



Decision

Matter of: U.S. Department of the Interior, U.S. Fish and Wildlife Service—
Applicability of the Congressional Review Act to Record of Decision for
Barred Owl Management Strategy

File: B-337059

Date: May 28, 2025

DIGEST

In August 2024, the U.S. Department of the Interior, U.S. Fish and Wildlife Service (FWS) issued a record of decision titled, *Record of Decision for Final Barred Owl Management Strategy Implementation and issuance of a Migratory Bird Treaty Act Special Purpose Permit in Washington, Oregon, and California* (Barred Owl ROD or ROD). The ROD announced FWS's decision to adopt a barred owl management strategy to improve the survival and recovery of northern spotted owls and to prevent declines in California spotted owls, both of which compete with barred owls. The Barred Owl Management Strategy adopted by the ROD provides a framework for federal, state, or tribal government agencies, or private landowners, to implement barred owl management through the lethal removal of barred owls.

The Congressional Review Act (CRA) requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate, as well as the Comptroller General. CRA incorporates the Administrative Procedure Act's (APA) definition of a rule for this purpose, with three exceptions. We conclude that the Barred Owl ROD is a rule for purposes of CRA because it meets the APA definition of a rule, and no CRA exception applies. Therefore, the ROD is subject to CRA's submission requirements.

DECISION

In August 2024, the U.S. Department of the Interior (Interior), U.S. Fish and Wildlife Service (FWS) announced its decision to adopt a barred owl management strategy. *Record of Decision for Final Barred Owl Management Strategy Implementation and issuance of a Migratory Bird Treaty Act Special Purpose Permit in Washington,*

Oregon, and California (Aug. 2024) (Barred Owl ROD or ROD).¹ We received a request for a decision as to whether the Barred Owl ROD is a rule for purposes of the Congressional Review Act (CRA).² As discussed below, we conclude that the ROD is a rule subject to CRA's submission requirements.

Our practice when rendering decisions is to contact the relevant agencies to obtain factual information and their legal views on the subject of the request.³ Accordingly, we reached out to Interior on February 4, 2025, and received Interior's response on March 18, 2025.⁴

BACKGROUND

Barred Owl ROD

The Barred Owl ROD documents FWS's decision to adopt the *Final Barred Owl Management Strategy*⁵ (Barred Owl Management Strategy or Strategy) and issue an associated permit under the Migratory Bird Treaty Act (MBTA)⁶ to implement the Strategy.⁷ The ROD states that the purpose of the action "is to reduce barred owl populations to improve the survival and recovery of northern spotted owls" (a threatened species under the Endangered Species Act) "and to prevent declines in California spotted owls" (proposed for listing under the Endangered Species Act).⁸ The ROD explains that barred owls, a non-native invasive species in western North

¹ The Barred Owl ROD is available at <https://www.fws.gov/media/barred-owl-management-strategy-record-decision> (last visited May 20, 2025).

² Letter from Senator Cory A. Booker to Comptroller General (Jan. 21, 2025).

³ GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>.

⁴ Letter from Assistant General Counsel, GAO, to Associate Solicitor, Division of Mineral Resources, Interior (Feb. 4, 2025); Letter from Associate Solicitor, Division of General Law, Interior, to Assistant General Counsel, GAO (Mar. 18, 2025) (Interior Response).

⁵ FWS, *Final Barred Owl Management Strategy* (Aug. 2024).

⁶ 16 U.S.C. §§ 703–712.

⁷ Barred Owl ROD, at 1, 15. The Strategy is included as an attachment to the ROD and the MBTA permit analysis is included as an appendix. See *id.* at Attachment 1, Appendix A.

⁸ *Id.* at 1–2.

America, compete with northern and California spotted owls, and this competition “is a primary cause of the rapid and ongoing decline of northern spotted owl populations” and poses a similar risk to California spotted owls as barred owl populations expand southward.⁹

The Barred Owl Management Strategy provides a framework for federal, state, or tribal government agencies, or private landowners, to implement barred owl management.¹⁰ The Strategy involves the lethal removal of barred owls from specific areas and describes removal protocols and a monitoring plan for FWS as well as governmental and non-governmental entities designated by FWS.¹¹ The Strategy provides for barred owl management in all provinces in the northern spotted owl range and throughout the California spotted owl range.¹²

The MBTA prohibits the lethal removal of protected migratory bird species, including the barred owl, unless authorized by FWS in accordance with 50 C.F.R. parts 13 and 21.¹³ As part of the Barred Owl ROD, FWS approved the issuance of a Special Purpose Agency Species Protection Permit to the FWS Oregon Fish and Wildlife Office under the MBTA to implement the Strategy in Washington, Oregon, and California, and to authorize the lethal removal of barred owls by FWS and other governmental or non-governmental entities designated by FWS.¹⁴ In particular, implementers and removal specialists designated by FWS under the MBTA Permit must meet the training and skill requirements described in the Strategy and must follow the Strategy’s removal protocols.¹⁵

The ROD states that it was prepared in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA),¹⁶ the Council on Environmental Quality’s NEPA implementing regulations¹⁷ in effect when the NEPA

⁹ *Id.*

¹⁰ Barred Owl Management Strategy, at 18–19; see Barred Owl ROD, at 3.

¹¹ Barred Owl Management Strategy, at 19–20, 69–70, 86–97, 314–27; see Interior Response, at 2.

¹² Barred Owl ROD, at 4–5.

¹³ Interior Response, at 2; see 16 U.S.C. §§ 703(a), 704(a).

¹⁴ Barred Owl ROD, at 1, 3, 5–6, 12–13.

¹⁵ See *id.* at A-7–A-8, A-22–A-23.

¹⁶ 42 U.S.C. §§ 4321–4347.

¹⁷ 40 C.F.R. pts. 1500–1508 (2022).

process commenced, and Interior's NEPA regulations.¹⁸¹⁹ As part of the NEPA process, FWS developed a draft strategy and shared it for public comment along with a draft Environmental Impact Statement (EIS).²⁰ After considering and addressing comments and input from the public and various stakeholders, FWS revised the draft Strategy and released it with a final EIS.²¹ The final EIS evaluated six alternatives, and the ROD adopted the preferred alternative, with some minor clarifying edits and corrections to the Strategy.²²

Congressional Review Act (CRA)

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and the Comptroller General for review before the rule can take effect.²³ The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date.²⁴ CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures.²⁵ If a resolution of disapproval is enacted, then the new rule has no force or effect.²⁶

CRA adopts the definition of "rule" under the Administrative Procedure Act (APA), which states that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of

¹⁸ 43 C.F.R. pt. 46.

¹⁹ Barred Owl ROD, at 1, A-24.

²⁰ *Id.* at 1, 6; Notice of Availability, *Draft Environmental Impact Statement for the Barred Owl Management Strategy; Washington, Oregon, and California*, 88 Fed. Reg. 80329 (Nov. 17, 2023).

²¹ Barred Owl ROD, at 7–8; Notice of Availability, *Final Environmental Impact Statement for the Barred Owl Management Strategy; Washington, Oregon, and California*, 89 Fed. Reg. 55647 (July 5, 2024).

²² Barred Owl ROD, at 3, 8.

²³ 5 U.S.C. § 801(a)(1)(A).

²⁴ *Id.*

²⁵ See 5 U.S.C. § 802.

²⁶ 5 U.S.C. § 801(b)(1).

an agency.”²⁷ However, CRA excludes three categories of APA rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.²⁸

FWS did not submit a CRA report to Congress or the Comptroller General on the Barred Owl ROD. In its response to us, Interior provided additional information about the Barred Owl ROD but did not state a position as to whether it is a rule under CRA.²⁹

DISCUSSION

To determine whether the Barred Owl ROD is a rule subject to review under CRA, we first address whether it meets the APA definition of a rule. As explained below, we conclude that the ROD meets this definition. The next step is to determine whether the document falls into one of the categories of APA rules excepted from CRA’s requirements. We conclude that the ROD does not fall within any of the exceptions. Therefore, the ROD is a rule subject to CRA’s submission requirements.

The Barred Owl ROD is a Rule Under APA

The Barred Owl ROD meets the APA definition of a rule. First, the ROD is an agency statement as it is an official document issued by FWS.³⁰

Second, the ROD is of future effect. An agency action of future effect is one “concerned with policy considerations for the future rather than the evaluation of past or present conduct.”³¹ In particular, we previously examined another FWS record of decision documenting the actions necessary to restore and maintain certain types of fish in a particular river.³² We determined that the essential purpose of the record of

²⁷ 5 U.S.C. §§ 551(4); 804(3).

²⁸ 5 U.S.C. § 804(3).

²⁹ See Interior Response.

³⁰ Barred Owl ROD, at 1, 15; Notice of Availability, *Record of Decision for the Barred Owl Management Strategy; Washington, Oregon, and California*, 89 Fed. Reg. 72881 (Sept. 6, 2024); see B-287557, May 14, 2001 (concluding that an FWS record of decision met the APA rule definition).

³¹ B-316048, Apr. 17, 2008.

³² See B-287557, May 14, 2001.

decision was “to set policy for the future,” and it was “clearly intended to have future effect, namely the restoration and maintenance of . . . [certain] fishery resources in the . . . [r]iver.”³³ Like the record of decision at issue in B-287557, the Barred Owl ROD sets policy for the future, namely the adopted Barred Owl Management Strategy, and is likewise intended to restore and maintain certain wildlife populations, in this case the northern spotted owl and California spotted owl, in particular geographic areas, specifically portions of Washington, Oregon, and California.³⁴

Finally, the Barred Owl ROD prescribes and implements law and policy and describes agency procedure and practice requirements. An agency statement implements, interprets, or prescribes law or policy when the action creates new regulations, changes regulatory requirements or official policy, or alters how the agency will exercise its discretion, among other things.³⁵ The ROD prescribes and implements a new policy, the Barred Owl Management Strategy, to improve the survival and recovery of northern spotted owls and to prevent declines in California spotted owls from barred owl competition through the lethal removal of barred owls from specific areas.³⁶

An agency statement describes agency organization, procedure, or practice requirements when the statement discusses the internal operations of an agency, including statements that govern the conduct of agency proceedings.³⁷ The Barred Owl ROD adopts the Barred Owl Management Strategy, which includes detailed procedures and practices for barred owl management, and these procedures and practices apply to FWS to the extent the agency itself engages in barred owl management.³⁸ The Strategy also describes procedures for designating other governmental and non-governmental entities as implementers and removal specialists.³⁹ In particular, the Strategy describes the information that requesting

³³ *Id.*

³⁴ Barred Owl ROD at 1–2, 15.

³⁵ B-334005, Jan. 18, 2023 (*citing Industrial Safety Equipment Association, Inc. v. Environmental Protection Agency*, 837 F.2d 1115, 1120 (D.C. Cir. 1988)).

³⁶ Barred Owl Management Strategy, at 18–20; Interior Response, at 1–2; see B-287557, May 14, 2001 (concluding that another FWS record of decision intended to restore and maintain certain wildlife populations in a specific geographic area met the APA definition of a rule).

³⁷ B-335316, Nov. 29, 2023; B-334005, Jan. 18, 2023.

³⁸ See, e.g., Barred Owl Management Strategy, at 86–97.

³⁹ *Id.* at 86–88.

entities and individuals must submit to FWS and the process for FWS review and approval.⁴⁰ In addition, the Strategy includes a monitoring program under which implementers must submit certain information to ensure actions are consistent with the Strategy and to assess the success of the management effort.⁴¹

CRA Exceptions

Having determined that the Barred Owl ROD meets the APA definition of rule, we next consider whether the ROD falls within one of the three categories of APA rules not subject to CRA.

⁴⁰ *Id.*

⁴¹ *Id.* at 69–70, 314–27. In addition to adopting the Barred Owl Management Strategy, FWS approved the issuance of a Special Purpose Agency Species Protection Permit to the FWS Oregon Fish and Wildlife Office under the MBTA to implement the Strategy. Barred Owl ROD, at 1, 5–6. There is a question as to whether FWS’s issuance of the MBTA Permit could constitute an order under APA, meaning it would not be a rule under that statute, and, therefore, not subject to CRA. See B-334309, Nov. 30, 2023; B-332233, Aug. 13, 2020 (rules and orders are “mutually exclusive”). APA defines an order as “the whole or a part of a final disposition, . . . of an agency in a matter other than rule making but including licensing.” 5 U.S.C. § 551(6). APA further defines “licensing” to include an agency granting or revoking a license, and “license” to include “the whole or a part of an agency permit.” 5 U.S.C. § 551(8), (9). While rules are the result of rulemaking, orders result from adjudications. B-334309, Nov. 30, 2023; see 5 U.S.C. § 551(5), (7). “[A]n adjudicatory order is a case-specific, individual determination of a particular set of facts that has immediate effect on the individual(s) involved.” B-334309, Nov. 30, 2023.

Although FWS issued what it referred to as a “permit” in this instance, the agency issued the permit to itself, or, more specifically, a component of the agency. None of our previous decisions determining that an agency action was an order under APA involved the agency serving as both arbiter and affected party, and it is unclear whether such an action represents “a case-specific, individual determination of a particular set of facts.” B-334309, Nov. 30, 2023. However, because the Barred Owl ROD’s adoption of the Barred Owl Management Strategy renders the ROD a rule under APA, we need not determine whether issuance of the MBTA Permit, standing alone, would constitute a rule. See B-336217, Aug. 6, 2024 (concluding that because certain portions of an agency letter met the APA rule definition, the letter, taken as a whole, met the definition).

(1) Rule of Particular Applicability

The Barred Owl ROD is not a rule of particular applicability.⁴² Such rules are addressed to a specific, identified person or entity and address actions that person or entity may or may not take, taking into account facts and circumstances specific to that person or entity.⁴³ In determining whether a rule is one of general or particular applicability, we have noted that a rule need not apply to the population as a whole to be considered a rule of general applicability; rather, all that is required is that the rule has general applicability within its intended range, regardless of the magnitude of the range.⁴⁴ For example, we have determined that a rule is one of general applicability even if the rule is limited to a specific geographic area, so long as the rule does not apply to specific, identified persons or entities.⁴⁵

The Barred Owl ROD adopts the Barred Owl Management Strategy, and although the Strategy is focused on specific areas within Washington, Oregon, and California, the Strategy is not addressed to specific, identified persons or entities. Instead, the Strategy provides a framework for any federal, state, or tribal government agency, or private landowner, to implement barred owl management.⁴⁶

(2) Rule of Agency Management or Personnel

The Barred Owl ROD is not a rule of agency management or personnel.⁴⁷ This exception applies to rules relating to “purely internal agency matters.”⁴⁸ These include rules related to controlling, directing, or supervising internal management

⁴² See 5 U.S.C. § 804(3)(A).

⁴³ See, e.g., B-334146, June 5, 2023; B-330843, Oct. 22, 2019.

⁴⁴ B-287557, May 14, 2001.

⁴⁵ See B-238859, Oct. 23, 2017 (concluding that a rule applying to a specific national forest was not a rule of particular applicability because it applied to all persons or entities using the forest); B-329065, Nov. 15, 2017 (concluding that a plan comprising resource management plans for four areas in Alaska was not a rule of particular applicability because it applied to all persons or entities engaged in activities under the plan).

⁴⁶ See Barred Owl Management Strategy, at 18–20; Barred Owl ROD, at 3.

⁴⁷ See 5 U.S.C. § 804(3)(B).

⁴⁸ B-335142, May 1, 2024.

issues,⁴⁹ as well as those related to personnel issues like communications between employees and managers, leave, or benefits.⁵⁰

The Barred Owl ROD does not involve internal agency management or personnel matters. Rather, the ROD adopts a Barred Owl Management Strategy that provides a framework for federal, state, or tribal government agencies, or private landowners, to implement barred owl management.⁵¹ Although FWS will be one entity implementing the Strategy—as demonstrated by the issuance of the MBTA Permit to the FWS Oregon Fish and Wildlife Office⁵²—FWS contemplates designating other governmental and non-governmental entities to implement the Strategy under its MBTA Permit and also expects that other entities could potentially apply for their own permit using the Strategy.⁵³

(3) Rule of Agency Organization, Procedure, or Practice that Does Not Substantially Affect Non-Agency Parties

Finally, the Barred Owl ROD is not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.⁵⁴ A rule of agency organization, procedure, or practice is a rule that is limited to an agency's methods of operation or how the agency organizes its internal operations.⁵⁵ Although certain rules directed at non-agency parties are considered rules of agency organization, procedure, or practice—such as those that affect the way regulated entities submit information to an agency, how the agency reviews that information, or the type or timing of actions the agency will take based on that submission⁵⁶—rules that are directed at and primarily concerned with the behavior of non-agency parties do not fall within this category.⁵⁷

⁴⁹ See B-336512, Aug. 29, 2024.

⁵⁰ B-335115, Sept. 26, 2023.

⁵¹ See Barred Owl Management Strategy, at 18–20; Barred Owl ROD, at 3.

⁵² See Barred Owl ROD, at 5–6.

⁵³ Barred Owl ROD, at 3; Barred Owl Management Strategy, at 19, 86–88.

⁵⁴ See 5 U.S.C. § 804(3)(C).

⁵⁵ B-336217, Aug. 8, 2024 (citing B-274505, Sept. 16, 1996).

⁵⁶ See B-336217, Aug. 8, 2024.

⁵⁷ B-335629, July 8, 2024.

As discussed above, the Barred Owl Management Strategy adopted by the ROD provides a framework for non-agency parties to implement barred owl management.⁵⁸ This includes detailed requirements and guidance for non-agency parties designated by FWS to implement the Strategy, including removal protocols and how those parties might prioritize actions under the Strategy.⁵⁹ These elements of the Strategy are primarily focused on the behavior of those non-agency parties rather than FWS's internal operations.

On the other hand, the Barred Owl Management Strategy also describes FWS's methods of operation. For example, the implementation requirements and guidance apply to FWS to the extent the agency itself engages in barred owl management under the Strategy. The Strategy also describes procedures for designating other governmental and non-governmental entities as implementers and removal specialists.⁶⁰ In particular, the Strategy describes the information that requesting entities and individuals must submit to FWS and the process for FWS review and approval.⁶¹ However, notwithstanding the inclusion of these agency procedures and practices, the Strategy's primary focus on the conduct of non-agency parties implementing barred owl management establishes that the ROD does not qualify as a rule of agency organization, procedure, or practice.⁶²

In addition, the ROD substantially affects the rights or obligations of non-agency parties. Although the Strategy adopted by the ROD does not require an entity to implement barred owl management and actions are limited to the lands of willing landowners and land managers,⁶³ we have previously concluded that rules establishing requirements for voluntary programs may still substantially affect non-agency parties that choose to participate.⁶⁴

In B-334146, we examined U.S. Department of Agriculture actions establishing four new financial assistance programs.⁶⁵ The actions prescribed each program's

⁵⁸ See Barred Owl Management Strategy, at 18–19; Barred Owl ROD, at 3.

⁵⁹ See Barred Owl Management Strategy, at 18–20, 23–24, 39–40.

⁶⁰ *Id.* at 86–88.

⁶¹ *Id.*

⁶² *Cf.* B-281575, Jan. 20, 1999 (concluding that although a portion of an agency action might fall within the third exception, the action, as a whole, did not).

⁶³ Barred Owl Management Strategy, at 19; see Barred Owl ROD, at 3.

⁶⁴ See, e.g., B-334146, June 5, 2023.

⁶⁵ *Id.*

eligibility requirements, application requirements, calculation and distribution of funds, and, in some cases, reporting requirements and limitations on how funds could be used.⁶⁶ Although participation in the programs was voluntary, we concluded that the actions substantially affected non-agency parties because they directly determined whether interested entities would receive funding under the programs, and, for certain programs, imposed additional implementation and reporting requirements on program participants.⁶⁷

The ROD's adoption of the Barred Owl Management Strategy establishes a new voluntary program for interested governmental and non-governmental entities. Like the eligibility and application requirements included in the actions at issue in B-334146, the Strategy prescribes the information that must be submitted by non-agency parties interested in becoming implementers and removal specialists,⁶⁸ as well as qualifications for persons participating in removal activities.⁶⁹ And just as some of the actions in B-334146 imposed additional requirements on program participants, the Strategy includes requirements for individuals and entities designated as implementers by FWS. For example, the Strategy prescribes detailed protocols for removal activities, as well as reporting requirements.⁷⁰ In short, the ROD and adopted Strategy substantially affect non-agency parties by describing who may implement barred owl removal activities, the information those persons or entities must submit to FWS (both to be designated as implementers or removal specialists and as part of subsequent reporting requirements), and the protocols those persons or entities must follow when conducting removal activities.

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ Barred Owl Management Strategy, at 86–88 (stating that “[t]o receive designation as an implementer for actions under the Strategy, requesting entities must provide” certain information, and that “[p]rior to being designated as a removal specialist authorized to remove barred owls under the Strategy, each individual requesting designation must provide documentation of training or experience” in certain areas), 96–97.

⁶⁹ Barred Owl Management Strategy, at 89, 93.

⁷⁰ Barred Owl Management Strategy, at 20 (“All actions taken under the auspices of the Strategy must conform to all elements of the protocol in Appendix 2” and “[e]ntities implementing barred owl removal under this Strategy will be required to meet the requirements of training for removal specialists described in Appendix 2, abide by the protocol for removal, and provide all required reports.”), 69–70, 86–97, 314–27; see Barred Owl ROD, at 3–4.

CONCLUSION

The Barred Owl ROD meets the APA definition of a rule, and no exception applies. Therefore, the ROD is subject to CRA's requirement that it be submitted to Congress and the Comptroller General before it can take effect.

A handwritten signature in black ink, reading "Edda Emmanuelli Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez
General Counsel