31 July 2023

Public Comments Processing
U.S. Fish and Wildlife Service
MS: PRB (JAO/3W)
5275 Leesburg Pike
Falls Church, VA 22041– 3803


Submitted via regulations.gov

Thank you for the opportunity to submit these comments regarding the U.S. Fish and Wildlife Service’s June 1, 2023 Proposed Rule to amend the current regulatory authorizations and add new regulatory authorizations for the possession of migratory birds and eagles.

The Ornithological Council is a consortium of scientific societies of ornithologists. The research conducted by their members spans the globe and their cumulative expertise comprises the knowledge that is fundamental and essential to science-based bird conservation and management. The members of these scientific societies may be researchers working for academic institutions, museums, agencies or non-profit organizations. Their work runs the gamut from field research, to teaching, to curating museum collections. Collectively, the ornithological research they conduct and facilitate enables ornithological conservation around the globe.

Federal permit regulations are one of the Ornithological Council’s key concerns, as such permits are often a prerequisite for the scientific research undertaken by ornithologists. Therefore, we appreciate the USFWS’s efforts to improve efficiency and reduce regulatory burden through regulatory authorizations, and thank you for the opportunity to submit comments on this proposed rule.
Salvage Authorization -

We are particularly grateful to the USFWS for proposing a regulatory authorization that would allow members of the public to collect and donate bird carcasses to museums. This seemingly minor change actually addresses a long-standing problem in that museums were often unwilling to accept such donations because the donors had no salvage permits and therefore were not lawfully in possession of these carcasses. However, the carcasses can be of great scientific and educational value, and can reduce the number of live birds that scientists might otherwise collect from the wild for research and teaching purposes.

The Ornithological Council has requested a citizen salvage policy or regulation for years. In 2010, a citizen salvage provision was included in a proposed regulation for a new conservation education permit (75 FR 182). Unfortunately, that regulation was never finalized. We thank the USFWS for developing a policy that would allow citizen salvage, so that scientists can take advantage of this valuable resource. Eliminating the requirement for a salvage permit will also relieve the administrative burden of the permitting process for both the agency and for those who salvage birds with some regularity.

The proposal notes that, “All birds salvaged must be promptly disposed of by donation to a person or entity authorized to receive them, such as for purposes of education or science, or disposed of by complete destruction. Any person may contact the Service Migratory Bird Program to determine if an entity is authorized to receive donated birds.” We encourage the USFWS to develop and post online a list of institutions willing to accept salvaged bird carcasses, to facilitate the timely donation of salvaged specimens.

Airborne Hunting Act Regulations -

Drones are a valuable tool for wildlife management and research. Many members of our ornithological societies use drones to study birds and much of that research serves as a foundation for wildlife management and species conservation. Drones (aka “small unmanned aerial systems” or “small unmanned aerial vehicles”) allow access to places that are otherwise difficult or impossible to reach and can gather valuable information while reducing disturbance to wildlife. The use of drones also promotes researcher safety by eliminating the need for survey by piloted aircraft and reducing the need for activities such as cliff-climbing, tree-climbing, and wading through swamps.

Current regulations authorize the harassment of migratory birds under the Airborne Hunting Act (AHA) only for activities conducted under depredation permits issued by the USFWS. Those AHA regulations have not been substantively revised since they were promulgated in 1974. The Ornithological Council has been calling for regulatory changes to clearly allow the use of the drones for wildlife research for several years, so we appreciate this proposed change.
In 2017, the Ornithological Council asked the Department of the Interior’s Office of the Solicitor to advise the USFWS, other federal agencies, and state agencies that the use of drones for wildlife research is not subject to the Airborne Hunting Act. We also asked that, if the Solicitor determined that the use of drones to study wildlife was subject to the AHA, that they address the need for federal permits because there are few, if any, state laws pertaining to drone use for wildlife research and monitoring.

In 2018, the Ornithological Council filed a petition for rule-making, asking the USFWS to issue permits for the use of drones to study wildlife. That petition proposed the changes necessary for the USFWS to issue permits under the AHA, since, if the Solicitor were to determine that the use of drones for wildlife research was covered by the AHA, permits would be needed. That petition explained that state airborne hunting statutes generally pertain only to game species, which is not surprising given that these laws, like the federal AHA, were intended to restrict hunting. Most state drone laws (some states have none) pertain primarily to privacy, law enforcement, and restrictions on flights near “critical facilities” such as utility generation plants, water treatment plants, and airports. Therefore, in most states, there is no existing statute that could accommodate a provision for drone use for scientific research and monitoring generally, much less by non-governmental institutions and individuals.

We do recommend some changes to the regulatory language proposed by the USFWS, based on our previous comments.

Revised regulatory language proposed by USFWS:

50 CFR 19.21 No Federal permits will be issued to authorize any person to hunt, shoot, or harass any wildlife from an aircraft, except for Federal permits issued under part 21 or part 22 of this subchapter.

Regulatory language previously suggested by the Ornithological Council (proposed new language in italics):

50 CFR 19.21 No Federal permits will be issued to authorize any person to hunt, shoot, or harass any wildlife from an aircraft, except:

(a) permits to scare or herd migratory birds referred to in § 21.41 of this subchapter;

(b) permits to allow the scientific study and monitoring of wildlife, provided that for the scientific study and monitoring of birds, permits authorized under 50 CFR 21.23 may include authorization for the use of manned or unmanned aircraft. Permits issued under this provision may be used only if required state permits (if any) for scientific collecting and/or drone use have been obtained and FAA registration requirements have been met.

(c) if a state issues a permit pursuant to Subpart D of this regulation, no federal permit is required.
We also suggested that 50 CFR 19.31(a) (regarding state permits) be revised (proposed new language in italics):

50 CFR 19.31 State permits (a) Except as provided in § 19.3, States may issue permits to persons to engage in airborne hunting or harassing of wildlife for purposes of administering, protecting land, water, wildlife, livestock, domestic animals, human life or crops or for the purpose of scientific research and monitoring. The use of manned or unmanned aircraft for scientific research and monitoring may be authorized in scientific collecting or scientific research permits. States may not issue permits for the purpose of sport hunting.

While the regulatory changes proposed by USFWS would address the Ornithological Council’s concerns by allowing drone use under permits issued by USFWS under 50 CFR 21 and 22, we note that the changes recommended by the OC would also:

1. Make clear that FAA registration and state permitting requirements should also be met; and
2. Explicitly allow states to issue permits for scientific collecting or research that allow drone use.

Again, we appreciate the USFWS’s attention to this important issue.

**Public Institutions: Educational Use of Specimens Authorization** -

Current regulations allow certain public entities to possess migratory bird specimens without a permit. Under 50 CFR 21.12(b)(1), public museums, public zoological parks, accredited institutional members of the Association of Zoos and Aquariums and public scientific or educational institutions (among others) are exempt from the permitting requirements for possession of migratory birds and eagles. We support expanding the scope of that term to include all public entities, and thank the USFWS for proposing a clear definition for the term “public.”

We acknowledge that, under the new rule, the authorization would no longer apply to the possession of live birds. The Ornithological Council submitted separate comments on the recent Advanced Notice of Proposed Rule the exhibition of live migratory birds and eagles for educational purposes, and appreciates that the USFWS will allow any entity currently operating under 50 CFR 21.12(b)(1) to continue activities currently authorized by the regulatory authorization until the agency finalizes the proposed educational use regulations.

The regulatory changes would also provide an interpretation of the term “scientific societies,” as it relates to exhibition of eagles. As proposed, a public scientific society is any entity that, as part of its purpose, promotes public knowledge about science or conducts research and makes data and findings available to the public. The ornithological Council supports this definition of scientific society.
Mortality Event Authorization -

Regulations currently authorize natural resource and public health agency employees to collect, possess, transport, and dispose of migratory birds affected by avian disease outbreaks without a permit. The proposal clarifies the existing language and expands the current scope of this authorization from disease outbreaks to all mortality events. Such an expansion would allow agencies to also address avian infectious disease outbreaks, such as avian influenza or West Nile virus, under this authorization. The Ornithological Council supports an expansion of this authorization, as these types of mortality events are often emergent and require a timely response to identify and contain the outbreak.

Natural Resource Agency Employees Authorization -

The proposal would establish a new regulatory authorization for USFWS and state wildlife agency employees to salvage birds, use migratory bird specimens for educational programs, transport birds to medical care, and relocate birds in harm's way. The Ornithological Council supports this authorization and agrees that allowing these activities under a regulatory authorization as opposed to a special use permit would better facilitate agency employees conducting routine activities and reduce the administrative burden of the permit process on the USFWS and other natural resource agencies.

Humane and Healthful Conditions Definition -

Current regulations currently require any live wildlife to be possessed under “humane and healthful conditions” but do not provide a definition of that term. The agency has proposed adding a definition: *humane and healthful conditions means using methods supported by the best available science that minimize fear, pain, stress, and suffering of a migratory bird held in possession.*

The Ornithological Council believes strongly that birds, both wild and captive-bred, should be treated humanely, both in the laboratory and in research conducted in the wild. We note that wild animals may be more sensitive to capture and manipulation than their captive-raised counterparts. We appreciate the desire to develop a definition for “humane and healthful conditions” and support reliance on the best available science. However, we caution that including subjective terms such as fear, pain, and suffering will make it difficult to enforce this provision.

We recommend revising the definition of “humane and healthful conditions” to reduce subjective assessment, to the extent possible, by relying more heavily on “stress,” a physiological condition, and less on the subjective terms “fear,” and “suffering.” The National Research Council in its 1992 publication *Recognition and Alleviation of Pain and Distress in Laboratory Animals* cautions that it is difficult to define and apply these terms. “There is a lack of agreement on the meaning of such terms as comfort, well-being, discomfort, stress, fear, anxiety, pain, and
distress,” says the report. “This document assumes that an animal’s state can vary across a continuum from comfort through discomfort to distress, as evidenced by the appearance of physiologic changes and maladaptive behaviors. The state of an animal depends on the nature of the stressors, the degree of stress induced, and the animal's ability to respond in such a way as to maintain or return to a state of comfort.”

Of course, there is a continuum of stress that may result from a given procedure, and where stress ends and fear or suffering begins is an unanswerable question. It is also important to recognize the differences among individuals and among species. There is not a reliable, universal indicator of pain. Responses vary significantly. Some individuals or species will exhibit behaviors indicative of discomfort (such as vocalizations or efforts to escape) simply because they are held by humans, even when no procedure is taking place. Others will sit quietly, but may be undergoing significant discomfort. Some birds may not manifest any overt signs until the negative stimuli exceed a certain threshold.

We do agree that the requirement for “humane and healthful conditions” should apply during capture, possession (temporary or long term), or transport, and pertain to handling (e.g., during capture, care, release, restraint, and training), housing (whether temporary, permanent, or during transport), shelter, feeding and watering, sanitation, ventilation, protection from predators and vermin, and, as applicable, enrichment, veterinary care, and euthanasia.

Conclusion

The federal permits issued under both the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act are crucial to the work of the ornithologists who make up the societies of the Ornithological Council. We appreciate the willingness of the U.S. Fish and Wildlife Service to consider our feedback on the implementation of these laws, both through these comments and through our many interactions over the year. Again, thank you for considering the views of ornithologists.

Sincerely,

Laura M. Bies
Executive Director