel
Florida, 22nd District

23



Cheri Bustos
Illinois, 17th District

24



Jared Huffman
California, 2nd District

25



Julia Brownley
California, 26th District

Subcommittee on Water Resources and Environment



Republicans

Senority

1



Bob Gibbs
CHAIRMAN
Ohio, 7th District

2



Candice Miller
Michigan, 10th District

3



Duncan Hunter
California, 52nd District

4



**Eric "Rick"
Crawford**
Arkansas, 1st District

5



Daniel Webster
Florida, 10th District

Democrats

Senority

1



Grace Napolitano
RANKING MEMBER
California, 32nd District

2



Donna Edwards
Maryland, 4th District

3



John Garamendi
California, 3rd District

4



Lois Frankel
Florida, 22nd District

5



Jared Huffman
California, 2nd District

6



Jeff Denham
California, 10th District

7



Reid Ribble
Wisconsin, 8th District

8



Thomas Massie
Kentucky, 4th District

9



Tom Rice
South Carolina, 7th District

10



Rodney Davis
Illinois, 13th District

11



Mark Sanford
South Carolina, 1st District

12



Todd Rokita
Indiana, 4th District

13



John Katko
New York, 14th District

14



Brian Babin
Texas, 36th District

6



Eddie Bernice Johnson
Texas, 30th District

7



Ann Kirkpatrick
Arizona, 1st District

8



Dina Titus
Nevada, 1st District

9



Sean Patrick Maloney
New York, 18th District

10



Elizabeth Esty
Connecticut, 5th District

11



Eleanor Holmes Norton
District of Columbia, At-large

12



Rick Nolan
Minnesota, 8th District

15



Cresent Hardy
Nevada, 4th District

16



Garret Graves
Louisiana, 6th District

17



David Rouzer
North Carolina, 7th District

United States House of Representatives Committee on Appropriations



The House Committee on Appropriations, chaired by Hal Rogers of Kentucky, drafts and hears appropriation measures for the 12 major areas of government, encompassing various departments, agencies, and activities. The Committee is comprised of 51 Representatives, 30 Republicans and 21 Democrats.

The Committee is divided into 12 subcommittees mirroring the major areas of government:

- Subcommittee on Agriculture, Rural Development, Food & Drug Administration, and Related Agencies
- Subcommittee on Commerce, Justice, Science, and Related Agencies
- Subcommittee on Defense
- Subcommittee on Energy and Water Development, and Related Agencies
- Subcommittee on Financial Services and General Government
- Subcommittee on Homeland Security
- Subcommittee on Interior, Environment, and Related Agencies
- Subcommittee on Labor, Health & Human Services, Education, and Related Agencies
- Subcommittee on Legislative Branch
- Subcommittee on Military Construction, Veteran Affairs, and Related Agencies
- Subcommittee on State, Foreign Operations, and Related Programs
- Subcommittee on Transportation, Housing & Urban Development, and Related Agencies

Republicans



Hal Rogers

CHAIRMAN

Kentucky, 5th District

Seniority

2



Rodney Frelinghuysen

New Jersey, 11th District

Chairman, Subcommittee:
Defense

Seniority

5



John Culberson

Texas, 7th District

Chairman,
Subcommittee:
Commerce, Justice,
Science

3



Robert Aderholt

Alabama, 4th District

Chairman, Subcommittee:
Agriculture, Rural
Development, Food &
Drug Administration

6



Ander Crenshaw

Florida, 4th District

Chairman,
Subcommittee:
Financial Services and
General Government

4



Kay Granger

Texas, 12th District

Chairwoman,
Subcommittee: State,
Foreign Operations

7



John Carter

Texas, 31st District

Chairman,
Subcommittee:
Homeland Security

5



Mike Simpson

Idaho, 2nd District

Chairman, Subcommittee:
Energy & Water
Development

8



Ken Calvert

California, 42nd District

Chairman,
Subcommittee:
Interior, Environment

9



Tom Cole

Oklahoma, 4th District
Chairman, Subcommittee:
Labor, Health & Human
Services, Education

18

10



Mario Diaz-Balart

Florida, 25th District
Chairman, Subcommittee:
Transportation, Housing &
Urban Development

19

11



Charlie Dent

Pennsylvania, 15th District
Chairman, Subcommittee:
Military Construction,
Veterans Affairs

20

12



Tom Graves

Georgia, 14th District
Chairman, Subcommittee:
Legislative Branch

21

13



Kevin Yoder

Kansas, 3rd District

22

14



Steve Womack

Arkansas, 3rd District

23

15



Jeff Fortenberry

Nebraska, 1st District

24

16



Tom Rooney

Florida, 17th District

25

17



Chuck Fleischmann

Tennessee, 3rd District

26



Jaime Herrera Beutler

Washington, 3rd District



David Joyce

Ohio, 14th District



David Valadao

California, 21st District



Andy Harris

Maryland, 1st District



Martha Roby

Alabama, 2nd District



Mark Amodei

Nevada, 2nd District



Chris Stewart

Utah, 2nd District



Scott Rigell

Virginia, 2nd District



David Jolly

Florida, 13th District

27



David Young
Iowa, 3rd District

29



Steven Palazzo
Mississippi, 4th District

28



Evan Jenkins
West Virginia, 3rd District

Democrats



Nita Lowey

RANKING MEMBER

New York, 17th District

Seniority

2



Marcy Kaptur

Ohio, 9th District

Ranking Member,
Subcommittee: Energy
& Water Development

3



Pete Visclosky

Indiana, 1st District

Ranking Member,
Subcommittee: Defense

4



José Serrano

New York, 15th District

Ranking Member,
Subcommittee: Financial
Services and General
Government

5



Rose DeLauro

Connecticut, 3rd District

Ranking Member,
Subcommittee: Labor,
Health & Human
Services, Education

Seniority

6



David Price

North Carolina, 4th District

Ranking Member,
Subcommittee:
Transportation, Housing
& Urban Development

7



Lucille Roybal-Allard

California, 40th District

Ranking Member,
Subcommittee:
Homeland Security

8



Sam Farr

California, 20th District

Ranking Member,
Subcommittee:
Agriculture, Rural
Development, Food &
Drug Administration

9



Chaka Fattah

Pennsylvania, 2nd District

Ranking Member,
Subcommittee:
Commerce, Justice,
Science

10



Sanford Bishop
Georgia, 2nd District
Ranking Member,
Subcommittee: Military
Construction, Veterans
Affairs

18



Henry Cuellar
Texas, 28th District

11



Barbara Lee
California, 13th District

19



Chellie Pingree
Maine, 1st District

12



Mike Honda
California, 17th District

20



Mike Quigley
Illinois, 5th District

13



Betty McCollum
Minnesota, 4th District
Ranking Member,
Subcommittee: Interior,
Environment

21



Derek Kilmer
Washington, 6th District

14



Steve Israel
New York, 3rd District

15



Tim Ryan
Ohio, 13th District

16














**Dutch
Ruppersberger**
Maryland, 2nd District

17



**Debbie Wasserman
Schultz**
Florida, 23rd District
Ranking Member,
Subcommittee:
Legislative Branch

Subcommittee on Interior, Environment, and Related Agencies

<u>Republicans</u>			<u>Democrats</u>		
<u>Seniority</u>			<u>Seniority</u>		
1		Ken Calvert <i>California, 42nd District</i> <u>Chairman</u>	1		Betty McCollum <i>Minnesota, 4th District</i> <u>Ranking Member</u>
2		Mike Simpson <i>Idaho, 2nd District</i>	2		Chellie Pingree <i>Maine, 1st District</i>
3		Tom Cole <i>Oklahoma, 4th District</i>	3		Derek Kilmer <i>Washington, 6th District</i>
4		David Joyce <i>Ohio, 14th District</i>	4		Steve Israel <i>New York, 3rd District</i>
5		Chris Stewart <i>Utah, 2nd District</i>			
6		Mark Amodei <i>Nevada, 2nd District</i>			
7		Evan Jenkins <i>West Virginia, 3rd District</i>			

The Subcommittee on Interior, Environment, and Related Agencies is responsible for:

- The Department of the Interior (except for the Bureau of Reclamation and the Central Utah Project)
- Environmental Protection Agency
- Forest Service (USDA)
- Other Related Agencies

United States Senate Committee on Energy and Natural Resources



Jurisdiction of the Full Committee includes oversight and legislative responsibilities for: National Energy Policy, including international energy affairs and emergency preparedness; nuclear waste policy; privatization of federal assets; territorial policy (including changes in status and issues affecting Antarctica); Native Hawaiian matters; and Ad Hoc issues. [In addition, other issues are retained in the Full Committee on an ad hoc basis. Generally, these are issues which (1) require extremely expeditious handling or (2) substantially overlap two or more subcommittee jurisdictions, or (3) are of exceptional national significance in which all Members wish to participate fully.]

The Committee is divided into four subcommittees:

Subcommittee on Energy

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: nuclear, coal and synthetic fuels research and development; nuclear and non-nuclear energy commercialization projects; nuclear fuel cycle policy; DOE National Laboratories; global climate change; new technologies research and development; nuclear facilities siting and insurance program; commercialization of new technologies including, solar energy systems; Federal energy conservation programs; energy information; liquefied natural gas projects; oil and natural gas regulation; refinery policy; coal conversion; utility policy; strategic petroleum

reserves; regulation of Trans-Alaska Pipeline System and other oil and gas pipeline transportation systems within Alaska Arctic research and energy development; and oil, gas and coal production and distribution.

Subcommittee on National Parks

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: National Park System; Wild and Scenic Rivers System; National Trails System; national recreation areas; national monuments; historic sites; military parks and battlefields; Land and Water Conservation Fund; historic preservation; outdoor recreation resources; and preservation of prehistoric ruins and objects of interest on the public domain.

Subcommittee on Public Lands and Forests

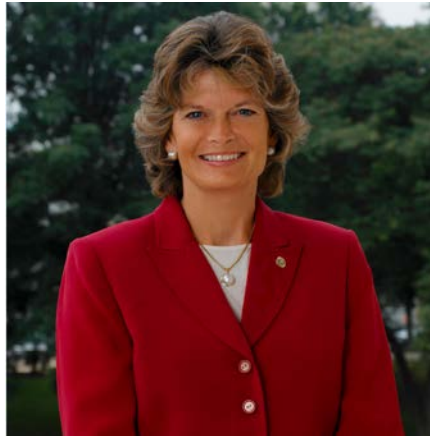
Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: public lands administered by the Bureau of Land Management and U.S. Forest Service including farming and grazing thereon, and wilderness areas; establishment of wildlife refuges on public lands and wilderness designation therein; military land withdrawals; reserved water rights; Alaska Native Claims Settlement Act; territorial affairs; national mining and minerals policy and general mining laws; surface mining, reclamation and enforcement; mining education and research; Federal mineral leasing; Outer Continental Shelf leasing; Naval oil shale reserves; National Petroleum reserve -- Alaska; and deep seabed mining.

Subcommittee on Water and Power

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: irrigation; reclamation projects, including related flood control purposes; power marketing administrations (e.g., Bonneville Power, Southwestern Power, Western Area Power, Southeastern Power); energy development impacts on water resources; groundwater resources and management; hydroelectric power; low head hydro; and energy related aspects of Deepwater ports.

The Senate Committee on Natural Resources membership consists of 22 Senators, 12 Republicans and 10 Democrats.

Republicans



Lisa Murkowski

CHAIRWOMAN

Alaska



John Barrasso

Wyoming
Chairman,
Subcommittee:
Public Lands,
Forests, and
Mining



**James E.
Risch**

Idaho
Chairman,
Subcommittee:
Energy



Mike Lee

Utah
Chairman,
Subcommittee:
Water and
Power



Jeff Flake

Arizona



Bill Cassidy

Louisiana
Chairman,
Subcommittee:
National Parks



**Cory
Gardner**

Colorado



Steve Daines

Montana



**Rob
Portman**

Ohio



**John
Hoeven**

North Dakota



**Lamar
Alexander**

Tennessee



**Shelley
Moore
Capito**

West Virginia

Democrats



Maria Cantwell

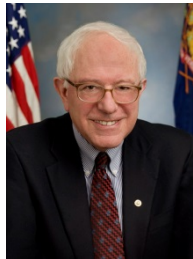
RANKING MEMBER

Washington



Ron Wyden

Oregon
Ranking Member,
Subcommittee:
Public Lands,
Forests, and
Mining



**Bernard
Sanders**

Vermont



**Debbie
Stabenow**

Michigan



Al Franken

Minnesota



Joe Manchin

West Virginia
Ranking Member,
Subcommittee:
Energy



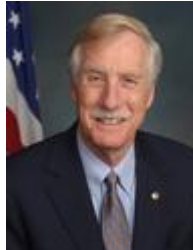
**Martin
Heinrich**

New Mexico
Ranking Member,
Subcommittee:
National Parks



Mazie Hirono

Hawaii
Ranking Member,
Subcommittee:
Water and Power



Angus King

Maine



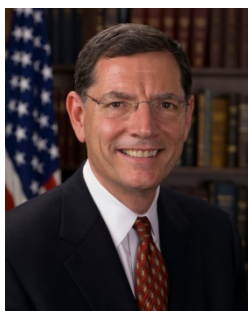
**Elizabeth
Warren**

Massachusetts

Subcommittee on Public Lands, Forests, and Mining

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: public lands administered by the Bureau of Land Management and U.S. Forest Service including farming and grazing thereon, and wilderness areas; establishment of wildlife refuges on public lands and wilderness designation therein; military land withdrawals; reserved water rights; Alaska Native Claims Settlement Act; territorial affairs; national mining and minerals policy and general mining laws; surface mining, reclamation and enforcement; mining education and research; Federal mineral leasing; Outer Continental Shelf leasing; Naval oil shale reserves; National Petroleum reserve -- Alaska; and deep seabed mining.

Republicans



John Barrasso

CHAIRMAN

Wyoming

Democrats



Ron Wyden

RANKING MEMEBER

Oregon



**Shelley
Moore
Capito**

West Virginia



**James E.
Risch**

Idaho



**Debbie
Stabenow**

Michigan



Al Franken

Minnesota



Mike Lee

Utah



**Steve
Daines**

Montana



**Joe
Manchin**

West Virginia



**Martin
Heinrich**

New Mexico



**Bill
Cassidy**

Louisiana



**Cory
Gardner**

Colorado



**Mazie
Hirono**

Hawaii



**Elizabeth
Warren**

Massachusetts



**John
Hoeven**

North Dakota



**Jeff
Flake**

Arizona



**Lamar
Alexander**

Tennessee

United States Senate Committee on Environment & Public Works



Jurisdiction of the Full Committee includes oversight and legislative responsibilities for: air pollution, construction and maintenance of highways, environmental aspects of Outer Continental Shelf lands, environmental effects of toxic substances (except pesticides), environmental policy, environmental research and development, fisheries and wildlife, flood control and improvements of rivers and harbors (including environmental aspects of deepwater ports), noise pollution, non-military environmental regulation and control of nuclear energy, ocean dumping, public buildings and improved grounds of the United States, public works, bridges, dams, regional economic development, solid waste disposal and recycling, water pollution, and water resources.

The Committee is divided into four subcommittees:

Subcommittee on Clean Air and Nuclear Safety

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: the Clean Air Act, indoor air, the Tennessee Valley Authority, The Nuclear Regulatory Commission, and nuclear plant safety.

Subcommittee on Fisheries, Water, and Wildlife

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: The Clean Water Act (including wetlands), the Safe Drinking Water Act, the Coastal Zone Management Act, invasive species, fisheries, wildlife, the Endangered Species Act, National Wildlife Refuges, and Outer Continental Shelf lands.

Subcommittee on Superfund, Waste Management, and Regulatory Oversight

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: the Toxic Substances Control Act (TSCA), Superfund and Brownfields, the Resource Conservation and Recovery Act (RCRA), federal facilities and interstate waste, the Emergency Planning and

Community Right to Know Act (EPCRA), the Chemical Safety Board, Persistent Organic Pollutants (POPs), environmental justice, risk assessment, and responsibility for oversight of agencies, departments, and programs within the jurisdiction of the full committee, including oversight of environmental research and development, and for conducting investigations within such jurisdiction.

Subcommittee on Transportation and Infrastructure

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: transportation, the Federal Highway Administration, public buildings, the Water Resources Development Act (WRDA), the Economic Development Administration, historic preservation, the National Dam Safety Program, the Stafford Act, federal disaster relief programs, the Mississippi River Commission, and green building standards

The Senate Committee on Natural Resources membership consists of 20 Senators, 11 Republicans and 9 Democrats.

Republicans



Jim Inhofe

CHAIRMAN
Oklahoma



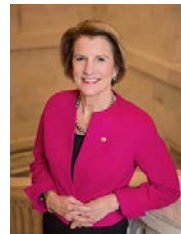
David Vitter

Louisiana
Chairman,
Subcommittee:
Transportation
and Infrastructure



**John
Barrasso**

Wyoming



**Shelley
Moore
Capito**

West Virginia
Chairwoman
Subcommittee:
Clean Air and
Nuclear Safety



Mike Crapo

Idaho



**John
Boozman**

Arkansas



Jeff Sessions

Alabama



Roger Wicker

Mississippi



Deb Fischer

Nebraska



Mike Rounds

South Dakota
Chairman,
Subcommittee:
Superfund, Waste
Mgmt., &
Regulatory
Oversight



Dan Sullivan

Alaska
Chairman,
Subcommittee:
Fisheries, Water,
and Wildlife

Democrats



Barbara Boxer

RANKING MEMBER

California



Thomas Carper

Delaware
Ranking Member,
Subcommittee:
Clean Air and
Nuclear Safety



Ben Cardin

Maryland



Bernie Sanders

Vermont



Sheldon Whitehouse

Rhode Island
Ranking Member,
Subcommittee:
Fisheries, Water,
and Wildlife



Jeff Merkley

Oregon



Kirsten Gillibrand

New York



Cory Booker

New Jersey



Edward Markey

Massachusetts
Ranking Member,
Subcommittee:
Superfund, Waste
Mgmt., &
Regulatory
Oversight

Subcommittee on Fisheries, Water, and Wildlife

Jurisdiction of the Subcommittee includes oversight and legislative responsibilities for: The Clean Water Act (including wetlands), the Safe Drinking Water Act, the Coastal Zone Management Act, invasive species, fisheries, wildlife, the Endangered Species Act, National Wildlife Refuges, and Outer Continental Shelf lands.

Republicans



Dan Sullivan
CHAIRMAN
Alaska



John Barrasso
Wyoming



John Boozman
Arkansas



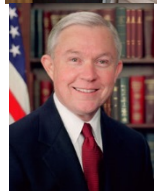
Roger Wicker
Mississippi



Mike Rounds
South Dakota



Shelley Moore Capito
West Virginia



Jeff Sessions
Alabama



Deb Fischer
Nebraska

Democrats



Sheldon Whitehouse
RANKING MEMBER
Rhode Island



Thomas Carper
Delaware



Bernie Sanders
Vermont



Cory Booker
New Jersey



Ben Cardin
Maryland



Kirsten Gillibrand
New York



Edward Markey
Massachusetts

United States Senate Committee on Appropriations



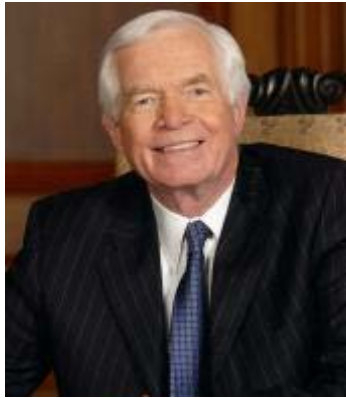
The Senate Appropriations Committee is the largest committee in the U.S. Senate, consisting of 30 members (16 Republicans and 14 Democrats). Its role is defined by the U.S. Constitution, which requires "appropriations made by law" prior to the expenditure of any money from the Federal treasury.

Twelve subcommittees are tasked with drafting legislation to allocate funds to government agencies within their jurisdictions. These subcommittees are responsible for reviewing the President's budget request, hearing testimony from government officials, and drafting the spending plans for the coming fiscal year. Their work is passed on to the full Senate Appropriations Committee, which may review and modify the bills and forward them to the full Senate for consideration.

The Committee is divided into 12 subcommittees:

- **Subcommittee on Agriculture, Rural Development, Food & Drug Administration, and Related Agencies**
- **Subcommittee on Commerce, Justice, Science, and Related Agencies**
- **Subcommittee on Defense**
- **Subcommittee on Energy and Water Development, and Related Agencies**
- **Subcommittee on Financial Services and General Government**
- **Subcommittee on Homeland Security**
- **Subcommittee on Interior, Environment, and Related Agencies**
- **Subcommittee on Labor, Health & Human Services, Education, and Related Agencies**
- **Subcommittee on Legislative Branch**
- **Subcommittee on Military Construction, Veteran Affairs, and Related Agencies**
- **Subcommittee on State, Foreign Operations, and Related Programs**
- **Subcommittee on Transportation, Housing & Urban Development, and Related Agencies**

Republicans



Thad Cochran

CHAIRMAN

Mississippi



**Mitch
McConnell**
Kentucky



Richard Shelby
Alabama



**Lamar
Alexander**
Tennessee



Susan Collins
Maine



Lisa Murkowski
Alaska



**Lindsey
Graham**
South Carolina



Mark Kirk
Illinois



Roy Blunt
Missouri



Jerry Moran
Kansas



John Hoeven
North Dakota



**Shelley Moore
Capito**
West Virginia



Bill Cassidy
Louisiana



James Lankford
Oklahoma



Steve Daines
Montana

Democrats



Barbara Mikulski

RANKING MEMBER

Maryland



Patrick Leahy

Vermont



Patty Murray

Washington



**Dianne
Feinstein**

California



Dick Durbin

Illinois



Jack Reed

Rhode Island



Jon Tester

Montana



Tom Udall

New Mexico



Jeanne Shaheen

New Hampshire



Jeff Merkley

Oregon



Chris Coons

Delaware



Brian Schatz

Hawaii



Tammy Baldwin

Wisconsin



**Christopher
Murphy**

Connecticut

Subcommittee on Interior, Environment, and Related Agencies

Republicans



Lisa Murkowski

CHAIRWOMAN

Alaska

Democrats



Tom Udall

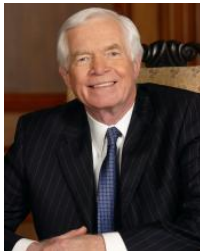
RANKING MEMBER

New Mexico



**Lamar
Alexander**

Tennessee



**Thad
Cochran**

Mississippi



Roy Blunt

Missouri



**Dianne
Feinstein**

California



Patrick Leahy

Vermont



John Hoeven

North Dakota



Mitch McConnell

Kentucky



Jack Reed

Rhode Island



Jon Tester

Montana



Steve Daines

Montana



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Louisiana



Jeff Merkley

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