



Tracking Number: (Click here to enter text.)

To request a change to regulations under the authority of the California Fish and Game Commission (Commission), you are required to submit this completed form to: California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814 or via email to [FGC@fgc.ca.gov](mailto:FGC@fgc.ca.gov). Note: This form is not intended for listing petitions for threatened or endangered species (see Section 670.1 of Title 14).

Incomplete forms will not be accepted. A petition is incomplete if it is not submitted on this form or fails to contain necessary information in each of the required categories listed on this form (Section I). A petition will be rejected if it does not pertain to issues under the Commission's authority. A petition may be denied if any petition requesting a functionally equivalent regulation change was considered within the previous 12 months and no information or data is being submitted beyond what was previously submitted. If you need help with this form, please contact Commission staff at (916) 653-4899 or [FGC@fgc.ca.gov](mailto:FGC@fgc.ca.gov).

## **SECTION I: Required Information.**

*Please be succinct. Responses for Section I should not exceed five pages*

### **1. Person or organization requesting the change (Required)**

Name of primary contact person: American Falconry Conservancy – Troy Morris - President

Address: [Click here to enter text.](#)

Telephone number: [Click here to enter text.](#)

Email address: [president@falconryconservancy.org](mailto:president@falconryconservancy.org)

### **2. Rulemaking Authority (Required) - Reference to the statutory or constitutional authority of the Commission to take the action requested: Fish & Game Code 395**

### **3. Overview (Required) - Summarize the proposed changes to regulations: Repeal FGC 670 (J)(1)(A) and 670 (J)(1)(B) 670(J)(1)(A) The department may conduct unannounced visits to inspect facilities, equipment, or raptors possessed by the licensee, and may enter the premises of any licensed falconer during a reasonable time of the day and on any day of the week. The department may also inspect, audit, or copy any permit, license, book, or record required to be kept by the licensee under these regulations at any time. 670(J)(1)(B) If a licensee's facilities are not on property owned by the licensee, he/she shall submit to the department's License and Revenue Branch a signed and dated statement indicating the property owner agrees that the falconry facilities and raptors may be inspected by the department without advance notice.**

### **4. Rationale (Required) - Describe the problem and the reason for the proposed change: Rationale – These regulations were not promulgated in compliance with California Administrative Procedures Act (APA). The APA establishes rulemaking procedures and standards for state agencies in California. The requirements set forth in the APA are designed to provide the public with a meaningful opportunity to participate in the adoption of state regulations and to ensure that regulations are clear, necessary and legally valid. The failure to comply with the APA CS11349(a), CS11349(b) and CS 11349(e) has resulted in regulations which violate the 4<sup>th</sup> Amendment of the US Constitution and threaten the personal security of the citizens of California from law enforcement abuses. APA Authority and Reference standard - The APA requires that regulation must satisfy the Authority and Reference standards. Complying with the Authority and Reference standards involves a rulemaking**



agency in two activities: picking appropriate Authority and Reference citations for the note that follows each regulation section to be printed in the California Code of Regulations, and adopting a regulation that is within the scope of the rulemaking power conferred on the agency. Each regulation section printed in the California Code of Regulations must have a citation to the specific statutory authority under which it was enacted and a citation to the specific statute or other provision of law that the regulation is implementing, interpreting, or making specific. APA 11349(b) "Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. APA 11349(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. Although the following is the Department's claims of "Authority" and "Reference" these have never been printed in the California Code of Regulations. In its Final Statement of Reasons ("FSR") pertaining to the California falconry regulations (51 Cal. 4th 1074, 1098, 2012) the Department supports either "authority" or "reference" (its unclear which since the citations were never printed in the CCR's) by referring to *People v. Maikhio*. *People v. Maikhio* rules only that a warden does not violate the Fourth Amendment by stopping the vehicle to demand the display of all fish or game that have recently been taken when a game warden reasonably believes that an occupant of a vehicle has recently been fishing or hunting. In *Maikhio*, the warden observed a man "handlining" (an illegal method of lobster fishing) from a pier and pull something from the water, which he placed in a black bag. The defendant got in his car, drove away and was stopped by the warden. The warden's further search of the Defendant's bag was supported because the warden had probable cause to perform the same, when Defendant lied about not having fish or a lobster in the black bag, in violation of California Fish and Game code 2012. Despite Department's use of this case in its FSR, the case is not applicable to residential searches without a warrant. This case only provides support for vehicle stops when a person has recently been hunting or fishing. Furthermore, the warden had probable cause to perform his search of the Defendant's bag after the stop. As a result, *People v. Maikhio* actually contradicts the Department's claim to legal residential searches. Further, the Department asserted in Commission hearings that California Fish and Game Code section 1006 provides further support for warrantless falconry inspections. This code section was reserved for commercial uses and permits, not residential searches of sportsmen. Fish and Game Code section 1006 reads as follows: The department may inspect the following: (a) All boats, markets, stores and other buildings, *except dwellings*, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibia may be stored, placed, or held for sale or storage. (b) All boxes and packages containing birds, mammals, fish, reptiles, or amphibia which are held for transportation by any common carrier. [Emphasis Added]. The Code clearly and specifically prohibits the search of dwellings, not because the search of all other personal property is allowed, simply than many commercial facilities that processed fish and game products at that time also had caretaker facilities on site. This attempt by the legislator to clarify the protection of personal property from warrantless administrative search is being misconstrued to suggest that one's cartilage is not offered 4th Amendment protection. In *People v. Maikhio* the Supreme Courts explains 1006: *Section 1006 is derived from former section 23 of the original Fish and Game Code as enacted in 1933 (Stats.1933, ch. 73, § 23, p. 396). Former section 23 provided in relevant part: "The commission shall inspect regularly (1) all boats, markets, stores and other buildings, except dwellings, and all receptacles except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, mollusks, or crustaceans may be stored, placed, or held for sale or storage..." In providing for the regular inspection of the specified locations, former section 23 was evidently intended to authorize game wardens to conduct repeated inspections of places where fish and game were likely to be kept for sale or storage, and was not primarily directed at more ad hoc, in-the-field stops of noncommercial anglers and hunters by game wardens seeking the display of required licenses or any fish or game that have been caught or taken.* The Department has cited also *Betchart v. Fish and*



*Game 158 Cal.App.3d 1104* as authority for warrantless searches. *Betchart* is inapposite, only allowing wardens to patrol private lands where game is present and hunting is actively occurring and specifically exempted the home from the same searches. It clearly states, *Wild game hunting is not a commercial enterprise (as are the liquor and firearms industries). Nevertheless, hunting takes place in "open fields" whether publicly or privately owned; this is a convincing factor that plaintiff's expectation of privacy while hunting is unreasonable. [7] Open field sites are regarded as so public in nature that searches are justifiable without any particular showing of cause or exigency. (People v. Dumas (1973) 9 Cal.3d 871, 882 & fn. 10 [109 Cal.Rptr. 304, 512 P.2d 1208].) "This hierarchy of protection arises not from the application of differing constitutional standards to various locales, but rather from an application of a single standard of reasonableness to all places in accordance with a fundamental understanding that a particular intrusion into one domain of human existence [such as the home] seriously threatens personal security, while the same intrusion into another domain does not." (Id, at pp. 882 883; see also Joseph v. Masonite Corp. (1983) 148 Cal.App.3d 6, 11 12 [195 Cal.Rptr. 629].) [Emphasis added].* Finally the Department claims warrantless searches are required by Federal regulation. The CCR cites Title 50, Code of Federal Regulations, Parts 21.29 and 21.30 as Reference for these warrantless administrative searches. While it is clear that the Federal regulation contains inspection language, it is equally clear that this regulatory language was recently added with nothing in statute or law supporting this disregard of Fourth Amendment protections. Agency regulations, Federal or State, do not meet the definition of "Reference" required by APA 11349 (a) or "Authority" required by APA 11349(b). California law requires that statute and law support the creation of regulation. One regulation cannot support the creation of another. Such circular logic leads to one illegal regulation creating another, thereby circumventing legislators' intentions and authority. The Federal authority to regulate migratory birds is provided by the Migratory Bird Treaty Act (MBTA), which does not authorize warrantless administrative searches. The MBTA is a strict liability statute and because of this, the Supreme Court has stated that such legislation and subsequent regulations must be explicit since citizens are held to higher standards since no intent of wrong doing is required for arrest, trial or conviction. Below is the explicit language provided in the MBTA authorizing searches. *706. Arrests; search warrants Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this subchapter shall have power, without warrant, to arrest any person committing a violation of this subchapter in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this subchapter; and shall have authority, with a search warrant, to search any place. The several judges of the courts established under the laws of the United States, and United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue warrants in all such cases.* APA Necessity standard - In the *record of the rulemaking proceeding* (record), the agency must state the specific purpose of each regulatory provision and explain why the provision is reasonably necessary to accomplish that purpose. It must also identify and include in the record any materials relied upon in proposing the provision and any other information, statement, report, or data the agency is required by law to consider or prepare in connection with the rulemaking action. Each regulation must satisfy the Necessity standard. APA 11349(a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. The Necessity of these two regulations to effectuate the purpose of the statute is unknown since this does not appear to have been stated on the public record. Had the Department complied with APA 11349(a) and attempted to document the need for a regulation to effectuate the purpose of the statute, they likely would have realized that the proposed provision of the regulation was inapplicable to the



statute. In any case the Necessity standard of APA 11349(a) has not been satisfied. As previously shown the Authority and References claimed by the Department are in conflict with the court decisions of *Betchart v. Fish and Game* and *People v. Maikhio* and the Fourth Amendment of the US Constitution. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” **Conclusion:** These regulations were not promulgated in compliance with the APA CS11349(a), CS11349(b) and CS 11349(e). The legal authority cited by the Department is invalid or inapplicable, and, in most cases, contradictory to its stated position. The administrative searches of a falconer’s home and related areas violate the California Constitution and the Fourth Amendment of the United States Constitution.

## SECTION II: Optional Information

5. **Date of Petition:** 6/17/2016

6. **Category of Proposed Change**

- Sport Fishing
- Commercial Fishing
- Hunting
- Other, please specify: falconry

7. **The proposal is to:** (*To determine section number(s), see current year regulation booklet or <https://govt.westlaw.com/calregs>*)

- Amend Title 14 Section(s): Click here to enter text.
- Add New Title 14 Section(s): Click here to enter text.
- Repeal Title 14 Section(s): FGC 670 (J)(1)(A) and 670 (J)(1)(B)

8. **If the proposal is related to a previously submitted petition that was rejected, specify the tracking number of the previously submitted petition** Click here to enter text.

Or  Not applicable.

9. **Effective date:** If applicable, identify the desired effective date of the regulation. If the proposed change requires immediate implementation, explain the nature of the emergency: 7/1/2016

10. **Supporting documentation:** Identify and attach to the petition any information supporting the proposal including data, reports and other documents: Click here to enter text.

11. **Economic or Fiscal Impacts:** Identify any known impacts of the proposed regulation change on revenues to the California Department of Fish and Wildlife, individuals, businesses, jobs, other state agencies, local agencies, schools, or housing: Click here to enter text.

12. **Forms:** If applicable, list any forms to be created, amended or repealed:

Click here to enter text.



**SECTION 3: FGC Staff Only**

Date received: [Click here to enter text.](#)

FGC staff action:

- Accept - complete
- Reject - incomplete
- Reject - outside scope of FGC authority

Tracking Number

Date petitioner was notified of receipt of petition and pending action: \_\_\_\_\_

Meeting date for FGC consideration: \_\_\_\_\_

FGC action:

- Denied by FGC
- Denied - same as petition \_\_\_\_\_
- Granted for consideration of regulation change

Tracking Number