Hunting, Fishing, and Recreational Shooting on Federal Lands: H.R. 4089 and Related Legislation

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Summary

The Sportsmen's Heritage Act of 2012 (H.R. 4089) is intended to create an "open until closed" management policy for federal lands, according to the House committee report. It describes the criteria for federal land management agencies to consider in order to close federal lands to fishing, hunting, or recreational shooting, and directs that management is subject to existing law. However, some ambiguities may lead to different, perhaps unintended results. H.R. 4089 passed the House on April 17, 2012.

Hunting and fishing are already allowed on the majority of federal lands. Because H.R. 4089 would change land management practices and would require additional or different analyses, reports, and notices, the bill would alter federal land management by adding or changing steps in the planning process. The Congressional Budget Office estimated that Title II of H.R. 4089, for example, would cost $12 million over the first four years.

Title I establishes the processes for federal land management agencies to close federal lands to hunting, fishing, and recreational shooting, and is almost identical to Senate bill S. 2066. Title II addresses recreational shooting in Bureau of Land Management (BLM) national monuments. While the associated House committee report refers to H.R. 4089 affecting lands managed by BLM and the Forest Service almost exclusively, the bills' broad definition of federal public lands could lead to portions of H.R. 4089/S. 2066 extending to all agencies that own land.

Wilderness areas may be most altered by the bills. While the Wilderness Act already allows hunting and fishing, H.R. 4089/S. 2066 would appear to allow any activity related to those activities, as well as to recreational shooting. This may mean that structures could be built in wilderness areas or mechanized transport could be allowed, which are activities that are banned under current law; however, this is not clear since another provision appears to continue to ban motorized access.

Titles III through VI address issues related to hunting, fishing, or federal lands. Title III would reverse the administrative rule in place since May 15, 2008, which banned the import of sport-hunted polar bears from Canada. It would allow the import of polar bear trophies by applicants who sought an import permit prior to that date, when the polar bear was listed as threatened under the Endangered Species Act (ESA). Senate bills S. 2066 and S. 1066 would also direct issuance of those permits. However, in 2011, a federal court rejected a suit to allow such imports.

Title IV of H.R. 4089 would prevent the Environmental Protection Agency (EPA) from regulating lead shot and lead sinkers, as would S. 838. EPA, however, denies it has the authority to take such action, while state laws could still restrict the use of lead shot and sinkers. Reversing a 2012 Forest Service decision, Title V would allow deer hunters in the Kisatchie National Forest in Louisiana to use hunting dogs without restriction. Title VI would limit the President's ability to establish national monuments under the Antiquities Act of 1906 by requiring both the governor and legislature of the affected state to approve designations.

Contents

Appendixes

Contacts

Introduction to H.R. 4089

While hunting and fishing are permitted on the majority of federal lands, some believe that those recreational activities are unnecessarily restricted by the planning processes of federal land management agencies, such as the Bureau of Land Management (BLM), the Forest Service, the National Park Service (NPS), and the Fish and Wildlife Service (FWS). Additionally, some believe courts have misinterpreted the purposes of those lands and impeded recreation.[1] The Sportsmen's Heritage Act of 2012 (H.R. 4089) would "open" almost all federal lands and waters to hunting, fishing, and recreational shooting,[2] and establish criteria for land management agencies to close lands to those activities.[3] Opponents of the bill assert that it would adversely affect wilderness areas and create additional, sometimes contradictory, steps for land management agencies in their already complex planning processes.[4]

Titles I and II establish a uniform system for land management agencies to determine whether federal lands should be closed to hunting, fishing, and recreational shooting. Titles III through VI of H.R. 4089 address issues related to hunting, fishing, or federal lands, such as issuing permits to allow the import of polar bear parts by certain applicants; continuing the use of lead shot and lead sinkers; opening the Kisatchie National Forest in Louisiana for dog-deer hunting; and limiting the President's ability to establish national monuments under the Antiquities Act of 1906.

In general, states manage hunting and fishing within their boundaries, and federal laws regulating these activities are a series of exceptions to this general rule. Exceptions include regulating migratory birds, protecting species under the Endangered Species Act, or regulating hunting and fishing on federal lands. Federal land managers work with state managers in regulating the time, place, manner, or quantity of animals to be taken. In short, the delineation of these responsibilities may be summarized as the federal government regulates the habitat, and the state regulates the take.

[1] See U.S. Sportsmens' Alliance, The Sportsmen's Daily (posted April 17, 2012) "A major focus of the organizations that helped craft H.R. 4089 is to prevent frivolous lawsuits that unfairly restrict the rights of hunters, anglers and shooters and limit wildlife conservation and management," available online at http://www.ussportsmen.org/legislative-action/u-s-house-votes-to-protect-hunting-shooting-on-public-land/.

[2] Committee on Natural Resources, H.Rept. 112-426, Part I (April 13, 2012).

[3] S.Amdt. 2302 to the 2012 Farm Bill (S. 3240) is identical to H.R. 4089. S.Amdt. 2232, also to S. 3240, is similar to H.R. 4089, but includes other issues. Neither amendment was in order, but may be introduced as separate legislation.

[4] Wilderness Watch, Recent Issues (entry dated 4/12), "[the bill] is a thinly disguised measure to gut the 1964 Wilderness Act and protections for every unit of the National Wilderness Preservation System," available online at http://wildernesswatch.org/issues/index.html#Repeal.

Hunting and conservation have been linked since the advent of federal wildlife legislation, such as the Lacey Act of 1900[5] or the Migratory Bird Treaty Act of 1918.[6] As one supporter of H.R. 4089 stated:

> The conservation movement was started by American sportsmen a century ago and since then almost all of our most successful wildlife conservation programs have been associated with recreational hunting and fishing. Species that were once rare, such as wild turkeys, deer, bear and wood ducks are now plentiful as a result of private efforts by sportsmen and scientific management by state fish and game departments.[7]

Even so, controversy exists about exactly what hunting, fishing, or shooting sports currently are allowed on federal land and when. Some believe federal land planning processes, which include analyses under the National Environmental Policy Act (NEPA), are an obstacle to hunting, fishing, and recreational shooting. Others point to recent court decisions favoring wilderness protection over recreation as restricting statutorily guaranteed recreational access.[8] Opening more lands to hunting, fishing, and recreational shooting should be balanced against good game management, public safety, resource management, and the statutory purposes of the lands. These are a few of the issues addressed in H.R. 4089.

[5] Act of May 25, 1900, §3, 31 Stat. 187 (making it a federal crime to ship game killed in violation of one state's laws to another state).

[6] Act of July 3, 1918, c. 128, §2, 40 Stat. 755 (prohibiting killing, hunting, buying, or selling migratory birds).

[7] Memorandum by James R. Streeter, Director, Subcommittee on National Parks, Forests, and Public Lands, Committee on Natural Resources (May 23, 2012).

[8] See, e.g., Wilderness Watch, Inc. v. U.S. Fish and Wildlife Service, 629 F.3d 1024 (9th Cir. 2010) (despite bighorn conservation as a statutory goal for a wilderness area, holding that FWS did not determine whether constructing watering structures in a wilderness area was necessary to preserve the area); High Sierra Hikers Association v. Department of the Interior, 2012 WL 214927 (N.D. Cal. January 24, 2012) (finding that NPS did not evaluate whether continued levels of pack animals in wilderness areas was a necessity to preserve the primitive character of the area).

Current Status of Hunting, Fishing, and Recreational Shooting on Federal Lands

The four principal federal land management agencies—BLM, NPS, FWS, and the Forest Service—do not maintain data on how many acres of land are currently open to hunting, fishing, and/or recreational shooting.[9] However, both the BLM and the Forest Service estimate that more than 95% of their lands are currently open to these activities.[10] NPS states that hunting is permitted in 61 of its 397 units, and fishing is allowed in 200 units.[11] Among the FWS's 594 wildlife refuges and waterfowl production areas, more than 365 are open to some form of hunting, and more than 300 units offer fishing opportunities.[12] For more information, see **Appendix**, "Current Land Management Practices."

Some data are available on the frequency of hunting and fishing on federal lands. The Forest Service annual data for FY2005 to FY2009 show that 7.6% and 8.2% of annual recreational visitors to national forests list hunting or fishing, respectively, as their main activity.[13] For BLM lands in FY2011, 8.07% of visitors were hunters, and 3.45% fished.[14] For wildlife refuges, the FY2010 to FY2011 data show 27% of visitors' primary activity was fresh or saltwater fishing, and 13% was hunting.[15] While this could indicate that only a minority of visitors use federal lands for the activities described in H.R. 4089, it could also suggest that if more land were available, more people might use the lands for that type of recreation.

The bill is supported by groups including the U.S. Sportsmen's Alliance, National Rifle Association, Safari Club International, and other organizations. Opponents include Wilderness Watch, Backcountry Hunters and Anglers, Humane Society, and others. Wilderness Watch described the bill as "a thinly disguised measure to gut the 1964 Wilderness Act and protections for every unit of the National Wilderness Preservation System."[16] However, one of the supporters of H.R. 4089, U.S. Sportsmen's Alliance, describes the bill as clarifying "that hunting, fishing and recreational shooting are legitimate uses of federal public lands and that these lands are open, as a matter of law, to these traditional activities."[17] According to Safari Club International, the lack of

[9] Personal communication, June 5-6, 2012, between Laura Comay of CRS and the following agencies: Bureau of Land Management (Division of Legislative Affairs); U.S. Forest Service (Jeannie Masquelier, Legislative Affairs Specialist); and National Park Service (Chris Powell, Senior Congressional Affairs Specialist). Personal communication between (name redacted) of CRS and the Fish and Wildlife Service (Martin Kodis, Deputy Chief, Division of Congressional and Legislative Affairs).

[10] The BLM estimate is derived from testimony in the 112th Congress on H.R. 3440, H.R. 2834, and H.R. 1444 regarding recreational shooting and hunting, and personal communication regarding fishing between BLM and Carol Hardy-Vincent of CRS, May 21, 2012. The FS estimate is from personal communication between Laura Comay of CRS and Jeannie Masquelier, Legislative Affairs Specialist, U.S. Forest Service, June 7, 2012.

[11] Personal communication between Laura Comay of CRS and Chris Powell, Senior Congressional Affairs Specialist, National Park Service, June 14, 2012. Units may be completely open to hunting or fishing, or these activities may be permitted only in portions of the unit. NPS regulations do not specifically address recreational shooting; for more information, see the **Appendix**.

[12] Hunting data based on personal communication between Martin Kodis, Deputy Chief, Division of Congressional and Legislative Affairs, FWS, and (name redacted), CRS (May 17, 2012). Fishing data based on FWS, National Wildlife Refuge System, "List of Refuges that Offer Fishing," online at http://www.fws.gov/refuges/fishingguide/pdf/National_Print.pdf

[13] Forest Service, National Visitor Use Monitoring Results, National Summary Results, data collected FY 2005 through FY 2009, p. 13 (last updated April 2010), available online at http://www.fs.fed.us/recreation/programs/nvum/nvum_national_summary_fy2009.pdf.

[14] BLM, Recreation Management Information System, Estimated Recreational Use of BLM-Administered Public Lands for Recreation Activities Under Various Fee Authorizations (Fiscal Year 2011), available online at http://www.blm.gov/public_land_statistics/pls11/pls4-2_11.pdf.

[15] U.S. Geological Survey, National Wildlife Refuge Visitor Survey Results: 2010/2011, Fig. 6, available online at http://pubs.usgs.gov/ds/685/DS685.pdf.

[16] Wilderness Watch, Recent Issues (entry dated 4/12), available online at http://wildernesswatch.org/issues/index.html#Repeal.

[17] U.S. Sportsmen's Alliance, The Sportsmen's Daily (posted April 17, 2012), at http://www.ussportsmen.org/
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access is a "primary reason" that hunters and anglers stop using federal lands for those activities.[18]

However, it is not clear whether those goals will be achieved by H.R. 4089. To the extent that "access" means physical access, rather than regulatory, the bill does not provide any funding for road or trail expansion or maintenance. It is also possible that the bill could slow the planning process; it appears to add steps to the land management processes already in place, such as new criteria, reporting requirements, and public notices. H.R. 4089 is silent as to when implementation is required, which could be interpreted as leading to land agencies having to revise all land management plans at the same time. Additionally, the bill proposes different criteria for different types of lands and different types of activities, potentially making application by land management agencies difficult. Finally, in some cases, particularly lands withdrawn for a particular purpose, such as wilderness areas or BLM national monuments, the bill favors activities over the conservation values for which those lands were designated.

Legislative History

Introduced on February 27, 2012, the Sportsmen's Heritage Act of 2012 (H.R. 4089) is an amalgam of three earlier bills. Title I is based on H.R. 2834, the Recreational Fishing and Hunting Heritage and Opportunities Act. Title II is based on H.R. 3440, the Recreational Shooting Protection Act. Title III is based on H.R. 991, which concerns importing polar bear trophies from Canada. Hearings were held on those bills. Title IV is based on H.R. 1558, which concerns regulating the use of lead shot and sinkers by the Environmental Protection Agency. The two remaining titles of H.R. 4089 are similar to other bills introduced in the House during the 112th Congress. Title V is similar to H.R. 2793, which concerns the use of hunting dogs in a national forest in Louisiana. There were no hearings on this bill. Finally, a portion of Title VI, which would limit the President's ability to establish national monuments, is similar to H.R. 302, on which hearings were held.

The Committee on Natural Resources reported H.R. 4089, as amended, on April 13, 2012 (H.Rept. 112-426). H.Res. 614 allowed eight amendments to be in order. Three amendments were approved by the full House—H.Amdt. 1005, H.Amdt. 1009, and H.Amdt. 1012.[19] On April 17, 2012, the bill passed the House (yeas 274—nays 146).[20]

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[18] See Safari Club International website, Hunter Access, at http://www.scifirstforhunters.org/advocacy/hunters.

[19] H.Amdt. 1005 adds Section 104(e)(3) (see "Wilderness Purposes Cannot Obstruct Other Opportunities"), among other changes such as reducing the reporting requirements and addressing technical conflicts between Title I and Title II over certain BLM land. H.Amdt. 1009 adds Title V (see "Title V—Hunting in the Kisatchie National Forest"). H.Amdt. 1012 adds Title VI (see "Title VI—Ending Unilateral Presidential Power to Establish National Monuments").

[20] Roll call #164.

Land Management Planning Overview

The federal government owns and manages approximately 635 million-640 million acres of land.[21] About 95% of this land is owned and managed by four federal land management agencies—BLM, Forest Service, NPS, and FWS. The current land management practices for the four agencies regarding hunting, fishing, and recreational shooting are provided in the **Appendix**. In general, each agency is required by law to prepare a plan for land management approximately every 15 years, considering public input in the plan's development. Among other determinations, these plans describe what lands are open for activities including hunting, fishing, and recreational shooting, and any restrictions on those activities, such as locations and seasons. Each agency must balance statutory mandates regarding use and conservation in the plans. The plans may be amended or revised as circumstances warrant.

A memorandum of understanding among the Forest Service, Fish and Wildlife Service, BLM, and dozens of sporting organizations provides for increased communication in planning and implementing projects and activities related to hunting, fishing, and recreational shooting on federal lands.[22]

In addition to the specific statutes and regulations of each agency, all federal agencies must comply with the National Environmental Policy Act (NEPA),[23] which requires agencies to assess the environmental consequences of a proposed action before making a final decision, and Sections 106 and 110 of the National Historic Preservation Act,[24] which require federal agencies to evaluate the effects of their actions on historic and cultural properties before acting. Both laws require public consultation prior to decision making.

Title I—Recreational Fishing and Hunting Heritage and Opportunities Act

Introduction: Facilitating Use and Access

Title I of H.R. 4089, the Recreational Fishing and Hunting Heritage and Opportunities Act, is intended to create an "open until closed" management policy for federal lands, according to the House committee report on H.R. 4089.[25] Title I describes the factors a land management agency must consider to justify closing federal lands to fishing, hunting, or recreational shooting. The steps include specific criteria for closure determinations, revising planning documents, and filing reports with Congress. Senate bill S. 2066 is almost identical to Title I of H.R. 4089, which

[21] See page 1 of CRS Report R42346, *Federal Land Ownership: Overview and Data*, by (name redacted), (name redacted), and (name redacted).

[22] See, Federal Lands Hunting, Fishing, and Shooting Sports Roundtable, Memorandum of Understanding (2006), available online at http://www.fs.fed.us/recreation/programs/trails/shooting_mou.pdf.

[23] 42 U.S.C. §4332. For more information, see CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by (name redacted).

[24] 16 U.S.C. §§470f, 470h-2, respectively. For more information, see CRS Report R42538, *A Section 106 Review Under the National Historic Preservation Act (NHPA): How It Works*, by (name redacted).

[25] H.Rept. 112-426, Part I, p. 7.

passed the House on April 17, 2012. Because of the similarities between the two bills, this report will refer only to H.R. 4089 unless there is a distinction between the two.

This analysis will focus on Title I's potential impacts on lands managed by BLM, the Forest Service, NPS, and FWS. However, in light of the definition of federal public land (see below), the scope could be broader, including any agency that owns lands.

Definitions

Definition of Federal Public Land

Title I of the Sportsmen's Heritage Act of 2012 defines *federal public land* broadly. Under H.R. 4089, Section 103(1), *federal public land* means "any land or water that is owned by the United States; and managed by a Federal agency (including the Department of the Interior and the Forest Service) for purposes that include the conservation of natural resources." The definition exempts lands or waters held in trust for the benefit of Indians or other Native Americans (§103(1)(B)); and Section 104(d) exempts BLM and Forest Service lands on the Outer Continental Shelf.[26]

While there is no existing statutory definition of *federal public land*, the Federal Land Policy and Management Act (FLPMA) defines *public lands* as BLM lands,[27] the Title I definition is broader than the FLPMA definition, and arguably could be construed to include all federal lands. However, the House committee report refers to H.R. 4089's affecting only BLM and the Forest Service in all but one reference,[28] suggesting that the definition was not intended to be so broad. The language in the rest of the bill appears to target only the four traditional land management agencies: BLM; NPS; FWS; and the Forest Service.

Nevertheless, since the definition of *federal public land* is not narrowly focused, it could include lands under other agencies, such as the Bureau of Reclamation, the Department of Defense[29] (including the Army Corps of Engineers)[30], the Department of Energy, and the Department of Commerce, all of which have natural resource conservation as a purpose. A similar, inclusive definition of *federal lands* was used in the Energy Policy Act of 2005, which referred to a number

[26] CRS has not identified any lands on the Outer Continental Shelf under the jurisdiction of BLM or the Forest Service.

[27] FLPMA §103(e); 43 U.S.C. §1702(e): "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management ... except (1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and Eskimos."

[28] H.Rept. 112-426, Part I. See pp. 7, 14 for references that Title I pertains to only BLM and Forest Service land. See p. 16 for the reference that Title I pertains to "BLM, the Forest Service, and other land management agencies."

[29] The Department of Defense (DOD) owns 20,809,157 acres of the 27,875,707 acres it controls. DOD, Defense Base Structure Report, FY2011 Baseline, available online at http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf. According to DOD Directive 4165.06 4.6: "Utilizing the multiple-use principle, DoD real property shall be made available for mineral exploration and extraction to the maximum extent possible consistent with military operations, national defense activities, environmental conservation and protection, and Army civil works activities."

[30] The Army Corps of Engineers own 7.6 million acres, manages an additional 4.1 million acres, and its reservoirs' surfaces represent an additional 26.25 million acres. While the agency's primary missions are flood damage reduction, navigation, and ecosystem restoration (16 U.S.C. §3956), many of the agency's water resources facilities are operated for multiple purposes including fish and wildlife (16 U.S.C. §661, 16 U.S.C. §460*l*-12), recreation (16 U.S.C. §460*l*-12), and water supply storage (43 U.S.C. §390b, 33 U.S.C. §708). For information on Corps of Engineers management, see CRS Report R41243, *Army Corps of Engineers Water Resource Projects: Authorization and Appropriations*, by (name redacted) and (name redacted).

of departments as being necessary to establish rights of way on federal lands: Agriculture, Commerce, Defense, Energy, and the Interior.[31] Also, as multiple executive orders direct all agencies with land to preserve the environment, it could be construed that any such agency has as a purpose the "conservation of natural resources"[32] and would be covered by Title I of H.R. 4089.

If the Title I definition reaches more lands than was intended, the scope could be contained by referring to specific management agencies in the definition rather than trying to describe lands. This approach is used in other legislation. The Federal Lands Recreation Enhancement Act (FLREA), for example, defines *Federal land management agency* as "the National Park Service, the United States Fish and Wildlife Service, the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service."[33]

Definition of Hunting

Section 103(2) defines hunting for the purposes of Title I to mean "using a firearm, bow or other authorized means in the lawful pursuit, shooting, capture, collection, trapping, or killing of wildlife; attempt[ing] to pursue, shoot, capture, collect, trap, or kill wildlife; or the training of hunting dogs [including field trials]."[34]

The definition includes two activities that are not traditionally included under this term: trapping and field trials. Trapping is allowed under some circumstances on some federal lands, but the use of traps (particularly a design called leghold traps) has been controversial and is less common than traditional hunting on federal lands. For example, it is not included as one of the six priority uses of Refuge System lands under the National Wildlife Refuge System Improvement Act.[35] While using hunting dogs for waterfowl has not been controversial, field trials[36] have been an issue because of the potential impact of hundreds of participants and spectators and the use of horses at some of these events.

Field trials already occur occasionally on some federal lands, under the sponsorship of sporting organizations, where the agencies determined the activity to be compatible with their multiple use or recreation mandates.[37] H.R. 4089 could lead to an expansion of an activity that appears to be

[31] P.L. 109-58, §368(a); 42 U.S.C. §15926(a).

[32] See, e.g., Exec. Order No. 11990 (each agency shall take action to protect against harming wetlands); Exec. Order No. 13112 (directing agencies to stop actions that would spread invasive species); Exec. Order No. 13186 (directing each agency to protect against harming migratory birds); Exec. Order No. 11514 (each agency shall develop programs to enhance environmental quality).

[33] P.L. 108-447, §802; 16 U.S.C. §6801 note. Typically, the Bureau of Reclamation is not included in lists of federal land management agencies.

[34] The issue of possessing firearms on federal lands is outside the scope of this report. For information on that topic, see CRS Report RL32842, *Gun Control Legislation*, by (name redacted).

[35] 16 U.S.C. §668ee.

[36] Field trials are organized under different rules based on the type of hunting dog (retrievers, spaniels, pointers, etc.). The American Kennel Club (AKC) is one of the organizations sponsoring such events. For information on AKC events of the various types of field trials, see http://www.akc.org/events/performance/.

[37] For example, there are field trials on Forest Service lands in Arizona and Kentucky, according to Gary Taylor, Legislative Director, Association of Fish and Wildlife Agencies. Personal communication with (name redacted) (May 17, 2012).

rare on federal land and may not exist on NPS lands.[38] Current regulations ban field trials in wildlife refuges, except by special permit.[39]

While the definition concerns *hunting*, use of the term within Title I is somewhat inconsistent. Title I refers to *sport hunting* twice,[40] and could be read as referring to *recreational hunting* eight times.[41] The bill does not draw a distinction among the three terms. Similarly, the provision addressing licensing in Section 104(k)(2) refers to "fish, hunt, and trap," which also appears to be inconsistent with the definition, which includes trapping within the definition of hunting. In addition, Section 104(g)(1) refers to "activities related to fishing and hunting (or both)," potentially expanding the allowed activities.

The definition of hunting excludes "the use of skilled volunteers to cull excess animals."[42] Historically, NPS has been reluctant to allow volunteers to carry out culling operations in areas where hunting is forbidden.[43] Instead, NPS has typically requested that Wildlife Services (part of the Animal and Plant Health Inspection Service of the Department of Agriculture) carry out that role.

Definition of Recreational Fishing

Section 103(3) defines *recreational fishing* as "the lawful pursuit, capture, collection or killing of fish; or attempt to capture, collect, or kill fish." The only other statutory definitions of *recreational fishing* exclude commercial fishing more explicitly. For example, 16 U.S.C. Section 1802(37), of the Magnuson-Stevens Fishery Conservation and Management Act, defines recreational fishing as "fishing for sport or pleasure" while 16 U.S.C. Section 3302(10) of the Salmon and Steelhead Conservation and Enhancement Act defines recreational fishing as "fishing for personal use and enjoyment using conventional angling gear, and not for sale or barter." It is possible that the definition of *recreational fishing* in H.R. 4089 might be interpreted to include commercial fishing, which may create additional confusion because certain federal land units, such as Glacier Bay National Park and Preserve, have implemented specific efforts to phase out traditional commercial fishing that occurred in their marine waters.[44]

[38] The Committee report's section-by-section analysis (H.Rept. 112-426 (p.14)) discusses the application of these provisions only to Forest Service and BLM lands, although a cost analysis (p. 16) refers to costs to these two agencies as well as "other land management agencies."

[39] 50 C.F.R. §27.91.

[40] Section 104(a) and Section 104(f)(2).

[41] This reference occurs where the phrase *recreational fishing, hunting, or shooting* is used, and it is not clear whether the modifier "recreational" applies to all three activities, or just fishing. Sections 104(a)(2) and (3); Section 104(b)(1); Section 104(c)(1) and (c)(1)(C) (twice); Section 104(d)(1); and Section 104(i).

[42] Section 103(2)(B).

[43] Section 104(c)(2) as discussed below directs the use of volunteers to cull excess animals. This is change from existing practice.

[44] The definition of *federal public land* includes waters without explicitly excluding waters of the Outer Continental Shelf. This could be read to require marine national monuments, which specifically bar commercial fishing, to allow such fishing. See Pres. Proc. 8337, 74 Fed. Reg. 1579 (January 12, 2009) (establishing the Rose Atoll Marine National Monument); Pres. Proc. 8335, 74 Fed. Reg. 1557 (January 12, 2009) (establishing the Marianas Trench Marine National Monument).

Definition of Recreational Shooting

Section 103(4) defines recreational shooting as "any form of sport, training, competition, or pastime, whether formal or informal, that involves the discharge of a rifle, handgun, or shotgun, or the use of a bow and arrow."[45] The definition appears to include hunting; shooting ranges; informal target practice; and war reenactments, both formal and informal. It appears those activities were intended to be included and encouraged on all of the federal public land as defined in Section 103(1).[46] However, because of some controversy over the continued existence of shooting ranges on Forest Service or BLM lands, it may be that only those lands were intended to be affected by the promotion of shooting ranges.[47]

Recreational shooting, including shooting ranges, on NPS or FWS lands would likely be controversial. While war reenactments might be permitted on certain NPS lands, conversely, their occurrence on FWS lands would not be considered wildlife-dependent recreation, and therefore may be discouraged by land managers.

Management of Federal Lands

Section 104 directs the heads of federal public land management agencies to facilitate use of and access to lands for hunting, fishing, and recreational shooting. Section 104(b) would require that each land management agency act (1) in a manner that supports and facilitates hunting, fishing, and recreational shooting opportunities; (2) to the extent authorized under applicable state law; and (3) in accordance with applicable federal law. This provision may raise questions because state law does not *authorize* actions on federal land. Instead, federal management is exercised to the extent consistent with state law, which establishes hunting seasons, game species, fishing licenses, etc.

While agencies must manage public lands to facilitate those activities, Section 104(i) states that the title does not require "a Federal agency to give preference to recreational fishing, hunting, or shooting over other uses of Federal public land." This provision is an example of the apparent tension in the bill between directing federal agencies generally to allow more hunting, fishing, and shooting and to facilitate such activities procedurally, versus an effort to maintain some existing management structures and policies.

Section 104(d)(2) directs agency heads to use existing authorities to lease or permit use of lands for shooting ranges and to designate specific lands for recreational shooting activities. Although this directive is within a subsection that pertains only to BLM and the Forest Service (§104(d)), it is not clear that the provision is limited to those two agencies. While Section 104(d)(1) applies explicitly to BLM and the Forest Service, Section 104(d)(2) directs the "head of each Federal agency" to address recreational shooting, without clarifying whether it is each federal agency under H.R. 4089, or just the two referred to in Section 104(d)(1).

[45] The omission of the word *lawful* appears to be an oversight: Title I uses *lawful* in the definitions of hunting and recreational fishing.

[46] See "Definition of Federal Public Land."

[47] Use of certain public lands for shooting ranges is not necessarily a cause of controversy. For example, certain BLM public lands in Wyoming have been used as a shooting range for over 30 years under a special use permit for a private club. S. 2015 in the 112th Congress would transfer title to the land conditionally to the club. BLM supports the transfer.

A separate management directive is found in Section 104(j), which requires agency heads to consult with advisory councils established in two executive orders. The first, Executive Order 12962,[48] establishes a recreational fisheries council. The second, Executive Order 13443,[49] however, does not create an advisory council. Instead, it refers to the Sporting Conservation Council, which was established a year earlier by the Department of the Interior.[50]

Section 104(c)(2) would direct agency heads to allow skilled volunteers to assist in managing wildlife populations on federal lands where hunting is banned, based on the best scientific data available. This would change the existing practice in which employees of Wildlife Services of the Department of Agriculture are used. It appears that the decision to allow volunteers to cull animals would not be subject to NEPA, which would reduce the time required to implement a wildlife management plan, although it appears that the rest of the action, that is, the factors indicating culling is needed, may still be subject to review. See "NEPA Waivers," below.

Closing or Limiting Lands to Hunting, Fishing, or Recreational Shooting

Because the premise of H.R. 4089 is that lands will be open unless closed, Title I establishes processes for when and how those lands can be closed to hunting, fishing, or recreational shooting.[51]

At issue is the fact that some criteria required by Title I may not have been used in developing land plans by BLM, the Forest Service, NPS, or FWS. Definitions introduced by H.R. 4089 could mean that existing plans have not considered the activities as defined. The bill is silent as to whether those existing plans may remain in place until they can be revised; whether those plans must all be revised immediately; or whether all lands are open to hunting, fishing, and recreational shooting upon the bill's enactment, regardless of restrictions in existing plans, until new plans using the Title I criteria are finalized. Additionally, the revision of portions of the Wilderness Act could significantly alter how those lands are managed. Finally, while Title I actions appear exempt from NEPA reviews, this may not accelerate the agency process significantly, as land agencies have other statutory requirements for public review.

Criteria for Closing Federal Lands

Section 104(a) directs agencies to "exercise their authority under existing law ... to facilitate use of and access to Federal public lands." It creates a three-prong test for when agencies may close lands:

- existing law authorizes limits for reasons of national security, public safety, or resource conservation;[52]

[48] Exec. Order No. 12962; 60 Fed. Reg. 30769 (June 9, 1995).

[49] Exec. Order No. 13443; 72 Fed. Reg. 46537 (August 20, 2007).

[50] Department of the Interior Press Release (March 23, 2006), available online at http://www.doi.gov/archive/news/06_News_Releases/060323b.htm.

[51] References to *Federal public land management officials* or *Federal public land management agency* within Title I could be interpreted to include any agency that owns land.

[52] Each of the four land management agencies has authorizing statutes directing conservation of resources: BLM (continued...)

- existing law specifically precludes fishing, hunting, or recreational shooting on specific lands or waters; and
- discretionary limitations on hunting, fishing, and recreational shooting are determined to be necessary and reasonable as supported by the best scientific evidence and advanced through a transparent public process.

The last prong, Section 104(a)(3), appears to establish new criteria for closing lands, rather than using existing statutory authority. Because "and" is used, rather than "or," it may be that all three criteria must be met before lands may be closed to hunting, fishing, or recreational shooting.[53] As a result, all agencies' planning processes may require an additional step to determine land uses if limits on those activities are imposed.

In addition, Section 104(a)(3) may establish grounds for litigation by parties not satisfied with a decision to limit those activities on certain lands. The bill would require an evaluation to curtail activities based on three subjective phrases:

- necessary and reasonable;
- supported by the best scientific evidence;[54] and
- advanced through a transparent public process.

As written, these three phrases require interpretation by the agencies incorporating them into their land planning practices, and likely also by courts, when groups disagree with an agency's interpretation or application.

Additional Criteria Established in S. 2066

It appears S. 2066 would require additional criteria for determining when lands may be closed to hunting, fishing, and recreational shooting. After making a determination under the three criteria in Section 104(a) (which are identical in S. 2066), a land agency may close land only if it is "clearly inconsistent with or incompatible with" that land's purposes, under Section 104(c)(1)(A). Section 104(c)(1)(A) would direct that all agency planning documents "provide for opportunities to engage in hunting, recreational fishing, and recreational shooting, except as determined to be clearly inconsistent with or incompatible with the purposes for which the applicable unit of Federal public land is to be managed."

Accordingly, more lands might be open under S. 2066 criteria than under H.R. 4089.

(...continued)

(FLPMA); Forest Service (National Forest Management Act); NPS (Organic Act); and FWS (Refuge Act). See the **Appendix** for a discussion of these laws.

[53] Strict grammatical construction would suggest that all three criteria must be met. However, it is not clear whether that was the intent. See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted), p. 9: "Ordinarily, as in everyday English, use of the conjunctive 'and' in a list means that all of the listed requirements must be satisfied, while use of the disjunctive 'or' means that only one of the listed requirements need be satisfied. Courts do not apply these meanings 'inexorably,' however; if a 'strict grammatical construction' will frustrate evident legislative intent, a court may read 'and' as 'or,' or 'or' as 'and.' Moreover, statutory context can render the distinction secondary" (internal citations omitted).

[54] Typically, this phrase includes the term "available," to set an achievable limit on the science. This is how the term is used in Section 104(c)(2), for example.

Criteria for Closing BLM and Forest Service Lands

Section 104(d) applies only to BLM and Forest Service lands and explicitly directs that those lands "shall be open to recreational fishing, hunting, and shooting unless the managing Federal agency acts to close such lands." This differs from the Section 104(a) language that directs land management agencies to "facilitate use of and access to" lands for those activities.

Although Section 104(a) does not limit its application to any type of federal lands, it may be that Section 104(d)'s more specific criteria supersede application of Section 104(a) to BLM or the Forest Service. However, it may also be interpreted that Section 104(d) provides additional criteria for BLM and Forest Service closures, or gives managers a choice of criteria. Unlike Section 104(a), it could be found that these criteria are consistent with existing land planning practices.

Under Section 104(d), the head of the agency may close or limit lands available for hunting, fishing, or shooting, when it is necessary and reasonable and supported by facts and evidence. Lands may be limited for the following purposes:

- resource conservation,
- public safety,
- energy or mineral production,
- energy generation or transmission infrastructure,
- water supply facilities,
- protection of other permittees,
- protection of private property rights or interests,
- national security, or
- compliance with other law.

This appears to preclude BLM and Forest Service land closure decisions from being "based on the best scientific evidence" or "advanced through a transparent public process," as required by Section 104(a)(3). It is not clear why different criteria are established for BLM and Forest Service management decisions than for the other federal public land agencies addressed by this bill.

These criteria seem to be in addition to the existing management criteria dictated by federal land management laws, for example, FLPMA and the National Forest Management Act (NFMA),[55] and would add to agencies' planning responsibilities.

Where the BLM lands are national monuments and the activity is recreational shooting, this section is superseded by Title II (see "Title II—Recreational Shooting Protection Act," below), which has different closing criteria.

[55] 16 U.S.C. §§1601-1606.

Criteria for Closing Lands Over 640 Acres Excluding BLM or Forest Service Lands

Section 104(g)(1) requires a process for the "permanent or temporary withdrawal, change of classification, or change of management status ... that effectively closes or significantly restricts 640 or more contiguous acres of Federal public land to access or use for fishing or hunting."[56] Unlike most sections in Title I, Section 104(g)(1) does not include recreational shooting as an activity that triggers coverage. Additionally, it excludes closures under Section 104(d), meaning it excludes those closures on BLM and the Forest Service lands. Closures, except for emergency closures, must follow this procedure:

- publish appropriate notice;
- demonstrate that coordination has occurred with a state fish and wildlife agency; and
- submit written notice to the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources.

Short-term closures, such as for a day or a week, are not exempted. (But see "Criteria for Closing Lands in an Emergency," below.)

Under S. 2066, closure determinations would still require a NEPA review, in contrast to H.R. 4089, where it appears they would not. See "NEPA Waivers in S. 2066" below.

Aggregation of Closure Areas

Section 104(g)(2) addresses aggregate effects of multiple closures that are smaller than 640 acres each. It states that if "separate withdrawals or changes effectively close or significantly restrict 1280 or more acres of land or water, such withdrawals and changes shall be treated as a single withdrawal or change for purposes of [Section 104(g)(1)]." This aggregation appears to apply to the cumulative closures among all agencies, and it requires no geographical link among the closures, so closures of 80-acre plots in 16 different states could amount to a closure that required reporting and publication. Although not clear, it appears that this section does not apply to BLM or Forest Service lands.[57] Currently, there is no coordinating body among federal land agencies to manage the requirements of Section 104(g)(2).

Criteria for Closing Lands in an Emergency

Section 104(g)(3) allows an agency in an emergency to close "the smallest practicable area to provide for public safety, resource conservation, national security, or other purposes authorized by law." *Emergency* is not defined. The emergency closures terminate "after a reasonable period of time." Although emergency closures are allowed, Section 104(g)(3) is silent as to whether agencies still must follow the notice and reporting requirements established elsewhere in Title I.

[56] H.R. 4089, §104(g). 640 acres is a square mile and is a unit of measurement used in federal land management since the late 1700s.

[57] Only Section 104(g)(1) explicitly excludes BLM and Forest Service lands, but it would be inconsistent to eliminate those lands from the provisions for closures for 640 acres or more, but not also the aggregation of closures.

NEPA appears to be waived. (See "NEPA Waivers," below.) However, under S. 2066, NEPA is not waived for emergency closures (see "NEPA Waivers in S. 2066" below).

Planning Documents

The decisions clarifying which lands are closed to hunting, fishing, and shooting will be part of an agency's planning document. Section 104(c) requires each planning document shall "include a specific evaluation of [its] effects on opportunities to engage in recreational fishing, hunting, or shooting."[58] As noted in "Land Management Planning Overview," above, although most federal lands are open to hunting and fishing, recreational shooting is less common. It is unlikely agencies have evaluated recreational shooting as broadly defined in this bill, when making existing land use plans. Additionally, it is unlikely that NPS or FWS used any new criteria for closure established by Title I when making evaluations for any restrictions on those three activities. To the extent that BLM and Forest Service have different planning criteria under the bill that appear consistent with existing practices, Title I would not pose a similar obstacle. According to the committee report, H.R. 4089 "would limit the amount of environmental and land use planning that would be required if new areas were opened."[59] It does not describe planning burdens when land would be closed.

Because Title I does not establish any deadlines for instituting most of these practices, it is unclear if all planning documents must be changed immediately or if management changes could be incorporated when the document is next revised. Either H.R. 4089 is intended to require immediate revision of land use plans where practices were not compatible, or many portions of the bill would not go into effect until the agency's plan came up for revision. In the case of some agency plans, those revisions may not occur for 15 years. Another interpretation is that the lands are open upon the law's enactment regardless of the current plan. This reading appears possible in the instance of BLM and Forest Service lands, in light of Section 104(d)'s directive that those lands "shall be open ... unless the managing Federal agency acts to close lands."

Additionally, it is not clear what parts of H.R. 4089 would trigger a plan revision. For example, the Title I definition of hunting, which includes trapping, could require all land management plans that allowed hunting but not trapping to be revised. Despite an apparent waiver of NEPA, discussed below, agencies would incur costs in revising existing plans, as those plans are subject to public review processes in addition to the NEPA process.[60]

Without clarification on this point, agency regulations may require review. For example, under NPS policy, any "new form of recreational activity will not be allowed within a park until a superintendent has made a determination that it will be appropriate and not cause unacceptable impacts."[61]

[58] The planning section in S. 2066, §104(c)(1)(A), is different, as discussed in "Additional Criteria Established in S. 2066," above.

[59] H.Rept. 112-426, at 16.

[60] FLPMA requires a review. 43 U.S.C. §1712(f). The Forest Service Appeals Reform Act (16 U.S.C. §1612(a)), and National Forest Management Act (16 U.S.C. §1604(d)) require public reviews. The Wildlife Refuge Administration Act requires that FWS allow for public comment before each evaluation of a use, including reevaluating existing uses and wildlife-dependent recreational uses. 16 U.S.C. §§668dd(d)(3)(B)(vii)-(ix).

[61] NPS, Management Policies, 8.2.2.

NEPA Waivers

NEPA requires that all federal agencies consider the environmental consequences of their actions before making a final decision.[62] In particular, NEPA requires the responsible federal agency to prepare a detailed statement on the proposed action (referred to as an environmental impact statement or EIS), that evaluates the environmental effects of the action, considers alternatives, and involves the public. Section 104(c)(1)(B) of H.R. 4089 states:

> that no action taken under this title, or under section 4 of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd), as amended by the National Wildlife Refuge System Improvement Act of 1997, either individually or cumulatively with other actions involving Federal public lands, shall be considered to be a major Federal action significantly affecting the quality of the human environment, and no additional identification, analysis, or consideration of environmental effects, including cumulative effects, is necessary or required.

By including language verbatim from NEPA ("major Federal action significantly affecting the quality of the human environment")[63], this section appears to exempt Title I activities from NEPA review, waiving not only the full environmental analysis performed within an EIS, but also possibly exempting environmental assessments and categorical exclusions prepared under that law. Generally, legislation with a NEPA waiver would include an explicit reference to the statute.[64] Section 104(c)(1)(B) appears also to prevent management activities under the National Wildlife Refuge System Administration Act from undergoing NEPA reviews. The scope of these exemptions is not clear. The S. 2066 NEPA provision is slightly different, as is discussed below.

It is not clear how broadly an *action taken under this Title* should be interpreted. For example, if a portion of a land management plan for BLM closes one parcel to recreational shooting but allows the rest of the area to be open, is the entire plan an *action* exempt from NEPA? Instead, the waiver might apply only to the more discrete tasks in Title I, such as the reporting requirement in Section 104(f) or the notice requirement in Section 104(g).

Additionally, the language at the end of Section 104(c)(1)(B)—"no additional identification, analysis, or consideration of environmental effects, including cumulative effects, is necessary or required"—could be read as restricting other types of environmental reviews required by statutes other than NEPA.

NEPA Waivers in S. 2066

Section 104(c)(1)(B) in S. 2066 is nearly identical to that in H.R. 4089, except that S. 2066 would require NEPA reviews in three instances that the House version appears to waive:

- designating lands and issuing leases for shooting ranges under Section 104(d)(2);
- closures of lands of 640 acres or greater, except for BLM or the Forest Service lands under Section 104(g); and

[62] 42 U.S.C. §4332. For more on NEPA generally, see CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by (name redacted).

[63] See 42 U.S.C. §4332(2)(C) for this language.

[64] See, e.g., these bills from the 112th Congress: H.R. 4976, §2; S. 1258, §122; H.R. 14 §§203, 1202.

- closures of lands in emergencies under Section 104(g)(3).

Accordingly, agencies would conduct a review under NEPA to determine the environmental impacts of designating certain lands for shooting ranges. Additionally, S. 2066 would require all land management agencies, except for BLM and the Forest Service, to continue to conduct environmental reviews to determine the effects of withdrawing lands of 640 acres or more from hunting and fishing. The review would occur even if the closure is due to an emergency. While this may slow the decision making as compared to H.R. 4089 provisions, it may provide a fuller analysis of how those activities may affect the environment. It is not clear why S. 2066 requires emergency closures of lands to follow NEPA, as NEPA reviews take time and are required to be conducted prior to an agency taking action.[65]

Wilderness Areas

The Wilderness Act[66] does not prohibit hunting and fishing, but, generally, it prohibits structures, roads and trails, and mechanized equipment including vehicles in wilderness areas. Section 104(e) of H.R. 4089, however, appears to allow any activity related to fishing, hunting, recreational shooting, or wildlife conservation in wilderness areas. It may obviate the primacy of wilderness values in determining permissible activities in wilderness areas. According to the committee report, this section was designed to avoid "continued nuisance lawsuits" that limit those activities in wilderness areas.[67] Despite the committee report's statement that "it would not open wilderness areas to motorized travel,"[68] it is unclear what additional activities are intended to be allowed under Section 104(e). In addition to the provisions in this section, wilderness management must also consider the closing criteria found in Sections 104(a) through 104(d).

Activities Deemed Necessary for Wilderness Management

Section 104(e)(1) states that "the provision of opportunities for hunting, fishing and recreational shooting, and the conservation of fish and wildlife to provide sustainable use recreational opportunities on designated wilderness areas on Federal public lands shall constitute measures necessary to meet the minimum requirements for the administration of the wilderness area."

Depending on the meaning of the phrase *provision of opportunities*, this section appears to repeal the Wilderness Act's limits on prohibited uses, which currently restrict roads, structures, machines, and commercial activities.[69] In contrast, Sections 104(a) and 104(d) made hunting, fishing, and recreational shooting within wilderness areas "subject to existing law." That existing law would be changed by Section 104(e).

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[65] While NEPA regulations provide for alternative arrangements under emergencies, see 40 C.F.R. §1506.11, it does not exempt actions taken in an emergency from review.

[66] 16 U.S.C. §§1131–1136.

[67] H.Rept. 112-426, Part I, p. 7.

[68] H.Rept. 112-426, Part I, p. 14.

[69] 16 U.S.C. §1133(c). The phrase, "necessary to meet the minimum requirements for the administration of the wilderness area" is almost a direct quote from the Wilderness Act, P.L. 88-577, §4(c), which states that "no commercial enterprise[s] and no permanent road[s]" are allowed in a wilderness area except "as necessary to meet the minimum requirements for the administration of the area." That section of the Wilderness Act continues: "there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats ... no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."

The use of *provision of opportunities* may suggest that land management agencies must actively provide for those activities. Despite the Wilderness Act's explicit ban on temporary and permanent roads, if H.R. 4089 were passed, arguably roads could be constructed in wilderness areas if they provided opportunity for hunting, fishing, recreational shooting, and wildlife conservation. While the Wilderness Act limits commercial activities, this bill might encourage activities such as additional commercially guided hunting and fishing tours. It could be construed to allow construction of structures such as cabins or dams to improve fishing. Because Section 104(c) may exempt application of NEPA, the potential impairment of wilderness values by those actions might not be considered.

Wilderness Purposes Cannot Obstruct Other Opportunities

Section 104(e)(2) repeals a different portion of the Wilderness Act:

> The term "within and supplemental to" Wilderness purposes in section 4(a) of Public Law 88-577, means that any requirements imposed by that Act shall be implemented only insofar as they do not prevent Federal public land management officials and State fish and wildlife officials from carrying out their wildlife conservation responsibilities or providing recreational opportunities on the Federal public lands subject to a wilderness designation.

Current law holds that permitted activities are allowed only to the extent they do not conflict with wilderness values. Section 104(e)(2)'s language would appear to end the Wilderness Act's primacy in land management,[70] meaning wilderness values would apply only to the extent that they did not conflict with providing recreational opportunities or wildlife conservation. Section 104(e)(2) appears to apply to all recreational opportunities, and is not limited to those related to hunting, fishing, and shooting, as is Section 104(e)(1).

Section 104(e)(3) was added as H.Amdt. 1005 to H.R. 4089. (The comparable provision in S. 2066 is described below.) Section 104(e)(3) in H.R. 4089 appears to try to limit the scope of the other two subsections: "Paragraphs (1) and (2) are not intended to authorize or facilitate commodity development, use, or extraction, or motorized recreational access or use."

Whether the reference to "motorized recreational access or use" limits Section 104(e)(1) is unclear. Section 104(e)(1) appears to direct that any opportunities related to hunting, fishing, shooting ranges, and wildlife conservation must be allowed. That would likely include motorized transport and access. A court, trying to give full effect to all three sections of Section 104(e), may find that Section 104(e)(3) bans only general recreational motorized access as permitted in Section 104(e)(2), and not the specific activities permitted in Section 104(e)(1). This construction is likely because "recreational" is used to modify *motorized access or use* in Section 104(e)(3). Instead, if that section stated it was not intended to repeal the Wilderness Act ban on *all* motorized vehicles and equipment, it would more clearly continue the current ban on motorized access. However, as written, H.R. 4089 appears to ban general "motorized recreational access or use," without limiting the more specific provision in Section 104(e)(1), thus appearing to allow motorized vehicles for hunting, fishing, recreational shooting, and wildlife conservation.

[70] See Wilderness Watch v. U.S. Fish and Wildlife Service, 629 F.3d 1024, 1027 (9th Cir. 2010); Wilderness Watch v. Mainella, 375 F.3d 1085, 1092 (11th Cir. 2004); Sierra Club v. Block, 622 F. Supp. 842, 861 (D.C. Colo. 1985).

S. 2066 may more clearly restrict motorized uses. It appears to construe activities related to hunting and fishing more narrowly than the House bill. Section 104(e)(2) in S. 2066 states that the revisions to the Wilderness Act do "not authorize or facilitate ... motorized recreation access, or comparable non-hunting, fishing and trapping activities." Motorized recreation access is linked to "*comparable non*-hunting, fishing and trapping activities" (emphasis added). Therefore, it appears that motorized recreation use is not considered a hunting, fishing, or trapping activity, and would be banned.

Both H.R. 4089, Section 104(e)(3), and S. 2066, Section 104(e)(2), appear ambiguous. Perhaps mirroring the language of the Wilderness Act to ban all "motor vehicles, motorized equipment or motorboats," if that is what is intended, would clarify the section. Otherwise, the section could be read to provide that motorized vehicle activities and access related to hunting, fishing, and recreational shooting are permitted, but other motorized uses, such as for recreation that does not include those activities, are still prohibited.

Timing

The bill does not establish any deadlines for implementing the wilderness changes. That may indicate that these activities must be allowed upon enactment. Alternatively, in light of the other references to planning documents, it may be that these changes would be implemented when the planning documents are revised.

National Wildlife Refuges

NEPA Waiver for Wildlife Refuge Management

Section 104(c)(1)(B) appears to exempt all activities related to wildlife refuge management from NEPA, regardless of whether those activities relate to Title I. For example, currently, under 16 U.S.C. Section 668dd(e), FWS prepares Comprehensive Conservation Plans (CCPs) for managing each refuge, conducting a NEPA review to consider the impacts of conservation, management, and restoration of fish, wildlife, and plants and the habitats on which they depend as well as wildlife-dependent recreation, including hunting and fishing.[71] Section 104(c)(1)(B) would appear to waive that NEPA review. Similarly, FWS NEPA reviews for a refuge's game management, such as hunting seasons and bag limits, appear to be waived. This would streamline FWS refuge management, but may adversely affect the conservation mission of wildlife refuges. However, provisions for public notice and comment currently required in 16 U.S.C. Section 668dd(e) under the CCP process could provide a different avenue for public participation outside of the NEPA process.

National Wildlife Refuge System Act Primacy

Section 104(g)(4) states that "Nothing in this Act is intended to amend or modify the provisions of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd et seq.), except as expressly provided herein." It is unclear why a provision to clarify application of the

[71] See http://www.fws.gov/policy/e1602fw3.pdf for a diagram of the steps and relationships between a CCP and the NEPA process.

entire title is added as the fourth subsection addressing closures. While this likely leaves unchanged the Section 104(c)(1)(B) exclusion of NEPA to wildlife refuge management, it does clarify that the section regarding priority of uses (§104(i)) would likely not apply to refuge management.

Differences between the bill and the Wildlife Refuge System Administration Act (Refuge Act) may raise further questions. While Title I encourages hunting and fishing, Section 104(i) provides that there is no "preference" to fishing, hunting, or recreational shooting over other uses. In contrast, the Refuge Act mandates that recreational hunting and fishing are "priority general public uses of the System and shall receive priority consideration in refuge planning and management."[72] While there may be a conflict between H.R. 4089's not giving a preference to those activities and the Refuge Act's requiring those activities to be a priority, in light of Section 104(g)(4)'s statement that Title I does not modify the Refuge Act unless done expressly, a court likely would find that Section 104(i) does not repeal the Refuge Act priority use provision.

National Parks and NPS National Monuments

Section 104(h) states that "nothing in this title requires the opening of national park or national monuments under the jurisdiction of the National Park Service to hunting or recreational shooting." Unlike most other provisions of Section 104, recreational fishing is not addressed. The language in Section 104(h) suggests that while national parks and national monuments are not required to be open, that exclusion does not apply to other types of national park units: national preserves, national historic sites, national seashores, national recreation areas, national battlefields, and others.[73] A proposed amendment to exclude all types of national park units from Title I was defeated.[74]

Although Section 104(h) would not *require* certain park units to be open to Title I activities, it does not exempt them from Title I. Taken as a whole, Section 104 appears to require NPS to follow the closure procedures if it limits lands available for hunting or recreational shooting, but does not force NPS to open the lands. It is not clear how Section 104(h) differentiates planning for those units from the general Title I closure requirements.

Reports to Congress

Two sections of Title I require federal land management agencies to notify Congress of restrictions on hunting, fishing, and recreational shooting. If an agency closes federal land to those activities, Section 104(f) requires the agency head to submit a report every two years to the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources. Despite the biannual reporting requirement, the bill directs the reports to describe only those closures happening in the previous year, thereby raising questions as to what is intended.

[72] 16 U.S.C. §668dd(a)(3)(C).

[73] For information on the units of the National Park system, see CRS Report R41816, *National Park System: What Do the Different Park Titles Signify?*, by (name redacted).

[74] See Cong. Rec. H1882 (April 17, 2012). H.Amdt. 1006 would have specified that all NPS units would be exempt from the provisions of Title I, and its encouragement of recreational shooting, but was defeated (yeas 152—nays 260; Roll no. 158).

An additional reporting mandate is found in Section 104(g), which requires notice to congressional committees of closures affecting 640 acres or more. While no deadline is established, the areas cannot be closed until those committees are given notice. Finally, Sections 203(b) and (g) in Title II require additional reports for recreational shooting in national monuments managed by BLM (see "Notice and Report of Closures," below).

It is not clear whether the reporting requirements within Title I are intended to replace or supplement the reporting requirements in FLPMA. Section 202 of FLPMA requires BLM to report to Congress when it closes land to principle or major uses when the land is 100,000 acres or more, and if that land will be closed for two or more years.[75]

Limitation of Liability for Shooting Ranges

Section 104(d)(2) includes a waiver of liability for the federal government for claims related to shooting ranges. Because Section 104(d)(2) does not refer to the Title I term, *Federal public land*, and in light of the narrow application of Section 104(d)(1), the limitation of liability may apply only to BLM and Forest Service lands. It is not clear what was intended. The liability limitation does not appear to apply to other recreational shooting activities, however.

State Authority

Section 104(k)(1) states that Title I shall not be construed as "interfering with, diminishing, or conflicting with the authority, jurisdiction, or responsibility of any State [to manage its fish and wildlife]." Other provisions also indicate that the bill is not intended to interfere with state law, as discussed above: Section 104(b)(2)—management of federal lands will be to the extent authorized by state law; Section 104(c)(2)—use of volunteers to cull animals will be in cooperation with state agencies; and Section 104(g)(1)(B)—closures of lands with an area 640 acres or more shall be in coordination with state agencies.

Federal Licenses and Fees

Section 104(k)(2) states that Title I does not authorize imposing a federal "license, fee, or permit to fish, hunt, or trap" on federal lands, excluding the Migratory Bird Stamp. (Recreational shooting is not included.) It is not clear if this is intended to prevent the *creation* of license or permit requirements based on this title, or whether existing authorizations for license, fees, and permits have been revoked. As discussed in the **Appendix**, below, land agencies already have permit requirements for some activities mandated in Title I. If revocation were intended, the permit required by FWS for field trials on refuge lands, for example, would no longer be valid. NPS permits for war reenactments would lose authorization, as war reenactments would become an authorized use. Because nearly all federal lands require a type of permit for activities that otherwise would be prohibited, this may require land management agencies to revise their regulations.

While Section 104(k)(2) does not authorize fees for fishing, hunting, or trapping, it does not exclude application of the Federal Lands Recreation Enhancement Act (FLREA). This could

[75] 43 U.S.C. §1712(e)(2).

allow agencies to impose a type of recreation fee for activities other than fishing, hunting, or trapping, such as shooting ranges or war reenactments, for example, subject to that act's restrictions.[76]

Acquisition of Private Property

One criticism of federal land management is that access to hunting and fishing areas can be limited. Sometimes, the best access to federal land is across private property. At least two federal land management agencies, BLM and the Forest Service, have authority to acquire property, especially to provide easier access to federal lands.[77] The authority includes eminent domain. Title I does not limit agencies' existing authority to acquire property, and Section 104(a) could be read as encouraging agencies to exercise their statutory authority to facilitate access to federal lands by acquiring property, such as easements, from adjoining property owners.

Title II—Recreational Shooting Protection Act

Title II more narrowly addresses recreational shooting on BLM national monument lands. Like the provisions in Section 104(d), it requires that lands be open for that activity, unless certain justifications are met. However, it does not include the reasons for which the lands were designated as monuments as a basis for limiting recreational shooting. The closures are limited to six months, unless Congress passes a law extending the term. Title II prohibits BLM from closing the same area more than once for the same reasons, potentially posing an internal contradiction when the reasons for closing land are statutory or based on national security or public safety. Additionally, Title II imposes different reporting duties on BLM than under Title I.

Monuments are established either by Congress or by presidential proclamation under the Antiquities Act to preserve federal lands with historic or scientific interest.[78] Management of each monument is unique, with circumstances dictated by either the presidential proclamation or the legislation creating the monument. For any monument, current practice is that BLM land management planning would have to find that recreational shooting is consistent with the values for which the land was preserved.

Definitions

Title II defines *national monument land* as having "the meaning given that term in [the Antiquities Act]."[79] However, the Antiquities Act does not use this term. A more precise definition of *national monument land* could be lands designated as national monuments under the Antiquities Act.

[76] For discussion of the act, see CRS Report RL33730, *Recreation Fees Under the Federal Lands Recreation Enhancement Act*, by (name redacted).

[77] 43 U.S.C. §1715(a).

[78] 16 U.S.C. §431.

[79] 16 U.S.C. §431. Section 202(2) contains a typographical error: the Antiquities Act was enacted in 1906 and not 1908.

The *recreational shooting* definition is the same as in Section 102(4) of Title I. (See "Definition of Recreational Shooting," above.)

BLM-Managed National Monuments Open for Recreational Shooting

Section 203(a) would require that BLM national monuments be open for recreational shooting unless closures are "necessary and reasonable and supported by facts and evidence." Thus, it uses almost the same criteria as for other BLM lands found in Section 104(d). (See "Criteria for Closing BLM and Forest Service Lands," above.) However, Title II closures do not require consideration of some factors required by Section 104(d)(1)—resource conservation, energy or mineral production, energy generation or transmission infrastructure, water supply facilities, protection of other permittees, protection of private property rights or interests—likely because those land uses, with the exception of resource conservation, would be uncommon in a national monument. Title II does not include the effect on natural resources or the values for which the monument was established as factors that BLM may consider to justify closing lands. Further, Section 203(d) directs BLM to manage monument lands "in a manner that supports, promotes, and enhances recreational shooting opportunities," and in compliance with applicable state and federal law.

Unlike Section 104 determinations, Section 203 closures are not excluded from NEPA review.

Section 203(j) establishes that if there is an inconsistency between the provisions in Title I and this title as regards BLM national monuments, the provision in Title II shall take precedence.

Notice and Report of Closures

Section 203(b) would require BLM to prepare a different analysis for limiting shooting on its monument lands than for other lands it manages, even different from the Section 104(d) requirements specific to BLM lands. Section 203(b)(1) requires BLM to publish a notice of a closure or restriction in a newspaper of general circulation, and to submit a report to Congress.[80] Section 203(b)(2) requires that both the public notice and the report must be issued before the closure unless public safety or national security is at risk, in which cases the closure is allowed for 30 days. Thus, the report would be in addition to the biannual reporting requirement in Section 104(f). It appears that the report would also be in addition to FLPMA reporting requirements.[81] (See "Reports to Congress," above.)

Additionally, Section 203(g) requires BLM to submit an annual report to congressional committees describing any national monument land closed or restricted to recreational shooting at any time during the prior year and the reason for the closure.

[80] Unlike other provisions in H.R. 4089, this Section does not specify that the reports go to the House Natural Resources Committee and the Senate Committee on Energy and Natural Resources, but to Congress, in general.

[81] 43 U.S.C. §1712(e)(2), requiring reporting closures of 100,000 acres that exceed two years.

Length of Closures or Restrictions

Section 203(c) establishes the duration for closures and restrictions. All administrative closures under Title II are temporary. The closures appear to last for six months starting on the date that the report of the closure is submitted to Congress. Title II does not appear to provide for shorter administrative closures.

A closure will end after six months if Congress takes no action. If Congress chooses to end the closure earlier through legislation, Section 203(c)(2) requires the land to reopen 30 days after that law's date of enactment. However, part of Section 203(c)(2) appears to be an unconstitutional restriction on a future Congress: a Congress cannot be bound by a previous Congress. Therefore, a future law regarding closures cannot be restricted by Title II's requirement for a 30-day effective date.

No Administrative Extension or Renewal of Closures

No closures may be longer than six months unless extended by law. Also, Section 203(e) states that unless there is a change in circumstance, no closure previously issued may be renewed if substantially similar. This would appear to bar closures based on breeding seasons, national security, or public safety, for example, as the reason for such closures would be substantially similar each year. This could also lead to statutory conflicts over a number of issues. For example, the Endangered Species Act (ESA) imposes duties on an agency to protect listed species.[82] However, Title II directs BLM to open monument lands without considering resource conservation and yet still comply with applicable statutes.

Effective Date for Previously Established Closures

Where a national monument or a portion of a monument was closed to recreational shooting prior to the enactment of this bill, Section 203(f) provides that that closure will be subject to the act six months after enactment. This means that barring a legislative extension, all BLM monument lands will be open to recreational shooting within six months, if the agency does not act, or up to one year, if BLM complies with the public notice, a report to Congress, and formal closure requirements under Title II within six months of H.R. 4089's enactment.

No Priority to Recreational Shooting

Section 203(h) states that nothing in the title gives a preference in land management to recreational shooting over other land management priorities. It also states that it does not affect state jurisdiction over fish and wildlife and does not establish a licensing requirement.

[82] 16 U.S.C. §1536(a)(2).

Title III—Polar Bear Conservation and Fairness Act of 2012

Title III would amend the Marine Mammal Protection Act (MMPA)[83] to authorize between 41 and 44 hunters with legally hunted polar bear remains from Canada to import those trophies to the United States. S. 1066 would do the same. Before May 15, 2008, when the ESA listing of polar bears as a threatened species took effect, it had been legal to import polar bear trophies from Canada. The law would apply only to bears legally killed prior to May 15, 2008. Permit fees of $1,000 for each trophy would be available for a U.S.-Russia Polar Bear Conservation Fund to support polar bear conservation activities.

FWS contends that once the proposed rule to list polar bears as a threatened species was published in January 2007, an extensive campaign was conducted by FWS to alert hunters to the potential impact of ESA listing on the ability to import polar bear trophies. However, despite this warning, FWS continued to authorize the import of polar bear trophies under existing law until the ESA listing became final. The permitting process was truncated by court order making the listing effective immediately rather than after 30 days.[84]

FWS does not oppose legislation allowing hunters who both applied for an import permit and completed their legal hunt prior to ESA listing.[85] FWS originally declined to support another version of this provision (H.R. 991, as introduced) because the introduced version would have allowed hunters to import polar bear trophies regardless of whether the hunter had applied for the permit prior to the ESA listing.[86] H.R. 991 was amended to address FWS concerns before it was reported by the House Committee on Natural Resources on December 1, 2011.

Others oppose Title III of H.R. 4089, believing it would encourage hunting of species whose listing was imminent. The Humane Society of the United States testified that allowing polar bear imports "would roll back polar bear conservation efforts and set a dangerous precedent for gutting the protections provided under the Marine Mammal Protection Act and the Endangered Species Act."[87] The dissenting views to the House committee report, for example, pointed to the "extensive outreach by the Fish and Wildlife Service that a prohibition would be placed on polar bear trophy imports if a listing occurred" as reason not to provide a legislative waiver.[88] A federal court upheld the permit ban, finding that there was no procedural flaw in blocking permits as of the day the bear was listed as threatened.[89]

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[83] 16 U.S.C. §1361 et seq.

[84] Center for Biological Diversity v. Kempthorne, No. C 08-1339, 2008 WL 1902703 (N.D. Cal. April 28, 2008).

[85] Testimony of Rowan Gould, Acting Director, FWS, before the House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs (May 12, 2011), available online at http://www.fws.gov/laws/Testimony/112th/2011/Gould_May%2011.html.

[86] *Id.*

[87] Testimony of Michael Markarian, Chief Program and Policy Officer, Humane Society of the United States, before the House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, Hearing on H.R. 991 (May 12, 2011), available online at http://www.humanesociety.org/assets/pdfs/legislation/testimony-michael-markarian-h-r-1054.pdf.

[88] H.Rept. 112-426, Part I, Dissenting Views p.21.

[89] In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation, 818 F. Supp. 2d 240 (D.D.C. 2011).

Title IV—Hunting, Fishing, and Recreational Shooting Protection Act

Title IV of H.R. 4089 would exempt lead shot, ammunition, and sinkers from provisions of the Toxic Substances Control Act (TSCA).[90] It is identical to H.R. 1558, and S. 838. Title IV appears to seek legislative certainty for a denied citizen petition to force the Environmental Protection Agency (EPA) to regulate lead in ammunition and in fishing sinkers. On August 27, 2010, EPA denied one portion of the petition relating to the production of lead for use in ammunition, stating that the agency did not have legal authority to regulate ammunition under TSCA. EPA continued to evaluate the petition with respect to fishing tackle and accepted public comments until September 15, 2010.[91] EPA denied that portion of the petition on November 4, 2010.[92] On April 30, 2012, a lawsuit challenging the denial was dismissed.[93] On June 7, 2012, a suit was filed challenging EPA's 2012 denial of a new petition to regulate lead shot under TSCA.[94]

H.R. 4089 would prevent federal regulation through TSCA, but not through other statutory authorities: lead shot has been banned in the United States for the hunting of migratory waterfowl since 1991 under authority of the Migratory Bird Treaty Act and the Endangered Species Act.[95]

Title IV does not appear to preempt state laws that ban use of lead. For example, New Hampshire, New York, and Vermont prohibit sale and/or use of lead sinkers.[96] Delaware prohibits killing deer with lead shot,[97] and Pennsylvania[98] and California[99] prohibit taking big game with lead ammunition.

Title V—Hunting in the Kisatchie National Forest

Title V, added by H.Amdt. 1009, prohibits the Forest Service from restricting the use of dogs in deer hunting activities on the Kisatchie National Forest in Louisiana. This title would vacate the 2012 decision by the Forest Service that dog-deer hunting is not appropriate on the Kisatchie National Forest.[100] The Forest Service reached that conclusion after conducting an environmental

[90] 15 U.S.C. §2602(2)(B).

[91] Comments are posted in the rulemaking docket, which is identified as EPA-HQ-OPPT-2010-0681 at http://www.regulations.gov/.

[92] For more information on the EPA position on the regulation of lead in ammunition and lead sinkers, see CRS General Distribution Memorandum "Petition for Regulation of Lead in Fishing Sinkers and Ammunition by the U.S. Environmental Protection Agency," by (name redacted) (March 16, 2012).

[93] Center for Biological Diversity v. Jackson, No.10-CV-2007 (D.D.C. April 30, 2012).

[94] Trumpeter Swan Society v. Environmental Protection Agency, No. 1:12-cv-00929 (D.D.C. *complaint filed* June 7, 2012).

[95] 53 Fed. Reg. 24284 (June 28, 1988). See also 50 C.F.R. §20.21.

[96] N.H. Rev. Stat. Ann. §211:13-b; N.H. Rev. Stat. Ann. §339:77. N.Y. Envtl. Conserv. Law §11-0308. Vt. Stat. Ann. tit. 10, §4606; Vt. Stat. Ann. tit. 10, §4615.

[97] Del. Code Ann. tit. 7, §704.

[98] 34 Pa. Cons. Stat. §2126.

[99] Cal. Fish & Game Code §3004.5.

[100] Forest Service Press Release, "USDA Forest Service Announces Decision on Dog-Deer Hunting on the Kisatchie National Forest" (March 1, 2012).

analysis and reviewed more than 1,300 public comments about this activity's effects on public safety, impacts on adjacent private lands, and the potential loss of this type of hunting opportunity.[101]

Section 501 would allow restrictions only if they were limited to the "smallest practicable portions" of the forest and were "necessary to reduce or control trespass" onto adjacent lands. The bill does not include an evaluation of the impacts of dogs on the resources of the forest, or on public health or safety.

Title VI—Ending Unilateral Presidential Power to Establish National Monuments

Section 601 would end the authority of the President to establish a national monument unilaterally. This title was added by H.Amdt. 1012. The Antiquities Act authorizes the President to protect areas of federal lands having historic or scientific interest by issuing a proclamation.[102] This authority has been challenged virtually since enactment, but has been limited only for the states of Wyoming[103] and Alaska.[104] Under Section 601, a President could still identify lands for protection, but the proclamation would not become valid until both the governor and legislature of the affected state approved. According to the bill, the monument designation could not restrict any public use of the area until the Secretary of the Interior allowed an "appropriate review period." It appears that the Secretary of the Interior would conduct the review despite whether the Department of the Interior would be the managing agency of the land.

[101] Forest Service, *Kisatchie National Forest Plan Amendment #9 Prohibiting Dog-Deer Hunting* (February 29, 2012), available online at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5355461.pdf.

[102] For details on issues relating to the Antiquities Act CRS Report R41330, *National Monuments and the Antiquities Act*, by (name redacted) and (name redacted).

[103] 16 U.S.C. §431a (prohibiting monuments established by a president).

[104] 16 U.S.C. §3213 (requiring congressional approval of monuments greater than 5,000 acres).

Appendix. Current Land Management Practices

Bureau of Land Management[105]

Management for Hunting, Fishing, and Recreational Shooting

The Bureau of Land Management (BLM) manages approximately 245 million acres[106] of public lands that contain diverse resources, attributes, and opportunities. The Federal Land Policy and Management Act of 1976 (FLPMA)[107] required BLM lands to be managed for diverse uses, which are sometimes conflicting, ranging from mineral extraction to wildlife conservation. Some lands are restricted from one or more uses or managed for a predominant use.

BLM allows fishing, hunting, and shooting sports[108] on public lands in accordance with state laws, unless specifically prohibited. Overall, BLM estimates that more than 95% of its lands are open to hunting, fishing, and recreational shooting.[109] BLM regulations address the general authority of states to regulate these activities. They note that except as otherwise provided by federal law or regulations, "state and local laws and ordinances shall apply and be enforced by the appropriate State and local authorities. This includes, but is not limited to, State and local laws and ordinances governing: ... (b) Hunting and fishing; (c) Use of firearms or other weapons."[110] Management of game populations is the responsibility of the state fish and game departments, and BLM manages wildlife habitats to sustain or improve wildlife populations while allowing for other sustainable uses of public lands.

Fishing, hunting, and recreational shooting on BLM lands may be restricted in a number of ways. Some BLM regulations may limit these activities on a site-specific basis. For example, the discharge or use of firearms or other weapons in developed recreation sites and areas is prohibited, unless specifically authorized.[111] Likewise, hunting could be limited under a BLM regulation that prohibits activities that create a risk to other persons.[112]

BLM may administratively close areas to a particular activity either permanently or temporarily. An area might be closed for reasons including health, safety, and resource protection. Among other procedures, BLM may close an area through the land use planning process or through a closure order. BLM officers are authorized to issue an order to close or restrict the use of designated public lands to protect people, property, public lands, and resources.[113] Further,

[105] This section was written by Carol Hardy-Vincent, CRS Specialist in Natural Resources Policy.

[106] This figure is current as of January 2012.

[107] P.L. 94-579; 43 U.S.C. §§1701 et seq.

[108] BLM has no regulatory definition of hunting or shooting.

[109] This estimate is derived from BLM testimony in the 112th Congress on H.R. 3440, H.R. 2834, and H.R. 1444 regarding recreational shooting and hunting, and personal communication regarding fishing between BLM and Carol Hardy-Vincent of CRS (May 21, 2012).

[110] 43 C.F.R. §8365.1-7.

[111] 43 C.F.R. §8365.2-5.

[112] 43 C.F.R. §8365.1-4.

[113] 43 C.F.R. §8364.1.

restrictions on other activities may limit hunting, fishing, or recreational shooting indirectly. For example, hunting might be limited through restrictions on travel or motorized access.

BLM has testified that its lands are open to hunting "virtually everywhere the individual states allow it," while the agency "must occasionally restrict recreational target shooting in extremely limited circumstances."[114] BLM further testified that recreational shooting closures typically occur to comply with state and local public safety laws and ordinances, and have occurred in areas with administrative sites, campgrounds, and other developed facilities; intensive energy, industrial, residential, or community development; and significant and sensitive natural or cultural resources.[115]

BLM Land Management Planning

Pursuant to FLPMA, BLM develops resource management plans for its land,[116] which "provide the basis for every BLM management action."[117] These plans establish land and resource goals and objectives and the actions needed to achieve them, and identify which lands are open, restricted, or closed to particular uses.

FLPMA requires BLM to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands."[118] The law specifies criteria for the development and revision of plans, including that BLM use and observe the principles of multiple use and sustained yield, use a systematic interdisciplinary approach to integrate scientific and other information, weigh long-term public benefits against short-term benefits, consider present and potential land uses, and consider the relative scarcity of the values involved and the availability of other means and sites to realize those values.

FLPMA contains various provisions on public participation in the planning process. One provision calls for public involvement in the development and revision of land use plans.[119] Another provides for public involvement, such as hearings where appropriate, to give federal, state, and local governments and the public "notice and opportunity to comment upon and participate in the formulation of plans."[120] Still another creates resource advisory councils to be involved in land use planning.[121] In addition, other provisions direct BLM to coordinate planning efforts with other federal, state, local, and tribal planning activities. Other laws, regulations, and executive orders govern public participation in BLM planning as well.[122]

[114] Bob Ratcliffe, BLM, Testimony on H.R. 3440 before the House Natural Resources Committee, Subcommittee on National Parks, Forests, and Public Lands, p. 2 (January 24, 2012).

[115] *Id.*

[116] *Land use plan* and *resource management plan* are used interchangeably by the BLM. All BLM lands (except some in Alaska) are covered by a resource management plan.

[117] Dept. of the Interior, BLM, *Budget Justifications and Performance Information, Fiscal Year 2013*, p. VIII-161.

[118] 43 U.S.C. §1712(a).

[119] 43 U.S.C. §1712(a).

[120] 43 U.S.C. §1712(f).

[121] 43 U.S.C. §1739.

[122] For example, see BLM planning regulations at 43 C.F.R. §§1600-1610, and the implementing regulations for the National Environmental Policy Act in 40 C.F.R. §§1500-1508.

BLM land management plans generally are intended to govern management of agency lands over a 10- to 15-year period. They are to be revised or amended as new issues arise or conditions change. A plan revision replaces an existing plan, and is undertaken when a major portion of a plan or the entire plan no longer serves as a useful guide to land management. A plan amendment typically changes one or more of the terms, conditions, or decisions of an existing plan.[123] Beginning in FY2001, BLM intensified efforts to update plans that were out of date, due to increased demands for energy resources, a rise in the use of off-highway vehicles, new listings of species under the Endangered Species Act, or a need to mitigate the effects of wildfires. Further, BLM has been developing new land use plans for additions to the National Landscape Conservation System. The agency estimates that since FY2001, 67 plans have been updated, while 48 are currently being updated and 44 need revision or amendment to meet changing demands and conditions.[124]

Forest Service

Management for Hunting, Fishing, and Recreational Shooting

The Forest Service of the U.S. Department of Agriculture (USDA) administers the National Forest System (NFS), which consists of 193 million acres in 44 states and the Commonwealth of Puerto Rico, including national forests (155), national grasslands (20), and a tallgrass prairie.[125] Approximately 2.9 million acres are officially designated as National Recreation Areas, 36.2 million acres as National Wilderness Areas, and 2.9 million acres as National Game Refuge and Wildlife Preserve Areas.[126] Roughly 21% of lands within the boundaries of NFS lands are lands that are not federally owned or administered by the Forest Service. Those lands—sometimes referred to as inholdings—can cause difficulties for Forest Service land management because the agency does not regulate the development and use of the inholdings, and for hunters who may not know the boundaries between public and private property.

The majority of NFS lands are open to hunting, shooting, fishing, and other recreational activities, although federal and state regulations and game limits apply.[127] NFS lands are open to those activities unless specifically closed at the unit level. A few Forest Service sites are not open to hunting, as restricted by Congress when designating the area.[128] While the Forest Service does not

[123] This distinction is taken from the BLM Land Use Planning Handbook, Chapter VII, on the BLM website at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.38665.File.dat/h1601-1.pdf. For more information on plan revisions and amendments, including on the different processes that apply, see that handbook as well as BLM regulations at 43 C.F.R. §§1610.5-5 and 5-6.

[124] Dept. of the Interior, BLM, *Budget Justifications and Performance Information, Fiscal Year 2013*, p. VIII-167.

[125] For a map of National Forests and National Grasslands, see http://www.fs.fed.us/recreation/map/finder.shtml.

[126] U.S. Forest Service, *Land Areas Report* (September 30, 2011), available online at http://www.fs.fed.us/land/staff/lar/LAR2011/lar2011index.html.

[127] For more information, see the Forest Service, *Federal Lands Hunting, Fishing and Shooting Sports Roundtable Memorandum of Understanding* (2006), available online at http://www.fs.fed.us/recreation/programs/trails/shooting_mou.pdf.

[128] See, e.g., Ozark Wildlife Preserve, Act of February 28, 1925, ch. 376; Tahquitz National Game Preserve (CA), Act of July 3, 1926, ch. 776; Ocala National Game Refuge (FL), Act of June 28, 1930, ch. 709.

keep track of how much land is open to those activities, visitation data show that 7.6% and 8.2% of annual NFS recreational visitors list hunting or fishing, respectively, as their main activity.[129]

State agencies manage the hunting, shooting, and fishing that occurs on NFS lands. Hunting, shooting, or fishing on inholdings require permission from the landowner and follow state laws.

Forest Service Land Management Planning

Forest Service management goals for the national forests have evolved over time. The first management goals were established in 1897, when Congress stated that the forest reserves were "to improve and protect the forest ... for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States."[130]

Management goals were further defined in Section 1 of the Multiple Use-Sustained Yield Act of 1960 (MUSYA), which states that forests will be administered for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes" in addition to the purposes established in 1897.[131] MUSYA directs land and resource management of the national forests for the combination of uses that best meets the needs of the American people.

Forest Service planning and management are guided primarily by the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974, as amended by the National Forest Management Act (NFMA) of 1976. NFMA requires the Forest Service to prepare a comprehensive land and resource management plan for each NFS unit, coordinated with the national RPA planning process. Planning regulations were first issued in 1979, and most recently revised in 2012.[132]

Under the planning regulations, the Forest Service will develop unit plans, known as land management plans, that describe resource management and projects and activities.[133] Plans are subject to NEPA. A plan must be revised at least every 15 years. However, a plan may be revised sooner than the 15-year mark upon a determination that conditions have changed significantly.[134] A plan may be amended at any time.[135] The Forest Service reports there are 127 land management plans for NFS lands, 68 of which are past due for revision.[136] Most of the past due plans were developed between 1983 and 1993 and should have been revised between 1998 and 2008. The

[129] Forest Service, National Visitor Use Monitoring Results, National Summary Results, Data collected FY 2005 through FY 2009, p. 13 (last updated April 2010), available online at http://www.fs.fed.us/recreation/programs/nvum/nvum_national_summary_fy2009.pdf.

[130] Organic Administration Act of 1897, Act of June 4, 1897; 16 U.S.C. §§473 et seq.

[131] Multiple Use-Sustained Yield Act of 1960, P.L. 86-517; 16 U.S.C. §§528-531.

[132] 36 C.F.R. part 219.

[133] 36 C.F.R. §219.2(b).

[134] The supervisor of the national forest, grassland, prairie, or other comparable administrative unit is the responsible official for development and approval of a plan, plan amendment, or plan revision. Two or more responsible officials may undertake joint planning over lands under their respective jurisdictions. 36 C.F.R. §219.2.

[135] Plan amendments may be broad or narrow, depending on the need for change, and should be used to keep plans current and help units adapt to new information or changing conditions. 36 C.F.R. §219.13.

[136] *Id.*

Forest Service reports that efforts to produce a new planning rule over the past decade contributed to the delay in plan revisions.

National Park Service

Management for Hunting, Fishing, and Recreational Shooting

The National Park Service (NPS) manages lands within the national park system. The park system includes 84 million acres of land in 397 designated units, including 58 national parks and 75 national monuments. Other types of park units include memorials, battlefields and military parks, historic sites and parks, lakeshores and seashores, recreation areas, reserves, preserves, rivers and trails, and other designations.[137] Sixty-one NPS units are open to hunting, and 200 units allow fishing.[138] NPS has the often contradictory mission of facilitating access and serving visitors while protecting and preserving unimpaired for future generations the natural, historic, and cultural integrity of the lands and resources it manages.[139] NPS typically has specific management direction in the statutory authorization for each unit.

While each park may have more specific provisions based on its statutory authorization, NPS regulations establish general management guidelines for all park units. Park Superintendents have the authority to close areas of the park to specific uses consistent with federal law and administrative policy.[140] Fishing, generally, is allowed in national park units "in accordance with the laws and regulations of the State within whose exterior boundaries a park area or portion thereof is located."[141] Like other public uses, fishing is allowed to the extent it is an *appropriate use*, meaning it is "suitable, proper, or fitting for a particular park, or to a particular location within a park."[142]

NPS regulations prohibit hunting and trapping except in park areas where specifically authorized by federal law.[143] *Hunting* is not defined in the regulations. Additionally, even where authorized, hunting may take place only after NPS has determined that the activity is an appropriate use and is "consistent with public safety and enjoyment, and sound resource management principles."[144] Some park units where federal law allows hunting include Fire Island National Seashore,[145] Lake

[137] For basic information on the park units, see CRS Report R41816, *National Park System: What Do the Different Park Titles Signify?*, by (name redacted).

[138] Personal communication between Laura Comay of CRS and Chris Powell, Senior Congressional Affairs Specialist, National Park Service, June 14, 2012. Units may be completely open to hunting or fishing, or these activities may be permitted only in portions of the unit. NPS regulations do not specifically address recreational shooting.

[139] 16 U.S.C. §1.

[140] 36 C.F.R. §1.6(a).

[141] 36 C.F.R. §2.3(a).

[142] NPS, Management Policies, 1.5 (2006), available online at http://www.nps.gov/policy/MP2006.pdf.

[143] 36 C.F.R. §§2.2(a) and (b).

[144] 36 C.F.R. §2.2(b)(2).

[145] 16 U.S.C. §459e-4.

Chelan Cascades National Recreation Area,[146] Delaware Water Gap National Recreation Area,[147] Big Cypress National Preserve,[148] and Bighorn Canyon National Recreation Area.[149]

The NPS regulations do not address *recreational shooting* specifically. However, the regulations restrict *special events*, which reasonably could include war reenactments, field trials, or shooting competitions, to those that have "a meaningful association between the park area and the events, and the observance contributes to visitor understanding of the significance of the park area, and a permit therefor has been issued by the superintendent."[150] A permit may be denied for events that would: injure or damage park resources; be contrary to the purposes of the park, such as unreasonably interfere with the peace and tranquility maintained in wilderness, natural, historic, or commemorative zones; unreasonably interfere with park administration; substantially impair the operation of concessioners; present a clear and present danger to the public; or result in significant conflict with other existing uses.[151] Thus, park units appear to be the only types of federal lands where uses such as recreational shooting may be restricted due to noise.

NPS Land Management Planning

NPS management is directed by three main statutes: the Organic Act of 1916,[152] the General Authorities Act of 1970,[153] and the National Parks and Recreation Act of 1978.[154] Under the National Parks and Recreation Act, NPS must prepare management plans for park units. Goals and practices for management are within the NPS Management Policies.[155] NPS prepares General Management Plans (GMPs), "a broad umbrella document that sets the long-term goals for the park," for overall park unit management.[156] These are prepared every 10 to 15 years, but may be updated earlier if circumstances warrant.[157] Implementation Plans are prepared for specific projects or resources. NPS is required to identify and document the environmental impacts of its land management planning decisions pursuant to its guidelines implementing NEPA.[158]

[146] 16 U.S.C. §90c-1.

[147] 16 U.S.C §460o-5.

[148] 16 U.S.C. §698i.

[149] 16 U.S.C. §460t-3.

[150] 36 C.F.R. §2.50(a).

[151] 36 C.F.R. §§2.50(a)(1)–(6).

[152] 16 U.S.C. §1.

[153] 16 U.S.C. §1a-1.

[154] 16 U.S.C. §1a-7(b).

[155] NPS, Management Policies (2006), available online at http://www.nps.gov/policy/MP2006.pdf.

[156] NPS Management Policies, 2.2 (2006). Other types of plans are Program Management Plans, which have "program-specific information on strategies to achieve and maintain the desired resource conditions and visitor experiences, including identification of appropriate visitor use"; Strategic Plans, for one- to five-year goals; and Annual Performance Plans.

[157] NPS Management Policies, 2.3.1.12.

[158] NPS Director's Order 12, "Conservation Planning, Environmental Impact Analysis, and Decision Making," available online at http://www.nature.nps.gov/protectingrestoring/do12site/TOC.htm.

Of the 397 park units, 375 have GMPs. Approximately 50 new or revised GMPs are in development. All units are expected to have a GMP, except for one unit on an Indian reservation, which site is closed to the public.[159]

Fish and Wildlife Service

Management for Hunting, Fishing, and Recreational Shooting

The National Wildlife Refuge System (Refuge System) is administered by the Fish and Wildlife Service (FWS) of the Department of the Interior. The Refuge System has 149.0 million acres; a small fraction of the Refuge System (3.5 million acres) consists of Waterfowl Production Areas (WPAs),[160] managed for breeding habitat of waterfowl. In addition to the Refuge System, FWS manages another 157.1 million acres, consisting largely of marine national monuments established under the Antiquities Act. Of the 594 wildlife refuges and WPAs, 365 are open to some form of hunting.[161] Hunting closures occur for reasons including human safety, species conservation, and lack of huntable species.

All FWS lands are managed primarily for the conservation of animals and plants. Other uses in the Refuge System—hunting, fishing, recreation, timber harvest, grazing, etc.—are permitted to the extent that they are compatible with the purposes for which the refuge was created. The Refuge System resembles the Forest Service or BLM lands in allowing some commercial uses, but in certain cases, other uses (e.g., public access) can be substantially more restrictive than for NPS lands.

The National Wildlife Refuge System Improvement Act of 1997[162] addressed overarching refuge management controversies facing FWS. A key provision of this law designated "compatible wildlife-dependent recreational uses involving hunting, fishing, wildlife observation and photography, and environmental education and interpretation as priority public uses of the Refuge System."[163] It also required that priority public uses must "receive enhanced consideration over other general public uses in planning and management within the System."[164] The law continued to provide that activities that are not wildlife-dependent (e.g., grazing, growing hay, etc.) may be permitted, provided they are compatible with wildlife. Recreational shooting is not considered a wildlife-dependent activity and therefore is not a priority use of refuge lands.

[159] Personal communication from Patrick Gregerson, Chief, Park Planning & Special Studies, National Park Service with (name redacted). May 22, 2012.

[160] WPAs mostly occur in Montana, North Dakota, and Minnesota. Of the WPAs, 2.7 million acres are managed under easements or leases with private landowners, which would not be covered by the definition of federal lands under Section 103(1), requiring federal ownership.

[161] Personal communication between Martin Kodis, Deputy Chief, Division of Congressional and Legislative Affairs, Fish and Wildlife Service, and (name redacted), CRS (May 17, 2012).

[162] 16 U.S.C. §668dd. This is Section 4 of the National Wildlife Refuge System Administration Act of 1966, as amended.

[163] 16 U.S.C. §668dd(a)(3)(B).

[164] 16 U.S.C. §668dd(a)(4)(J).

FWS Wildlife Refuge Planning

The statutory basis for Refuge System planning is Section 4 of the National Wildlife Refuge System Administration Act (Refuge Act).[165] Hunting is on the short list of wildlife-dependent recreation activities and therefore is a priority use of a refuge. Section 4 requires refuge managers to document and describe "existing and potential opportunities for wildlife-dependent recreation" in their land management planning, which includes creating a Comprehensive Conservation Plan (CCP). Explicit directives for CCP development are contained in the FWS Service Manual, which states that CCPs must prepare goals for "compatible wildlife-dependent recreation" and also map desired future conditions for such activities. To an extent, the planning requirements of H.R. 4089 appear to be congruent with the analysis already undertaken by FWS. However, because the Refuge Act does not define hunting or fishing, H.R. 4089 might expand the scope of a CCP by (1) including trapping and field trials under its definition of hunting; (2) not clearly excluding commercial fishing from recreational fishing; and (3) adding recreational shooting (as defined) as an activity to be analyzed in such plans.

The CCPs process includes developing background information, preparing alternatives, and specifying one alternative as preferred, all subject to public notice and comments. FWS responds to comments about the draft plans, and issues a final plan. All refuge plans are to be completed within 15 years of when the Refuge Act was amended—by October 9, 2012—and revised at least every 15 years thereafter or as warranted. As plans are being prepared, FWS must publish a notice in the *Federal Register* of the opportunity for public comment. In addition, individual refuges post planning documents and notices on their websites.

Of the 554 units in the Refuge System at the time the Refuge Act was amended, 429 have completed CCPs. There are 109 plans under development; 16 CCPs have not yet begun the planning process, but are expected to begin soon. It is expected that all but 50 or so of the units will be completed by the October 9, 2012, deadline.[166]

[165] 16 U.S.C. §§668dd-668ee.

[166] Source: James Kurth, Chief, National Wildlife Refuge System, Fish and Wildlife Service. Personal communication with (name redacted) of CRS, (May18, 2012). Statistics cited do not include seven refuge units created after passage of Refuge Act, and therefore not under the October 9, 2012, deadline.

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