



WRTC's purpose is to disseminate data, share expertise and pass on to posterity the art and science of obtaining wild raptors for falconry.

Wild Raptor Take Conservancy

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Feb. 12, 2007

Re: Proposed Abatement Regulations

Dear Mr. Secretary:

On behalf of the Wild Raptor Take Conservancy (WRTC), I would like to address the Service's draft permit conditions regarding abatement regulations.

WRTC is a non-profit association with an elected Board of Directors dedicated to the right of falconers' access to healthy wild raptor populations for use in falconry.

WRTC believes the applicable Executive Orders that agencies are mandated to comply with when addressing regulatory issues – namely Executive Orders 12630, 12866, 12988, and 13132 – need to be reviewed and applied to any new regulations or changes to regulations. Therefore, the comments we are providing are not as concerned with the precise details of abatement regulations, rather, we are addressing principles of law and regulations in a free society.

We have used the Service's proposal as a template and merely inserted our comments – bracketed and in blue font – within the document, addressing particular provisions we find objectionable.

We appreciate the Service's work regarding this proposal in order to clarify the legal framework in which raptors are employed for commercial purposes. It is imperative that the U.S. government recognize that access to all natural resources is a right, not a privilege, and that the purpose of any regulatory framework is to establish sustainable use principles so as to manage access to our natural resources for present and future generations. Having said this, the primary purpose of WRTC's comments is to provide a legal position for present and future interaction between stakeholders and the government as it relates to the use of raptors.

During the period of 1930s through 70s falconers pushed to implement regulatory protections for raptors when much of the birding and wildlife management communities still viewed them as vermin. We believe it is time to recognize the falconry community as the saviors of raptors since ALL advances in our knowledge of them and protection for them come from this sector of society. It is time to lift the heavy regulatory burden from the backs of citizens as pertinent Executive Orders instruct.

Sincerely,

Bill Murrin
President, WRTC

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DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Draft Permit Conditions for Abatement Activities Using Raptors

SUMMARY: We, the U.S. Fish and Wildlife Service, have drafted permit conditions to allow *[Government cannot “allow,” since it does not possess this power; it can merely “provide for” activities where there are legitimate legal restrictions; however, it can prohibit activities, derived from legislative authority, only when activities are prejudicial to the interests of society. The interests of society are in establishing a framework to protect the rights and liberties of its individual citizens, of which access to natural resources is a right when grounded in sustainable use principles. The Dept. of the Interior has stated it has a duty to provide for such access. Semantics are ever so important in that the use of words reflects intentions, relationships, and a cultural mindset; and our culture is based on a system of government where sovereign power resides in the people, not the government. Words used in statutes and regulations must reflect this.]* the use of raptors protected by the Migratory Bird Treaty Act for abatement activities. We will authorize *[Again, the government cannot “authorize” citizens’ benign private activities (though it can for public activities); it can merely “find no objection to” a private activity that is regulated. Citizens “authorize” the government with power over certain activities so as to minimize conflict within society. At which point government agencies provide a regulatory framework to provide for the activity. Where there is no conflict to society in a regulatory structure, government must provide access to a particular activity that citizens wish to pursue. If an agency does not see this as a truism, then that agency sees itself as omnipotent and believes it has powers to arbitrarily dispense privileges as it sees fit based upon its beliefs and prejudices.]* the use of these raptors for this purpose under our special purpose permits. We are asking for comments on our draft permit conditions. Allowing *[replace with “Providing for.”]* the use of raptors to conduct abatement activities is consistent with ensuring the long-term conservation of these species and will serve a public need. *[There is no need for an activity to serve the public need. As long as it is not at odds with public interests, the Service needs to provide for citizens’ access to natural resources. The inclusion of the phrase “will serve a public need” is acceptable so long as it is qualified with “though this is not a prerequisite for the implementation of such a program.” Otherwise it may become just that – a prerequisite!]*

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service (FWS or Service) is the Federal agency with primary responsibility for managing migratory birds. Our authority is the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 et seq.), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). Activities with migratory birds are prohibited unless specifically authorized by regulation. *[The MBTA does not use the language “specifically” or “authorized.” It states under Prohibited Acts: “Unless permitted by regulations, the Act provides that it is unlawful to pursue....” Please use the same language as the Act provides. Stretching its meaning allows for easy misinterpretation, especially by law enforcement personnel who have been abusive of citizens’ rights. Specificity of interpretation of law has greater applicable force upon*

government activities, with broader discretion belonging to citizens, e.g. in order to guard against arbitrary government, the Constitution was written as a bulwark surrounding government powers, defining that which it is allowed to do. That which was not provided for is to remain in the hands of the people or the States, as the Ninth and Tenth Amendments instruct.] The MBTA authorizes us to issue regulations governing permits for migratory bird use *[The MBTA does not have a provision for “use.” Perhaps it would be more appropriate to use the word “access” in a similar light that access is provided for waterfowl hunting. Provision or prohibition of access to migratory birds is determined by the health of populations – not the beliefs or prejudices of the Service.]*. They are found in title 50, Code of Federal Regulations, parts 10, 13, 21, and 22.

We have implemented a series of migratory bird permit memoranda to ensure consistent implementation of our regulations and policies pertaining to migratory birds *[However, there is no consistency between raptor use and waterfowl use for private purposes.]*. Our latest memorandum in the series provides guidance for issuing Special Purpose permits (50 CFR 21.27) to authorize *[replace with “provide for”]* the possession and use of raptors protected by the MBTA to abate depredation problems. For purposes of this memorandum, “abatement” means the training and use of raptors to flush, haze, or take birds (or other wildlife where allowed) to mitigate depredation problems, including threats to human health and safety. Permit holders may be paid for providing abatement services *[please add to this sentence: “since the Service has no authority over privately owned birds being privately used for commercial purposes, other than sale, barter, etc., as the MBTA explicitly instructs.” Implicit interpretation is not acceptable, hence the reason the list of prohibitions are enumerated in the MBTA. The allowance of implicit interpretation provides for the means to expand Congresses’ intent in boundless directions, which provides access to arbitrary powers.]*. We developed this draft memorandum in response to growing interest in the use of raptors to conduct commercial abatement activities. The Service has determined that authorizing such use is consistent with the MBTA and with the long-term conservation of raptor species. The Service seeks public comments on the draft permit conditions, which are presented below.

Applicants for a Special Use--Abatement (SPA) permit would use FWS Form 3-200-10f, the Migratory Bird Special Purpose--Miscellaneous application form. If we determine that the application meets our requirements *[Better to say “meets the requirements” since it is not appropriate to give the impression that the Service sees itself as superior to citizens. Any authority the Service has is derived from the people, so the requirements are the peoples’ requirements, not the Service’s.]*, we will issue an SPA permit containing the proposed conditions set forth below. The first three conditions (A, B, and C) are standard for all Special Purpose permits. The remaining conditions (D through K) would be unique to abatement permits. It is about these conditions that we seek comment.

Special Purpose--Abatement Permit Conditions

A. General conditions set out in subpart D of 50 CFR 13, and specific conditions contained in Federal regulations cited in block 2 above, are hereby made a part of this permit. All activities authorized by this permit must be carried out in accord with and for the purposes described in the application submitted. *[There is no justification in this. An applicant may pursue commercial abatement opportunities where they may present themselves – so long as no ESA or MBTA provisions are infringed. Business is a dynamic environment requiring responsive adaptation to change. Government micromanagement will severely inhibit, if not outright prohibit, such dynamics (the application of CITES and WBCA regulations being a perfect example). Again this asserts that the Service is superior to citizens and that citizens’ actions must be monitored ever so carefully since they cannot be trusted. The Founders instructed us that the reverse is true – that*

government must be monitored ever so carefully if we are to protect our liberties. Therefore, when a permit has been issued, citizens are free to pursue their activities without government interference, so long as those activities are not detrimental to society. Refer to the Regulatory Flexibility Act; also see comments below item number 2.]

Continued validity, or renewal, of this permit is subject to complete and timely compliance with all applicable conditions. *[This is a challenge to citizens and it serves no purpose other than create animosity and potential contention between permittees and the Service, and to what end? If permittees violate provisions in regulations, the threat should not be the withdrawal of the permit, which would rightfully lead to litigation (refer to Executive Order 12988, Civil Justice Reform, found below, item number 3; also see comments below item number 4 regarding Takings) on behalf of the permittee; rather a fine should be levied, which adds to the treasury of the Service and is less likely to be adjudicated. A reasonably established fine is an application of the sound principle: The punishment must fit the “crime.” The withdrawal of a permit for minor infractions is an abuse of power, and not only serves no social good, but rather is a social evil. It is strictly a technique of coercing citizens into submission so that they might be obedient subjects rather than responsible citizens. This, then, raises the question: Has the Service over-reached its authority and has therefore become more harmful to society than the activities it was created to mitigate?]*

B. The validity of this permit is conditioned upon strict observance of all applicable State, local, or other Federal law. *[Again this is a challenge that has no place in regulatory policies as it relates to something as benign as the use of raptors. An infraction of any legitimate law carries consequences which is sufficient as a deterrence to the normal citizen. Where there are egregious or repeat offenses is the time to seek the withdrawal of a permit – not before. The Service believing that it can grant and withdraw privileges as it arbitrarily sees fit is a gross misinterpretation of the constitutional powers granted to government.]*

C. Valid for use by permittee named above.

D. You are authorized *[replace with “You have been certified”]* to acquire, possess, and train up to [specify number] *[there is no justification for government to dictate the number of raptors a citizen may own]* captive-bred raptors *[eliminate the term captive-bred and just leave it as raptors]*, in any species combination, to include hybrids from those species *[there is no need to be this specific since the word “raptor” – being all inclusive – includes hybrids]*, of the following migratory bird species for the purpose of conducting abatement activities:

[List species' common and scientific names.] *[There is no justification for limiting which birds can or cannot be used. This inhibits progress which the Regulatory Flexibility Act seeks to remedy. The only raptors that can be prohibited are those listed within the ESA. Otherwise, arbitrariness enters the regulatory process, and arbitrariness is the antithesis of liberty.]*

All raptors must be captive-bred *[there is no justification for this]* and must be marked on the metatarsus with a seamless numbered band issued by the U.S. Fish and Wildlife Service. *[Raptors also cause depredation problems on game farms; therefore, a provision for capture of raptors on game farms for use in falconry, abatement, breeding and education needs to be promoted (this too will serve society) so that game bird breeders will not seek a means to harm raptors – legal or otherwise.]*

E. You may not take *[include the word “depredating” here to clarify intent]* species protected under the MBTA unless such take is authorized under a Federal depredation order or a Federal depredation permit identifying you as a subpermittee *[The use of the word “subpermittee” by itself is not clear. Should it be “permittee” and “subpermittee”? Or is the Service discussing two permits here: one for the raptor permit and another for migratory bird depredation permit?]*. You do not need a Federal permit to flush or haze depredating birds, other than endangered or threatened species or bald and golden eagles.

You do not need a Federal depredation permit to take species that the MBTA does not protect. *[This could be construed to mean that a raptor abatement permit is not needed to pursue depredating starlings and other non-protected species. Is this the case? Please clarify this.]*

The Service should provide the States the ability to implement their own abatement program which is not in conflict with MBTA or ESA provisions. If a State provides citizens with its own program, there would be no need for a federal abatement permit; only a federal depredation permit would be required when taking depredating migratory birds.

Since this principle is being applied to proposed falconry regulations by the Service, there is no reason it cannot be applied to an abatement program.]

F. Under this permit, you may use a raptor held under your falconry permit for abatement. However, you may use a raptor held under this abatement permit for falconry only if it is transferred from your abatement permit to your falconry permit. If you use raptors to take depredating game birds in the context of falconry rather than abatement, you must comply with all applicable seasons and bag limits and may do so only in areas where the practice of falconry is authorized. *[There are no “areas where the practice of falconry is authorized.” This portion of the sentence needs to be struck since it may lead law enforcement personnel to believe that if there isn’t explicit provision for falconry to be practiced on some specific property, it would be prohibited. We need to remember that the Law Enforcement Division of the Service misinterprets regulations to mean that unless provided for, all activities are prohibited (perhaps they do not understand the principles underlying the Ninth Amendment which one might paraphrase as: Unless specifically prohibited by sound law, citizens of this country are at liberty to pursue their endeavors unencumbered by government intrusion). However, there are areas where hunting is prohibited and of course this would apply to falconry as well. But there is no need for addressing such issues in these regulations – a hunting prohibition would be sufficient unto itself, requiring no redundant provisions here.]*

G. Subpermittees: Persons under your direct control or employed by you, or under contract to you for purposes authorized by this permit, may carry out the permitted activities provided they are, or have been, a General or Master Falconer (in accordance with 50 CFR 21.28). *[We are in agreement with the provision “or have been....” This recognizes previous experience and allows for flexibility that is so important to business.]*

In addition, we agree with the Service in that an applicant should not be required to hold a falconry permit to qualify for an abatement permit. Falconry is a private activity for recreational purposes. Abatement is a private business for commercial purposes. One sector of society should not have undue influence over another sector just because their activities are related. In a similar vein, the bird watching community should not have power or influence over falconry just because they like to look at raptors. Their influence must be restricted to the expectation that sustainable use management principles will be applied to raptors as it is to all other natural resources. Falconers must respect the liberties of other raptor users as we demand others to respect our liberties.

There is another reason falconry and abatement permits should be separated: As in all human activities, we cannot possibly see all outcomes that an activity might produce. Therefore, if some “evil” should somehow surface, falconry should not be associated with any problems the abatement program could possibly create. They are similar yet distinct activities that need to be managed, not controlled, differently.]

H. You must submit FWS Form 3-186A (Migratory Bird Acquisition and Disposition Report) completed in accordance with the instructions on the form for each acquisition and disposition of a raptor.

I. If your raptor takes a migratory bird in the course of conducting abatement activities and that take is not authorized by a depredation permit or a depredation order, the *[include the word “migratory” here in order to clarify intent]* bird must be left in the

field, though the raptor may be allowed to feed on it in the field. [*This would get in the way of future abatement activity in that vicinity. Raptors remember where they took quarry and they would certainly look at such locations during future flights in that vicinity. In addition, carcasses left in the field would be sought out by other predators, which might add an additional problem to the local circumstances. In order not to be wasteful, the taken migratory bird should be used as food for the raptor, but not for personal use. Given the infrequencies of such circumstances, no harm would come to migratory bird populations.*]

J. All facilities and equipment must meet standards described in 50 CFR 21.29, and all birds must be maintained under humane and healthful conditions at all times. [*In accordance with Executive Order 13132 **Federalism**, it would be more appropriate to instruct permittees that they must comply with their State falconry regulations as it relates to facilities and equipment. State regulations reflect 50 CFR 21.29 provisions and given the fact that the Service is withdrawing from permitting falconry, 21.29 may be either substantially modified or eliminated. In addition, the “humane and healthful conditions” requirement is not the responsibility of the Service and there is no provision for it. This falls under the jurisdiction of other governmental agencies and therefore must be removed.*]

K. Acceptance of this permit authorizes us to inspect in accordance with 50 CFR 13.47. [*This infringes upon 4th Amendment guarantees and therefore is an illegal assertion once the permit has been provided. ONLY within the context of public safety or health can 13.47 inspection powers of permittees’ facilities come to bear on the subject; however, even this is not an unlimited governmental power. This issue was taken to the Department of Justice as it relates to falconry. It is advised that the Service discuss this once again with Justice.*]

Executive Orders the Service needs to comply with:

1. Executive Order 12866 **Regulatory Planning & Review**: The primary purpose of this Order is: “The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society.” It continues under Section 1: “*The Regulatory Philosophy*. Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.... In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.... Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits...” Under *The Principles of Regulation* it states: “To ensure that the agencies’ regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles... (1) Each agency shall identify the problem that it intends to address (including ... the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem. (5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation ... the costs of enforcement and compliance (to the government regulated entities, and the public) ... and equity. (6) Each agency shall assess both the costs and the benefits of the intended regulation and ... propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. (8) Each agency shall identify and assess alternative forms of regulation and shall ... specify

performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt. (10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.” The Service is inconsistent here as compared with other MBTA related activities in relation to waterfowl hunters, waterfowl breeders or pet keepers, and taxidermists as it relates to private use. It is also inconsistent with other Federal agencies as it relates to sustainable-use principles. Other agencies within the Interior support and promote these principles, but not when it comes to raptors. “(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals ... and other entities...” In the case of raptors, the Service has imposed a great burden on raptor related activities.

2. The **Small Business Regulatory Enforcement Fairness Act (SBREFA)**, expresses one of its primary purposes found in **Sec. 202 (5)** which states, “the requirements of chapter 6 of title 5, United States Code, have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute....” **Sec. 203 (6)** states, “to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented....” The principles found within this Act instruct agencies to find ways to reduce burdens upon citizens’ activities rather than maintain or increase them, especially when there is no compelling reason for the restrictions; and pressures exerted by special interest agendas are not compelling reasons to restrict citizens’ activities.

3. Executive Order 12988 **Civil Justice Reform** Section 3 (a) provides: “... each agency promulgating ... regulations ... shall adhere to the following requirements: ... (2) The agency’s proposed ... regulations shall be written to minimize litigation....” It is logical to assume that wherever a regulatory system is in place, there are bound to be infractions of the regulations and therefore adjudication of such cases. An increase in regulatory provisions and restrictions is therefore likely to see a corresponding increase in infractions and therefore judicial activity. Citizens and agencies must therefore scrutinize each regulatory provision and ask the question: If a restriction in question were repealed, what would the social and environmental cost be? If the answer is little or no cost, then the removal of such restrictions would be beneficial not only to principles of liberty, but they would also reduce the burden on the judicial system as this Executive Order instructs agencies to pursue. Therefore, unwarranted restrictions places an undue burden on the judicial system that offer little to no social or environmental benefits.

4. Executive Order 12630 **Takings** must be considered in formulating regulations. This proposal has a provision for taking of private property if the permittee doesn’t meet with some criteria imposed by these regulations. For example: If a tornado destroys a permittee’s raptor propagation facility and the permittee is unable to afford rebuilding it, the Service claims it has the authority to require the permittee to relinquish his private property, i.e. his raptors. No illegal activity need transpire and yet the Service can confiscate his property. The Takings Order requires “that government actions are undertaken on a well-reasoned basis” that it should “reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action....” It also states, “regulations imposed on private property that substantially affect its ... use, may constitute a taking of property.” In addition, “Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts. ... Actions to which this Order applies, asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to

achieve the health and safety purpose.” It cannot be asserted that health and safety are at issue in regards to raptor use; yet the use of raptors is treated as though they were at issue. In addition, the impositions on raptor use are far greater burdens than what are imposed upon public health and safety issues as it relates to something as important as food for example. This implies there is a substantial prejudice against the use of raptors for business or personal use, but without any justification for the prejudice. Therefore, Executive Order 12630 applies, which requires that the Service embrace these principles and reduce the burdens imposed to only those issues that are of justifiable public interest and no more.

5. The **National Environmental Policy Act**. It is hoped that the Service will embrace the principles contained within this Act where it states, “(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means ... to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may -- ... 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; 4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice; 5. achieve a balance between population and resource use”