AMERICAN ★ FALCONRY
CONSERVANCY

To: Dr. Kelly Helmick
Senior Veterinary Medical Officer – Avian Specialist
USDA, APHIS, Animal Care

Sept. 11, 2024

Re: U.S. Department of Agriculture's Animal Care Program (USDA-Animal Care) Final Rule pertaining to the care of birds, which includes raptors – *Federal Register, 88 FR 10654.*

We appreciate your time in helping the U.S. Fish & Wildlife Service (FWS) raptor permittees community better understand the line between FWS exclusive authority and where there might be overlap between FWS and U.S. Dept. of Agriculture's (USDA) authority under the AWA in relation to raptor use.

Falconry and raptor abatement activities have been clearly articulated to be exempt from AWA regulatory authority and provisions, so there are no clarifications needed for these uses. In addition, *de minimis* exemptions reduces the burdens on citizens while allowing APHIS officials to focus on businesses that have the greatest potential for inhumane conditions.

As for exhibition uses, USFWS's intent is to transfer these responsibilities to USDA. This has not actually transpired yet as they have not published their Final Rule. However, raptor propagation and raptor education uses in USDA's Final Rule are somewhat more murky. They therefore need examination to harmonize government interests with stakeholder interests and understandings. It is important that citizen welfare and animal welfare are balanced. After all, as Hegel expressed it, humans treating animals inhumanely promotes humans treating one another cruelly. There is an important social component in promoting healthy animal husbandry while simultaneously defending citizens' rights in the use of their property.

Legal Justification for Regulatory Oversight

As a matter of legal principle, we need to justify regulations and their interpretation and implementation based on sound doctrines that truly advance a social interest—in this case, the health and humane treatment of raptors—but yet are void of special interests that have a subjective perspective intended to incrementally extract property rights from animal owners, which is all too common.

The falconry community has endured just such abuse since raptors were brought under the MBTA and CITES. Recently, we have been exposed to abuse emanating from FWS's CITES Management Authority, which has been overtaken by extreme animal rights personnel. CITES

was originally designed to manage sustainable use of animals taken from the wild for commercial purposes and to promote captive breeding for commercial purposes to alleviate pressure on wild taken animals. FWS Management Authority has unilaterally expanded CITES protections to encompass captive bred raptors—in direct violation of the letter and spirit of CITES provisions—thereby treating raptor progeny as wild raptors (demonstrating FWS's position that raptors are always wild). This will have the effect of increasing pressure on wild raptor populations for international commercial trade. This is an example of subjective special interest pressures having a negative effect on social interests; hence the reason falconers are wary of further regulatory control by government agencies, since they are prone to the Trojan Horse effect.

Regulatory Authorization

Historically, the distinction of regulatory authority over animals has been thus: Wildlife possession and **use** has been under either State or Federal wildlife management authority. The use of domestic or pet animals has been under USDA authority. As mentioned above, FWS considers raptors as wildlife regardless whether they are taken from the wild or captive bred and can never be considered pets or domestic animals. The manner in which the two different universes are managed can be dramatic, given the fact that we hunt with our birds. But the line has been crossed in which USDA officials have announced exhibition uses of MBTA raptors and, without reasoned justification, raptor propagators selling to exhibitors may now fall under USDA authority.

As a matter of public policy and as articulated in numerous Proposed Rulemakings, there is a need to ensure that there are no conflicting regulations and no duplicating agency authority. This is in order to minimize regulatory burdens on citizens (that can expose citizens to potential government conflict due to poor regulatory interpretation as well as ambitious officers) and to minimize waste of government resources; unless it may serve a vital interest that cannot be addressed by any other means, which the U.S. Supreme Court has articulated in numerous decisions. In *Peter Stavrianoudakis, et al.* v. *U.S. Dept. of Fish & Wildlife, et al.* a lower court, on behalf of AFC, stated:

> Under *Central Hudson*, the restriction must not be more extensive than necessary to serve the government interest. *Valle Del Sol, Inc.*, 709 F.3d at 821. The test is sometimes phrased as requiring a "reasonable fit"[1] between the government's legitimate interests and the means it uses to serve those interests, or that the government narrowly tailors the means to meet its objective. (p. 52)

[1] Also known as the *strict scrutiny* standard.

For decades, the FWS regulations, 50 CFR Part 21 Migratory Bird Permits, has adequately regulated raptor uses, and encompass specific standards for their care, including facility requirements, food, and inspection provisions, prior to issuance of permits. To now suggest another government agency needs to assist in raptor propagation oversight conducted by FWS without evidence of their failure is unnecessary, redundant, and wasteful.

Where FWS does not or will not provide animal welfare provisions for raptors—as their Proposed Rulemaking for Exhibition of Migratory Birds intends to leave such responsibilities to USDA—then AWA oversight makes sense and causes no duplication of agency authority.

Therefore, for USDA to oversee animal welfare of certain FWS raptor special use permittees, FWS would be required to publish a final rule change for the *Proposed Rulemaking for Exhibition of Migratory Birds & Eagles*, and FWS would have to surrender the animal welfare authority to USDA through the *regulatory authorization* tool as FWS has stated. It makes sense that only one agency should manage animal welfare regulations for any given use.

AWA Authority

To establish USDA's authority as enacted in the Animal Welfare Act, the Final Rule states:

> Under the Animal Welfare Act (AWA), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by **dealers**, **research facilities**, **exhibitors**, **operators of auction sales**, and **carriers and intermediate handlers** [emphasis added].

This establishes who is to be regulated. To establish what uses are to be regulated the Final Rule states:

> **Research**, **testing**, **experimentation**, or **exhibition** purposes, or as a **pet** [emphasis added].

Note, no mention of propagation.

Clearly it can be seen that some of what is provided for in the Final Rule is stretching the plain language of the AWA. But this can be argued another day, depending on how APHIS officers treat users of raptors.

AMERICAN ★ FALCONRY
CONSERVANCY

FWS's Transfer of Regulatory Oversight of Raptor Exhibition Uses

FWS's Proposed Rule for exhibition of MBTA raptors clarifies FWS versus USDA authority where it states:

> To balance the roles of USDA-Animal Care and the Service's Migratory Birds Program, the Service is considering the following framework. The movement of migratory birds from the wild to exhibition would be regulated by the Service. The humane care of exhibition birds would be primarily regulated under the Animal Welfare Act. To accomplish this, the Service would use an authorization tool called a *regulatory authorization* [emphasis added] (p. 35822).

Notice there is no mention by FWS of transferring raptor propagation regulatory authority to USDA.

FWS has not yet transferred health and humane treatment authority to USDA as it relates to exhibition permitted **uses**. Therefore, raptor uses must remain exclusively under FWS authority until a transition has been legally authorized. Once FWS has authorized and transferred animal welfare authority for exhibition to USDA via the *regulatory authorization* tool, USDA can then implement animal welfare regulations under the AWA, based on non-falconry exhibition use. The sole overlap between USDA's and FWS's regulatory authority will be the transfer of raptors (under MBTA authority) from wild populations or breeders (or any other FWS permitted use) to exhibitors, who are not using those raptors for falconry education. Once transferred, exhibitors will then fall under AWA authority.

Falconry Education

For raptor education, there is a division that must be clearly articulated:

1. Falconry education is exempt from AWA authority and will remain under the exclusive authority of FWS. On page 10657, USDA's Final Rule provides an exemption for raptor education dedicated to falconry: "Along with the practice of falconry, exhibitions of birds that solely promote the art of falconry will also be excluded from regulation, much in the same way that exhibitions of animals that promote the agricultural arts are not regulated. APHIS will determine whether an exhibition qualifies as promoting falconry on a case-by-case basis." However, this conflicts with FWS's policy: "Regulatory authorizations are most appropriate for situations that have straightforward eligibility criteria, do not require case-by-case customization of conditions, and pose a low risk to migratory bird populations" (*See* Federal Register/Vol.88, No. 105, June 1, 2023, Proposed Rules, page 35882).

Please keep in mind that some natural history education may be an element of falconry education. For example: migratory behavior (acquired over centuries of raptor trapping for falconry uses); health and care issues that originated with falconers and was later expanded upon by veterinarians and raptor scientists; the niches various raptors fill in the wild which corresponds to their uses in falconry; how falconers educated the public that raptors were not vermin which led to raptor inclusion under the MBTA; etc. Our objection to the use of the word "vermin"—since the time when Americans started practicing falconry in the 1930s—is a good example of why falconry and raptor education is so important to raptors and our society. Another good example is the plight of the peregrine and falconers' part in their recovery—separate from falconry practice—since we developed the knowledge and techniques to breed them in captivity and we developed the peregrine release programs.

2. Non-falconry related raptor education will be transferred to USDA authority once FWS's Final Rule is published.

Raptor Propagation:

Overlap or Duplicative Authority: Finally, we need to resolve the USDA position that FWS permitted raptor propagators, who may sell to exhibitors, will require an AWA license. For those who sell or breed raptors exclusively for exhibition, it is appropriate that they will require an AWA license. However, for those who sell to FWS permitted raptor users, along with AWA permitted exhibitors, this creates overlap of authority and is inappropriate given Federal directives to avoid overlap.

USDA's Final Rule provides many references to where it is appropriate for breeders to be exempt from the AWA licensure requirement. To begin, the Final Rule references USDA's effort to avoid or minimize overlap: "In the proposal, we invited comments on ways that we may reduce regulatory burden on persons who could be potentially regulated by both APHIS and USFWS" (p. 10666). Since USFWS has provided for animal welfare as it relates to raptor uses, and there have been no lapses in animal welfare for raptors under USFWS's regulations, it makes no sense for both agencies to have animal welfare provisions that are duplicative. Since the sole purpose of animal welfare regulations are to ensure protected animals are being treated humanely, if one agency is competent to this end, two will not make it any more effective. Duplicative regulations would only create conflict between users and the multiple agencies, as well as between agencies themselves. This is why FWS proposes to hand over animal welfare authority to USDA as it relates to exhibitors.

The reasoning used by some commenters that there are cases where there is agency regulatory overlap, must be justified with sound reasoning, e.g., one agency's authority and regulatory

provisions create a void for a true public interest. But in such cases, the question to ask: Is there truly "overlap?" The answer should be: Authority would be divided so that one agency addresses certain issues, that it is authorized to regulate through a Congressional act, while the second agency addresses separate issues that a separate Congressional act was created to address. Thus, overlap doesn't have to mean duplication.

Since there isn't a need for duplicative standards between the agencies' responsibilities, we suggest it be understood that for falconry, raptor propagation, raptor abatement, and falconry education, these uses remain exclusively under FWS, while exhibition activities will be the exclusive domain of USDA. This exclusive USDA domain would encompass raptor propagators who breed raptors for the exclusive use in exhibition and who are neither USFWS permitted nor authorized to sell to USFWS permitted users. The Final Rule addresses this where it states: "USFWS propagation permittees that do not exhibit their birds are not defined as *exhibitors* under § 2132(h) of the AWA and therefore are not subject to its provisions or to these regulations, which have been issued pursuant to the AWA" (p. 10668). Therefore, raptor breeding exhibitors should be under their own AWA licensing program, with USFWS having regulatory authority over the acquisition of wild raptors and any transfer from one use or one person to another (through 3-186A forms). Applying AWA regulations to these raptor uses, i.e., breeding exclusively for exhibition as well as exhibition itself, would not duplicate regulatory requirements.

The following provisions in the AWA Final Rule further exemplifies the principle for the need to avoid duplicative regulations:

> We proposed to revise the definition of *carrier* to include an exemption from AWA registration for anyone transporting a migratory bird covered under the MBTA from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities. As transport of such migratory birds is regulated by USFWS, any person transporting or otherwise possessing a migratory bird is required to obtain authorization to do so from that agency. We added this exception because APHIS and USFWS agree that the continued transport of MBTA-covered birds for rehabilitation without additional regulation is beneficial for species preservation and outweighs any potential risk to animal welfare (p. 10659-60).

On page 10660, the Final Rule repeats this same principle regarding rehabilitation being under USFWS under 50 CFR 21.76; as well as it relates to *Intermediate Handler*, "Any person intending to transport or otherwise possess a migratory bird covered under the MBTA is currently required to obtain authorization from USFWS" (p. 10663).

Actual versus Intended Use: The following is an analysis of USDA's explanations for *bred in captivity*:

> Revising our proposed definition of *bred for use in research* to mean ‘‘an animal that is bred in captivity **and** used for research, teaching, testing, or experimentation purposes,’’ in order to clarify that it pertains to **actual use** of the birds in research rather than stated **intended use** at the time of breeding [emphasis added].

This point clarifies that it is the end use that determines the need for an AWA license; not the act of propagation. Bred birds can be sold or given away or used initially for one purpose and then for another purpose. Therefore, the propagator cannot be held to the standards of the end use.

Subsequently, an exhibitor who breeds raptors for exhibition **uses** will need to be licensed under the AWA.

Correlations: The Final Rule provides the reasoning for the falconry exemption which correlates with why USFWS permitted raptor propagators also need to be exempt from the AWA:

> Several commenters asked if raptors would be exempt from licensing or excluded from coverage under the Act…. We are not excluding or exempting raptors from licensing…. However, we have amended the definition of *animal* to exclude from coverage all activities involving falconry … because falconry **falls outside of the regulated uses specified in the definition of *animal* in the Act**: ‘‘[R]esearch, testing, experimentation, or exhibition purposes, or as a pet” ... Moreover, USFWS regulations **require a permit to possess raptors according to use,** none of which include use as a pet. … This extensive degree of oversight further supports our interpretation of the AWA not to regulate falconry [emphasis added] (p. 10657).

This same line or reasoning applies to raptor propagation when propagators sell to USFWS permittees as well as AWA licensees. Propagators who breed exclusively for exhibition should be under the authority of AWA. To further clarify this point (though, as it relates to research), the Final Rule provides:

> We proposed to define the term *bred for use in research* so that the regulations are consistent with the Act and to make clear what birds are included under the term and therefore not covered under the Act or regulations. The term as we proposed it means ‘‘an animal that is bred in captivity and is being used or is intended for use for research, teaching, testing, or experimentation purposes’’ (p. 10658).

This line of reasoning also applies to the propagation-exhibition relationship. Raptors bred by exhibitors for use in exhibition fall under the Act. But propagators that breed raptors for other uses are exempt even if their progeny are sold to exhibitors.

An additional explanation in the Final Rule clarifies this further:

A substantial number of persons commenting on our proposed definition of *bred for use in research* indicated that the definition does not clearly delineate which uses of birds would be considered bred for use in research and which would not be, and many asked how APHIS would regulate based on a facility's intended use versus actual use of animals.

The commenters' questions on this subject highlight an important point, in that the use of the term in the AWA itself is ambiguous: ''Bred for use in research'' could be construed to mean bred with the intended use at the time of breeding being future use in research, or bred and used in research at a research facility. Several commenters pointed out that the intended use for the bird at the time of breeding may not be its ultimate use: A bird could be bred intending to be used in research and later sold or exhibited if determined to be ill-suited for research, or, alternatively, bred for purposes other than use in research and later determined to be suitable for research and used in a study or experiment.

The fact that intended use of animals can differ from actual use later on, poses two areas for revision for our rule and specifically our proposed definition of *bred for use in research.*

First, the definition leaves open a broad path for breeders to evade regulation: If APHIS regulated based on intended use of a bird, a breeder could simply state that the bird is intended for research and subsequently divert it to another, regulated use, thus circumventing the regulations entirely. Second, it creates a compliance challenge for registered research facilities, which are required to follow AWA regulations specific to research facilities: At what point does a bird in their possession stop being an AWA-covered, regulated animal and begin being a bird used in research? Could a stated intent to use all birds in research serve to exclude all birds in their possession from regulation, even those not being used in research? In other words, when do the regulations apply to a particular bird?

For these reasons, we decided that the most defensible interpretation of ''bred for use in research'' in the AWA is that the bird is bred in captivity and used for research at a research facility. ''Used for research'' applies to testing, experimentation, teaching, and research, including activities such as holding, conditioning, acclimating, and preparing animals for procedures. ''Used for research'' is unambiguous and makes it easier for the regulated community and APHIS to determine which birds are to be regulated and which are not, and **eliminates the challenges of regulating for intended use**. Accordingly, we are amending our definition of *bred for use in research* to mean ''an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes [emphasis added].''

> One commenter stated that the definition of *bred for use in research* in the proposed rule is unclear as to whose intent is at issue—the owner of the bird at the time it is bred or the ultimate user of the bird. The commenter asked us to clarify the meaning of ''intended for use,'' including how intent is determined and whose intent is at issue, and that we affirm that a change in intended use will not by itself result in being regulated.
>
> We acknowledge above that intended use would be difficult for inspectors to externally verify and could expose an impermissible exception in the regulations, as breeders excluded from regulation based on their intention to breed birds for use in research could later divert the birds to a different use such as pets or exhibition. Under the revised definition, only bred and used for research, not a change in intended use, would dictate a bird's regulatory status.
>
> As we have noted, a bird may be intended for regulated purposes such as for exhibition, only later to be determined to be suitable for and used in research. On this point, a commenter asked if the proposed definition would include birds ultimately acquired by a laboratory for research, but that had been bred for the pet trade, such as a parrot, finch, or other bird bred as a companion animal. Another commenter asked if zebra finches bred for the pet trade but purchased by a research institution would be covered by the proposed amendment. Another commenter asked whether birds for which the intent of use has changed over their lifetime, for example, birds raised as poultry to provide eggs, but later given to a biomedical research institution for teaching or research, are to be regulated.
>
> In keeping with our revised definition, birds that are bred in captivity and used by a research facility for research, education, or product testing, would be considered ''bred for use in research.'' Such birds would not be covered under the AWA or its regulations at the time that they are so used. Their intended use prior to being used for research would be immaterial for the purposes of meeting the definition (p. 10658-59).

USDA should create the phrase *bred for use in exhibition* to correlate the principles the Final Rule articulated above with *bred for use in research*.

Avoidance of Breeding for Exhibitors: One last point to make regarding USFWS permitted propagators: If these propagators require USFWS and USDA permitting-licensing to sell to exhibitors, many will forgo the USDA license, thereby narrowing choices to exhibitors. This will limit the choices and availability of captive bred raptors for exhibitors, and will therefore create an upward pressure on prices for raptors, but with no benefit to individuals, society, or raptors.

Sincerely,
Bill Murrin
American Falconry Conservancy
Legal Liaison and Great Lakes Director
605-691-3730

cc: Dr. Cody Yager, Avian Field Specialist, APHIS, Animal Care, USDA

Eric Kershner, Chief, Div. of Bird Conservation, Permits, and Regulations, Migratory Bird Program, USFWS