March 4, 2022

The Honorable Thomas R. Carper  
Chairman  
The Honorable Shelley Moore Capito  
Ranking Member  
Committee on Environment and Public Works  
United States Senate

The Honorable Raúl M. Grijalva  
Chairman  
The Honorable Bruce Westerman  
Ranking Member  
Committee on Natural Resources  
House of Representatives

Subject: Department of the Interior, Fish and Wildlife Service: Regulations Governing Take of Migratory Birds; Revocation of Provisions

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Interior, Fish and Wildlife Service (FWS) entitled “Regulations Governing Take of Migratory Birds; Revocation of Provisions” (RIN: 1018-BD76). We received the rule on February 24, 2022. It was published in the Federal Register as a final rule on October 4, 2021. 86 Fed. Reg. 54642. The effective date is December 3, 2021.

According to FWS, the final rule revokes a rule previously issued on January 7, 2021. 86 Fed. Reg. 1134. FWS stated that the immediate effect of this final rule is to return to implementing the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq., as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and longstanding FWS practice prior to 2017.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the Federal Register or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, any rule that “establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity relating to hunting, fishing, or camping” is exempt from the 60-day delay requirement. 5 U.S.C. § 808(1). This rule relates to hunting and, according to the Service, is therefore exempt from the 60-day delay requirement.

Enclosed is our assessment of FWS’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the
subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

Shirley A. Jones  
Managing Associate General Counsel
REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE
ENTITLED
“REGULATIONS GOVERNING TAKE OF MIGRATORY BIRDS;
REVOCATION OF PROVISIONS”
(RIN: 1018-BD76)

(i) Cost-benefit analysis

The Department of the Interior, Fish and Wildlife Service (FWS) stated the benefits of the final rule would result from decreased incidental take, increased ecosystem services and benefits to businesses that rely on these services, and increased birdwatching opportunities. FWS acknowledged these benefits were not quantifiable.

FWS also determined the final rule would result in compliance costs incurred by industry, which are also not quantifiable based on currently available data. According to FWS, firms are more likely to implement best practice measures to avoid potential fines. Additionally, FWS stated potential fines would generate transfers from industry to the government. FWS estimated potential fines over the period from 2022 to 2031 would be $149.3 million at a seven percent discount rate and $174.6 million at a three percent discount rate.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

FWS certified the final rule will not have a significant economic impact on a substantial number of small entities.


FWS determined the final rule is not a significant regulatory action under the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On May 7, 2021, FWS published a proposed rule. 86 Fed. Reg. 24573. FWS received 238 comments. Many comments included additional attachments (e.g., scanned letters, photographs, and supporting documents). These comments represented the views of multiple state and local government agencies, private industries, nongovernmental organizations, and private citizens. In addition to the individual comments received, 3 of those comments were petitions that contained a total of 42,610 individual signatures supporting the final rule. FWS presented the substantive comments it received along with the agency’s responses in the final rule.
Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

FWS stated the final rule does not contain information collection requirements subject to the Act.

Statutory authorization for the rule

FWS promulgated the final rule pursuant to sections 668a–668d, 703–712, 742a–742j–l, 1361–1384, 1401–1407, 1531–1543, and 3371–3378 of title 16; section 42 of title 18; and section 1202 of title 19, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

FWS stated the Office of Management and Budget reviewed the final rule and determined it is economically significant.

Executive Order No. 13132 (Federalism)

FWS determined the final rule will not create substantial direct effects or compliance costs on state and local governments or preempt state law.