HR 5

The Regulatory Accountability Act (RAA)

Passed House 1/11

Received in the Senate 1/12

Referred to the Senate Committee on Homeland Security and Governmental Affairs

This post was co-authored by law student Emma Hamilton.

On January 11th, the House passed HR 5, the Regulatory Accountability Act of 2017, which includes a provision mandating new procedural requirements for the U.S. Forest Service (USFS) and Bureau of Land Management (BLM) when revising land management plans. HR 5 includes a suite of measures that compel administrative agencies to conduct and publish analyses of the economic costs and benefits, alternative measures, and legal authority for nearly all proposed and final rules, guidance documents, and interpretations, and choose the most economically efficient option. Read more about the HR 5 and related legislation from the Hill, and in this letter from thirteen environmental groups opposing the bill.

Each of the new rulemaking requirements contained in HR 5 are likely to impact public lands management by adding procedural hurdles that will make administrative agency action slower, more complicated, and generally harder to achieve. In addition, Title III, the "Small Business Regulatory Flexibility Improvements Act," contains more explicit implications for the future of public lands management. It amends the Regulatory Flexibility Act (RFA) to require that all proposed and adopted revisions to land management plans by the BLM or USFS trigger the preparation of a regulatory flexibility analysis. Flexibility analyses are designed to identify the economic impacts proposed agency actions might have on small businesses and similar entities.

The current RFA applies to all proposed and final agency rules that are subject to notice and comment requirements. HR 5 inserts additional language that explicitly applies the RFA to any "revision or amendment to a land management plan." The new language requires an initial regulatory flexibility analysis for all proposed revisions or amendments to such plans, and a final analysis for all adopted revisions

or amendments. Each analysis must include documentation and quantification of potential economic impacts on small businesses and consideration of alternatives to reduce those impacts.

Land management plans are comprehensive documents prepared by federal land management agencies that integrate science, current resource conditions, and policy goals to set objectives and guidelines for the management of particular units of public land. The USFS prepares land management plans for each of its National Forest units, and the BLM prepares resource management plans for pre-defined areas of BLM land that share common resource characteristics. These comprehensive planning documents are forward looking and provide broad parameters and authority for the day-to-day, project level actions that the agencies undertake to effectively manage public lands. Because land management plans are prospective, revisions and amendments play a crucial role in the management process by allowing agencies to revise and improve their plans to reflect changing circumstances and resource conditions.

As a result, the language in HR 5 explicitly requiring RFA flexibility analyses for all proposed and final changes to land management plans has the potential to severely hamper BLM and USFS's ability to effectively manage public lands through the regulatory process. HR 5 also includes several provisions that make regulatory flexibility analyses more detailed and cumbersome to comply with. First, the bill requires agencies consider even *indirect* economic impacts on small businesses that would be "reasonably foreseeable" as a result of the proposed rule or management plan. The current RFA requires the identification and analysis of only *direct* impacts on small businesses as regulated entities. Second, the amended RFA requires agencies conduct flexibility analyses for even those proposed rules and plans that would have a projected beneficial impact on small businesses. The current RFA requires such analyses only for actions that would have potentially adverse effects. The revised RFA also mandates more detailed analyses in both the initial and final flexibility analyses, and allows affected small businesses and entities to seek judicial review under the RFA following the mere publication of a rule, rather than waiting for final agency action.

Though these amendments to the RFA will almost certainly obstruct BLM and USFS's ability to actively and efficiently update their land management plans, initial and final flexibility analyses will still only be required if an agency determines that a proposed rule would have a "significant" economic impact on a "substantial" number of small business entities. These terms remain vague and undefined, even

under the proposed RFA amendments. Thus, if an agency determines at the threshold stage that its proposed rule or land management plan will *not* have such an effect on small businesses, it may explain and certify its decision by publishing the basis for the determination in the Federal Register. This option offers a potential avenue for the BLM and USFS to avoid conducting RFA analyses for each and every plan revision. Still, HR 5 adds more stringent requirements to this certification process, including a more detailed economic assessment summary to back up the agency's conclusion of no significant or substantial economic impacts.

Overall, HR 5's language explicitly applying the RFA to BLM and USFS land management plans is a significant step toward reigning in those agencies' discretion in managing public lands. Since any new or amended land management plan will have to undergo a flexibility analysis before proceeding, one can imagine land management decisions being delayed or prevented because of the need to analyze economic impacts to small ranching and timber operations – when agency budgets are already short, agencies may not have resources to do those analyses. Not only would the agencies then be required to prepare a full analysis of potential impacts and detailed alternatives, plan revisions would also be subject to legal challenge by any small business or entity—even those only indirectly affected—after the adoption of each and every new revision.

HR 5 passed the House 238 – 183 and was referred to the Senate Committee on Homeland Security and Governmental Affairs on January 12th.