

First Priority?

The Neglect of Rural Development by Federal Agencies, and How Arkansas Could Respond



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Every agency of the United States is required to promote the location of its activities in rural areas. In 1970, Congress found that a balance between rural and urban development is "essential to the peace, prosperity, and welfare of all our citizens." Given the hardships then felt by populations in rural communities already affected by changes in agribusiness and in other economic bases of rural life, "the highest priority must be given to the revitalization and development of rural areas."² Accordingly, Congress directed "the heads of all executive departments and agencies of the Government to establish and maintain departmental policies and procedures giving *first priority* to the location of new offices and other facilities in rural areas."³

Every federal agency is therefore required by statute to craft a policy that gives first priority in the location and relocation of its operations into rural areas. Further, every agency is required by this law to maintain this policy, which must mean at least abiding by it when evaluating and selecting sites for the location or relocation of facilities or offices.

Federal agencies violate this law frequently and massively. As the General Accounting Office has found recurrently, few agencies have ever created such policies, and fewer still have conformed to them. Thus, the development of rural communities that Congress demanded has not occurred. Rural sites and populations that should, according to the law, benefit from federal development remain fallow, and states with considerable rural areas, including states with populations largely dispossessed from agricultural work by changes in the industry, receive less federal support than Congress intended.

This paper will consider, first, the structure of the Rural Development Act and the scope of its application to "rural areas." It will then consider agency attempts and failures to conform to it, as reported by the General Accounting Office. It will consider means for states and others whose interests are harmed by agencies that fail to conform to the RDA to enforce the act under the Administrative Procedures Act, and it will then consider the stakes for participation in such activities by governments

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2. Rural Development Act (P.L. 91-524, Title IX, § 901 (Nov. 30, 1970); 84 Stat. 1383; as amended; codified at 7 U.S.C. § 2204b-1(a))(hereinafter "RDA").

3. *Id.*, codified at 7 U.S.C. § 2204b-1(b) (emphasis added).

and private entities in Arkansas.

The paper suggests four observations. First, Congress has mandated the distribution of federal facilities to promote a balance between rural and urban development, and there is considerable evidence that agencies have failed to pursue, much less to achieve, such a balance. Second, it seems likely that certain parties and states in rural areas have standing to challenge certain agency decisions that fail to consider or give priority to rural sites. Third, litigation by those with such standing may well be the only means to ensure that agency administrators in fact carry out the will of the Congress in this matter. Fourth, it is in the interest of the governments of Arkansas and agencies in it, as it is for other states with large rural areas, to participate the internal competitions for agency operations to locate to rural areas in Arkansas, to which Congress has given first priority.

I. The Rural Development Act

The Rural Development Act currently provides

(a) Congressional commitment. The Congress commits itself to a sound balance between rural and urban America. The Congress considers this balance so essential to the peace, prosperity, and welfare of all our citizens that the highest priority must be given to the revitalization and development of rural areas.

(b) Location of Federal facilities. Congress hereby directs the heads of all executive departments and agencies of the Government to establish and maintain departmental policies and procedures giving first priority to

the location of new offices and other facilities in rural areas as defined in the private business enterprise exception in section 306(a)(7) of the Consolidated Farmers Home Administration Act of 1961, as amended.⁴

This act was initially passed as the Rural Development Act of 1970.⁵ That act originally required in paragraph (b)

Congress hereby directs the heads of all executive departments and agencies of the Government to establish and maintain, insofar as practicable, departmental policies and procedures with respect to the location of new offices and other facilities in areas or communities of lower population density in preference to areas or communities of high population densities.⁶

Two years later, the statute was effectively re-enacted in the Rural Development Act of 1972, with a significant change. The earlier language requiring a preference for "areas or communities of lower population density" over "areas or communities of high population densities" was removed from paragraph (b), and the current language requiring agency heads to give "first priority" to "rural areas" was substituted.⁷

The RDA of 1972 did not merely adopt the broad administrative language "rural areas" but designated which of several legal definitions of a rural area should be applied by agencies. Under the act, a "rural area" was that to be found in "section 306(a)(7) of the Consolidated Farmers Home Administration Act of 1961, as amended."⁸

The definition of the 1961 FHA Act was deleted

4. 7 United States Code § 2204b-1 (2003).

5. See Public Law 91-524, Title IX, § 901 (Nov. 30, 1970); 84 Stat. 1383.

6. *Id.*

7. Public Law 92-419 (Aug. 30, 1972), Title VI, § 601, 86 Stat. 674.

8. Codified at 7 U.S.C. § 1926(a)(7).

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by amendments to the FHA Act passed in 1996 and in 2002.⁹ The newest definition to the successor to the 1961 FHA Act was created in the 2002 Act.¹⁰ As shown in the part A, although the RDA was not itself amended to reflect these changes, the later definition appears clearly to apply.

A. The Definition of “Rural Area” in the FHA.

An error in codification dating from the 1996 Farm Bill might appear to have repealed the definition of “rural area” in section 306(a)(7) of the FHA Act. Despite this error, it is clear that Congress has intended the definition of “rural area” now within section 343(a) of the Consolidated Farm and Rural Development Act to substitute for the definition repealed from section 306(a)(7). Congress’s intent becomes clear only through consideration of non-codified text in references to the 2002 Act.

Further, agencies charged under the Rural Development Act with its implementation have applied this definition in rules promulgated in 2003.

An important qualification must be considered regarding any source of this definition. There are several, very different Congressional mandates dealing with “rural areas.” Definitions arising from other statutes have different purposes, different histories, and different applications. A definition of “rural area” created either for unspecified purposes or for any purpose other than defining the Rural Development Act or the required portions of the FHA does not apply to this act.

1. Definition of “Rural Area” in the FHA

The RDA requires application of the FHA Act

definition of “rural area” for the purposes of the private business enterprise exception 7 U.S.C. § 1926(a)(7). That definition was deleted by the Farm Security and Rural Investment Act of 2002.¹¹ Instead, Section 6020 of the 2002 Act specifies:

Sec. 6020. Definition of Rural and Rural Area.

(a) In General.—Section 343(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1991(a)) is amended by adding at the end the following:

(13) Rural and rural area.—

(A) In general.—Except as otherwise provided in this paragraph, the terms “rural” and “rural area” mean any area other than—

(i) a city or town that has a population of greater than 50,000 inhabitants; and

(ii) the urbanized area contiguous and adjacent to such a city or town.¹²

There is nothing to suggest that it is not the intent of Congress that this amendment of section 343(a) serves also to amend section 306(a)(7), which is the basis for the RDA. Indeed, it is clearly meant to have been an amendment and substitution. Subpart (b) of Section 6020 specifies:

(b) Conforming Amendments.—

(1) Section 306(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(a)) is amended by striking paragraph (7).¹³

Thus, the definition of “rural area” that Congress enacted in the 2002 Act was intended to substitute for the original definition to which the RDA was

9. P.L. 107-171, Title VI, Subtitle A, §§ 6001-6007(a), 6008, 6020(b)(1) (May 13, 2002); 116 Stat. 352, 355, 363 (“2002 act”).

10. Codified at 7 U.S.C. 1991(a).

11. Public Law 107-171 (May 13, 2002), Title VI, Subtitle A, §§ 6001-6007(a), 6008, 6020(b)(1), 116 Stat. 352, 355, 363.

12. 116 Statutes at Large 362-363. This definition is codified at 7 U.S.C. § 1991(a)(13).

13. 116 Statutes at Large 363 (uncodified).

related. That relationship, at the time it was created in the RDA, appears intended to alter with future evolution of the FHA (or, necessarily, its successor statutes), being based on “the private business enterprise exception in section 306(a)(7) of the Consolidated Farmers Home Administration Act of 1961, as amended.” If the definition in the RDA were not intended to alter according to changes in the FHA Act, the RDA could simply have repeated the language then operative from the act, freezing its definition into the statute at that time. Thus, the best available interpretation of the RDA implies the definition of a rural area from the 2002 Act.

2. Agency Interpretations of the RDA

In the wake of 1996 Act’s apparent repeal of the defining language for “rural area” under the RDA, agency interpretations of “rural” became diverse. As late as 2001, the GSA studied agency actions under the act using a definition of rural areas being communities of 25,000 or less.¹⁴ In doing so, it surveyed not only two different definitions then in use within the General Services Administration, but a host of other agency definitions. GAO Interim Rule D-1, defined a rural area as:

any area ‘that (i) is within a city or town if the city or town has a population of less than 10,000 or (ii) is not within the outer boundaries of a city or town if the city or town has a population of 50,000 or more and if the adjacent urbanized and urbanizing areas have a population density of more than 100 per square mile.’¹⁵

Other agency definitions included various definitions of the word “rural”, consolidated from a variety of distinct legislative programs, reflected in this table.

Following the issuance of that report, the General Services Agency has altered its interpretation of the Act, issuing a Federal Management Regulation (“FMR”) that defines a rural area under the RDA to conform with the definition in the FHA and FHAA, described above. The GSA’s FMR, *Locating Federal Facilities in Rural Areas* is “intended to assist Federal agencies, having their own statutory authority to acquire real property, in complying with the Rural Development Act of

<i>Definitions of Rural Used by Federal Agencies and Selected Private Organizations in 2001</i>	
<i>Agency/organization</i>	<i>Population thresholds and definitions for rural area</i>
<i>Census Bureau</i>	<i>Under 2,500 or open country</i>
<i>Department of Agriculture’s Economic Research Service</i>	<i>Under 2,500 (Metro or nonmetro area)</i>
<i>Department of Agriculture’s Rural Business Opportunity Grant Program</i>	<i>Under 10,000 (Open country not associated with urban area) USDA defines open country as open space separated from any adjacent densely populated urban area.</i>
<i>Department of Agriculture’s Rural Housing Programs</i>	<i>10,000 or under</i>

14. General Accounting Office, Report to Senator Byron L. Dorgan, U.S. Senate, *Facilities Location: Agencies Should Pay More Attention to Costs and Rural Development Act* (July 2001). [hereinafter, “GAO, RDA Study (2001)”].

15. *Id.*, p. 5.

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<i>Department of Housing and Urban Development's Rural Housing and Economic</i>	<i>One of five ways: (1) Under 2,500 population (metro or nonmetro area). Development Program (2) Counties with no urban population of 20,000 or more. (3) Rural portions of "extended cities," as defined by the Census Bureau. (4) Open country that is not part of or associated with an urban area. (5) Not over 20,000 and not in MSA.</i>
<i>Department of Agriculture's Intermediary Relending Program</i>	<i>25,000 or under</i>
<i>General Services Administration (Rural Development Act implementation)</i>	<i>Under 10,000 or under 50,000</i>
<i>Department of Agriculture's Rural Business Enterprise Grants</i>	<i>Under 50,000</i>
<i>Department of Agriculture's Rural Business Cooperative Service</i>	<i>Under 50,000</i>
<i>Office of Management and Budget</i>	<i>Nonmetropolitan areas (areas other than "core counties" containing one or more central cities with at least 50,000 residents or an urbanized area and a total population of at least 100,000 (75,000 in New England) and adjacent communities that have a high degree of social and economic integration with the core counties)</i>
<i>National Middle School Association (NGO)</i>	<i>25,000 or under</i>
<i>Housing Assistance Council (NGO)</i>	<i>25,000 or under</i>
<i>Plants, Sites and Parks Magazine (NGO)</i>	<i>20,000 or under, or 50 miles or more from major city or MSA¹⁶</i>

1972."¹⁷ The bulletin became effective January 21, 2003, and is to remain in effect indefinitely. Paragraph 5 of that bulletin states:

5. What "rural area" definition does GSA recommend for Federal agencies having their own statutory authority to acquire real property?

GSA recommends that Federal agencies, having their own statutory authority to acquire real property, use the following rural area definition:

"Rural area means a city, town, or unincorporated area that has a population of 50,000 inhabitants or less,

16. Drawn from *Id.*, Table 6, page 25.

17. GSA FMR Bulletin 2003-B1, 68 Federal Register 2776, January 21, 2003.

other than an urbanized area immediately adjacent to a city, town, or unincorporated area that has a population in excess of 50,000 inhabitants, as specified in 7 U.S.C. 2009.”¹⁸

Although the reference in this FMR is to the provision then at 7 U.S.C. 2009, and this provision was also deleted by amendment by the 2002 Act, the GSA has not amended its bulletin.

The Internal Revenue Service, among other agencies, has adopted the GSA definition for intra-agency compliance with the RDA.¹⁹ The IRS did so following a report that quotes and adopts the GSA standard of a rural area defined by 50,000 inhabitants as the appropriate agency definition.²⁰

There remain, of course, other definitions of what constitutes a rural area in the law. Particularly, agency development of Rural Area Small Business Development requires utilization of contractors who are not located in metropolitan areas.²¹ Indeed, the nature of the rural, and discourse about the rural, has a breadth of nuance in federal law, the significance of which is currently subject to a wide-ranging examination in the scholarship of Lisa Pruitt.²²

B. The Definition of “Rural Area” in the Rural Development Act.

In the light of the legislative history and agency interpretations, the current definition of a “rural area” in the Rural Development Act is any area that fails to meet either of two criteria. Under the 2002 act, “rural and rural area” includes any area other

than—

- (i) a city or town that has a population of greater than 50,000 inhabitants; and
- (ii) the urbanized area contiguous and adjacent to such a city or town.

Thus, a rural area is not a city or town that has a population of greater than 50,000 inhabitants. A rural area is not the urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants. All other areas are rural areas.

C. Policy Underlying the Rural Development Act.

Congress enunciated its primary rationale for the RDA to be the promotion of balance between urban and rural life in America. This purpose is more than a romantic notion of an American landscape, it is also a credible role for allocating demands on resources to distribute the benefits and burdens of government activities throughout different arenas of the national infrastructure.

By locating federal operations in rural areas, the government takes advantage of lower land and labor prices, although this advantage may be somewhat offset by higher transportation prices for certain activities. Still, the balance as seen by private industry has often favored the economics of rural location, as witnessed by the success of Wal-Mart, Tyson Foods, and other major business whose headquarters remain in the small towns of Arkansas.

Further, the benefits to the citizenry in rural areas are considerable. Not only do federal relocations provide direct employment and retraining potential to agricultural workers and small town

18. 68 Fed. Reg. at 2777.

19. See Treasury Department, General Management: Treasury Needs To Approve and Reissue Its Policy On The Rural Development Act Of 1972, Reference number OIG-CA-03-023, August 19, 2003.

20. Treasury Department, Procedures Established to Ensure Compliance With the Rural Development Act of 1972 Were Not Consistently Followed; Inspector General for Tax Administration Reference Number 2003-10-177, August 2003.

21. Public Law 100-590. See, e.g., NASA implementation plans at 48 C.F.R. 1819.7101 (55 F.R. 47479, Nov. 14, 1990; 62 F.R. 36704, 36710, July 9, 1997).

22. See Lisa R. Pruitt, *The Rhetoric around the Rural in Law* (draft on file with the author).

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inhabitants dispossessed by changes in agribusiness to become federal workers, but they also provide stimuli for the development of related activities by private-sector contractors and suppliers.

II. Agency Conformity to the Rural Development Act

A. Opportunity.

There are many governmental functions that are easily located or relocated to rural areas with minimal effects upon operation and with costs at or below those associated with the location of such operations to urban areas. The GAO has recommended the following activities, in particular, as appropriate for rural relocation:²³

- Accounting
- Account representative
- Appraisal/market research
- Clerical/secretarial
- Data processing
- Distribution/warehousing
- Education/training
- Enforcement and quality control
- Field service operations
- Human resources and social services
- Information technologies services
- Legal support
- Logistical support
- Manufacturing and assembly offices
- Operations centers
- Printing and publishing
- Records archiving
- Repairs and servicing
- Scientific studies, and research and development
- Technical functions and support

Telemarketing, order processing, and communications.

Congress, however, has mandated that every agency develop a comprehensive plan for review of *all* of its activities to give first priority for every activity to an rural area.

Certainly, Congress's mandate under the RDA must be balanced against other statutory requirements, such the Competition in Contracting Act of 1984.²⁴ There are also executive mandates, such as Executive Order 12072, requiring central business areas (CBA) be given first preference for the location of federal facilities that need to be in urban areas and Executive Order requiring the agencies to use historic properties, although any conflict between the RDA and these orders must be resolved by the agencies in favor of compliance with the RDA.

Within the structure of the act, even in the light of these competing federal mandates, there remains an arena of government operations that is even broader than the list above, encompassing nearly every governmental service that is not inherently tied to an urban clientele, such as the provision of urban social or educational relief.

B. Opposition.

Bureaucrats who prefer to live in urban areas with urban amenities are well skilled in arguing that the availability of technically skilled labor, and the costs of relocation, of transportation of specialized materials, and of the transportation of personnel to the offices of other agency operations and client operations outweigh the benefits of rural relocation. Indeed, these "mission-related" objections are the most common reasons offered for the widespread failure of agencies to comply with the law.²⁵

It is therefore no great surprise to find that there is widespread failure by federal agencies to

23. GAO, RDA Study (2001), *supra* note 5, at p. 31.

24. 741 U.S.C. § 253.

25. GAO, RDA Study (2001), *supra* note 5, at p. 16. See also the studies of John D. Dorchester Jr., of The Dorchester Group, L.L.C., Scottsdale, AZ, commissioned by the GSA, *Office Location Considerations of Large U.S. Corporations: U.S. Government Potentials*, March 31, 2001; *Facilities Location Policy: GSA Should Propose a More Consistent and Businesslike Approach* (GAO/GGD-90-109, Sept. 28, 1990), cited in GAO, RDA Study (2001), *supra* note 5, at p. 4. For a wonderful parody of this phenomenon, see Humphrey's dialogue with Hacker on the subject of moving civil service jobs from London to the north of England, in Jonathan Lynn and Antony Jay, *Yes, Prime Minister* (London: BBC Publishing, 1989).

comply with the law. As of the GSA study in 2001, of the thirteen cabinet-level departments, only the Departments of Agriculture, Commerce, Labor, Transportation, and Treasury had promulgated the policies required under the RDA.²⁶ Moreover, in the GSA survey, agencies chose urban areas for nearly three-quarters of all relocations of operations.²⁷

III. Extra-Agency Enforcement: The Potential for Litigation

A review of the legal literature does not disclose a single judicial action to enforce the Rural Development Act's rural re-location policy. This does not, however, mean that the act is beyond judicial enforcement.

The Administrative Procedures Act ("APA") provides a right of review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."²⁸ "Person" in this context may include states and municipalities, as well as corporations.²⁹ While a person who seeks to enforce a statute through the APA must satisfy

standing requirements, these are effectively the same standards as the constitutional requirements of a particularized injury within a statutory zone of interest.³⁰

There are myriad precedents for APA enforcement of statutes similar to the RDA, the two most similar being litigation under other provisions of the RDA itself and litigation under the National Environmental Policy Act ("NEPA").³¹ As to the first, individuals, municipalities, and other entities have resorted not infrequently to the APA to enforce their rights under the water district legislation consolidated into the Rural Development Act. Although there is no private right of action created under the RDA itself,³² such actions can be brought under the APA.³³

Litigation under the NEPA is both more common and better known. The parallels between NEPA and the RDA make NEPA's record of enforcement under the APA a strong and useful comparison. Both statutes establish policies for agencies in pursuing all of their obligations, and neither create a cause of action for citizen or state enforcement in their texts.³⁴ While the Supreme Court has recently emphasized that APA enforcement of Congressional mandates under NEPA will not give a right of action

26. GAO, RDA Study (2001), *supra* note 5, at p. 22.

27. In the study on which GSA based its report, "Agencies chose urban areas for the majority (72 percent) of the 115 recently acquired federal sites in our survey." GAO, RDA Study (2001), *supra* note 5, at p. 8 and pp. 51-64. This study, of course, applied a narrower definition of rural, basing it on communities of 25,000 rather than 50,000, yet a consideration by the author of the examples given suggests that similar results would have been reached had the more generous definition of a rural area been applied.

28. 5 U.S.C. § 702.

29. 5 U.S.C § 551 (2) defines "person" to include "an individual, partnership, corporation, association, or public or private organization" other than a federal agency. A state may sue both for injuries in its corporate capacity and, in many circumstances, for injuries to its citizens. *See* 42 A.L.R. Fed 23.

30. *See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 479 (1998).

31. 42 U.S.C. §§ 4331 -4335.

32. *Lundstrum v. Lyng*, 954 F.2d 1142 (6th Cir., 1991).

33. *See, e.g., Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir. 1994).

34. For cases discussing standing to enforce NEPA, see 11 A.L.R. Fed. 556.

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to force one or another discretionary result,³⁵ this does not relieve an agency of complying with statutory requirements that utterly limit that discretion. Thus an agency that fails to give first priority to rural relocations of its operations will violate the APA and be subject to injunction, even though an agency that does so and fails to locate an operation into a rural area according to a policy giving other valid considerations greater weight is not subject to injunction.

IV. The Participation of Arkansas and Rural States in Agency Facility Relocations

The opportunity posed by the RDA is an

untapped resource for Arkansas and other rural states. Federal agencies are constantly creating and re-locating operations, each of which represents economic opportunity for the new site. States can directly participate in this process with private contractors and local offices of agencies, as Mississippi has done in coordinating building sites and underwriting for NASA operations in one of its rural areas.³⁶ When such commitments are made by a state or its contractors, these efforts have not only the benefit of the statute and policy in their competition for facilities relocation but also the potential for judicial review in the event they fail in a competition that does not account sufficiently for this requirement.

35. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373 (2004).

36. The State of Mississippi has pledged 20 million dollars toward acquisition of a new NASA shared resource center. See *NASA Savings at Heart of Space Center Bid in Mississippi* (redacted from *The Sun Herald*) at <http://www.rednova.com/news/stories/1/2004/03/15/story118.html>.