

in which the Commission could lessen the burden on classes of carrier or entities and will most likely benefit small entities more, relative to large entities.

*6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules*

36. None.

**Ordering Clauses**

37. *It is ordered* that that pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. 1001, the Further Notice of Proposed Rulemaking in ET Docket No. 04–295 is adopted.

38. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 21**

**RIN 1018–A197**

**Migratory Bird Permits; Educational Use Permits**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** We are soliciting public comments to help us develop permit regulations governing possession of live migratory birds and eagles for educational use.

**DATES:** Written comments should be submitted by December 12, 2005, to the address below.

**ADDRESSES:** You may mail or deliver comments to the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, MBSP 4107, Arlington, Virginia 22203. You also may submit comments via the Internet to:

*MB\_education@fws.gov.* See

**SUPPLEMENTARY INFORMATION** for file

formats and other information about electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service; (703) 358–1714.

**SUPPLEMENTARY INFORMATION:** Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include your name and return address in your Internet message. If you do not receive a confirmation that we have received your message, contact us directly at (703) 358–1714.

**Background**

This scoping notice is intended to help the U.S. Fish and Wildlife Service (the Service) gather information and suggestions about current practices and public views regarding educational use of live migratory birds and eagles, in anticipation of drafting new permit regulations for possession of migratory birds and eagles for educational purposes. Feedback from this notice will enable us to propose regulations that will already have benefited from input from the regulated community. (The proposed regulations will then be subject to the standard public notice and comment for purposes of crafting final regulations.)

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*) prohibits possession of any bird listed under treaties between the United States and Canada, Mexico, Japan, and Russia. Birds protected by the MBTA are referred to as “migratory birds.” In order to possess migratory birds or their parts or feathers for use in educational programs, you must obtain a permit from the Service (unless you are an institution exempted from the permit requirement under 50 CFR 21.12(b)). The Service issues such permits to authorize educational programs and exhibits that use nonreleasable or captive-bred migratory birds to teach people about migratory bird conservation and ecology. Permits are also required to possess migratory bird parts and feathers for educational use; however, at this time, we seek input only on issues pertaining to possession of live migratory birds and eagles for educational use.

Currently, because no regulations pertain specifically to educational use permits, educational activities that involve migratory birds are authorized by issuance of a special purpose permit under 50 CFR 21.27. That miscellaneous permit category is used to authorize activities not specifically addressed in existing migratory bird permit

regulations. In the absence of specific regulations addressing educational activities using migratory birds, the terms and requirements governing educational activities using migratory birds are currently promulgated via a list of standard conditions that are issued with each permit. Approximately 1200 permits for possession of live birds (including eagles) for educational use are currently active.

In a future rulemaking, we intend to propose a new permit regulation that will incorporate many of the longstanding policies and practices that are the basis of the current special purpose—education permit conditions. However, those conditions have never been the subject of notice and comment and may benefit from revision as a result of public input. Also, the special purpose—education permit conditions are not specific enough to provide sufficient guidance to the Service or to permittees to address many of the issues that arise in the regulation of possession of migratory birds for educational purposes. By creating a new permit category specifically for this purpose, the Service hopes to bring specificity and clarity to this area of migratory bird use.

As part of that same rulemaking, we intend to revise permit regulations governing exhibition of bald and golden eagles for educational purposes. Eagle permits are addressed through separate regulations from those governing educational use of other migratory birds because, in addition to the MBTA, eagles are further protected by the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668), which contains different, more restrictive provisions than the MBTA. We anticipate that the new proposed eagle exhibition regulations will incorporate by reference the regulations proposed for non-eagle migratory bird educational use, but with some variations that will be necessary to comply with the BGEPA.

Despite the differences between the MBTA and the BGEPA, many of the same issues arise in developing educational use regulations for eagles as for other migratory birds. Most of the questions we pose in this scoping notice are not addressed directly by either the MBTA or the BGEPA. For this reason, we are soliciting input regarding both eagles and other migratory birds on each question, except where specifically noted.

Regarding what the educational use permits will or will not authorize, some longstanding Service positions are well-established, based on traditional and/or existing precedents, while other issues

are less settled. For example, the Service's current and historical policy is that birds protected by the MBTA, including eagles, may not be taken from the wild for educational purposes. (We distinguish between educational purposes and scientific purposes. We issue permits for take of migratory birds for scientific purposes, under 50 CFR 21.23 (migratory birds) and 50 CFR 22.21 (eagles).) Migratory birds held under educational use permits must be either captive-bred or nonreleasable. In this context, nonreleasable designates a bird that was taken from the wild because of injury, illness, or some other factor that rendered the bird unlikely, even after appropriate rehabilitative treatment, to survive in the wild should it be released. Because sufficient numbers of nonreleasable and captive-bred migratory birds are available to meet the needs of educators, we do not believe that allowing birds to be taken from the wild for this purpose would be consistent with the MBTA's objective to conserve wild populations of birds.

Another established Service policy concerning educational use of migratory birds is the requirement that any program, exhibition, or display using those birds must include a substantive ecological, biological, and/or conservation message. Migratory bird possession must be consistent with the mission to conserve and protect wild populations of migratory birds. Thus, exhibition of such birds must be accompanied by a public message that explains the wild nature of birds, their ecological needs and/or conservation status, and their status as a public trust resource. Absent such messages, the public may assume that birds can be kept for personal use or entertainment. Demand for such birds would likely grow—with potentially negative consequences for wild populations, including black market trade, pressure to change regulations to authorize take from the wild, and a degraded status through the public's growing perception of them as pets, rather than wildlife.

Commercial trade was a large factor in the decline of the nation's migratory bird resource and the subsequent enactment of the MBTA in 1918. Subsequently, we have prohibited most commercial use of birds. Today, we authorize some commercial use, including propagation and sale of captive-bred raptors, waterfowl, and game birds. And, we have permitted a number of for-profit educational migratory bird programs that include ecological and/or conservation education as a meaningful component of their programs. However, the use of eagles in educational formats has been

limited by law to nonprofit entities because the BGEPA restricts eagle exhibition permits to certain "public" (nonprofit) institutions (see #9 below).

Product endorsement is prohibited under the current special purpose permit. We believe that endorsement of commercial products or services is not an acceptable use of migratory birds because such endorsement tends to obscure or even negate any educational component, compromising the Service's mission to protect migratory birds as wildlife.

Within the framework discussed above, the regulation of migratory bird possession for educational use entails a number of unresolved and/or novel issues on which we seek input from the public. Comments are particularly sought concerning the following issues:

(1) *Facilities.* We seek suggestions regarding criteria for housing birds under an educational use permit. We wish to adopt standards that ensure humane treatment of the birds but which are flexible enough to reasonably accommodate different circumstances. Should caging dimensions be based on whether birds are flighted or non-flighted? Among flighted birds, should the rule require different caging dimensions based on whether the birds are regularly trained or exercised outside of their enclosures, or not? Should the regulation stipulate that certain materials be used or avoided in constructing enclosures?

(2) *Adequate experience.* What level of experience should an applicant be required to have in order to qualify a permit to hold live birds for educational use? The Service is considering establishing a minimal hourly requirement for hands-on experience with the type(s) of species that the educator will be using in his or her programs. What type(s) of hand-on experience should count towards this requirement (e.g., conducting educational programs as a subpermittee under another's permit, working as a migratory bird rehabilitator, working in a zoo)? How many hours of hands-on experience should be adequate to qualify for a permit? Need the applicant have worked with each specific species that he or she intends to use for their programs? What kind of certification should be required to demonstrate that the applicant has met this requirement?

Should the regulation set forth different qualifying criteria between those who work with flighted and non-flighted birds? Or is it more important to develop criteria based on whether birds will be held on the glove during programs versus displayed in enclosures?

What type and amount of experience should a person be required to have to qualify to hold a live eagle under an eagle exhibition permit? Permits to possess eagles for education/exhibition are limited to certain types of public institutions (see Item #9). As with other migratory birds, however, additional criteria must be met in order to obtain a permit to possess eagles for education, including the requirement that the applicant have sufficient experience handling and presenting programs with the type of species that will be held under the permit. Eagles are distinct from other raptors because of their size, strength, and temperament. Combined, these characteristics would appear to demand a greater degree of expertise from their handlers in order to ensure the safety of the handler, the public and the birds themselves. How much and what type(s) of additional experience should be required before a person qualifies to hold a live eagle under an eagle exhibition permit?

(3) *Audience Contact.* How should the regulations address audience contact with migratory birds and eagles? In November 2000, the Service published a Request for Comments on a variety of issues related to falconry education facilities (65 FR 69726). Based on the response to that notice, and on other information, it is our current policy to allow members of the public without permits to hold trained, captive-bred falconry birds on the glove in falconry education programs that adhere to certain conditions developed to ensure that the birds are safely handled (i.e., the programs are conducted by a permitted general or master class falconer, the birds are held under educational use (as opposed to falconry) permits, sufficient instruction is provided regarding safety, activities are conducted at a designated locations, among other conditions). How should we treat audience contact with birds in more typical educational settings where fewer institutional safeguards are in place? Outside of situations where the facility meets qualifications to allow individuals to hold falconry birds on the glove (as noted above), should all audience contact with live migratory birds be prohibited by this regulation?

(4) *Free-flying Birds.* The current special purpose—education permit is silent as to whether birds may be free-flown at open-area venues. A number of avian exhibitors now engage in this practice, sometimes using bald and golden eagles. We are soliciting public opinion on whether this activity should be permitted under the new regulations. How significant are the safety issues inherent in free-flying birds, both for the

birds themselves, and for the audience? Can such venues adequately convey the required conservation or ecological message? Is the educational component lost, or is concern for conservation enhanced by the experience of observing free-flying birds? Are alternative techniques available that may be less risky which avian trainers could employ to fly birds in open settings?

(5) *Commercial Venues.* Educators may charge money for programs, but may not use migratory birds to endorse any product. Should permittees be prohibited from conducting programs at businesses and other primarily commercial venues, even if the message is about conservation, wildlife biology, and/or ecology and not about product endorsement?

(6) *What Constitutes Conservation Education?* Must the presentation be strictly about conservation, wildlife biology, and/or ecology? If not, how much discussion of conservation education is sufficient to justify possession and exhibition? For example, would a 2-minute trailer addressing the decline of a species in the wild justify authorizing the use of a bird in a 2-hour film about the adventures of a clever magpie that performs tricks for children? What criteria should the Service use to evaluate whether a permittee's presentation (or film or other medium) incorporates sufficient conservation education to legitimately provide a conservation benefit? Should migratory birds be permitted to be used for entertainment or other purposes as long as conservation education requirements also are met?

(7) *Effect on Nonprofit Conservation Education.* Will the opportunity to make a profit using migratory birds result in fewer educators taking their programs to schools and other nonprofit venues, with the result that fewer children and other nonpaying audiences will be exposed to migratory birds through conservation education? Since migratory birds are a public resource, should all permittees be required to conduct a minimum number of not-for-profit educational programs?

(8) *Limit on Number of Birds.* Should the regulations establish a numerical limit on the birds an educator may hold? A fixed limit would prevent permittees from collecting live birds that they do not use in educational programs. However, some larger facilities may be able to accommodate greater numbers of birds than others, while continuing to use the birds in public programs. For the Service to select a single number of birds that would be appropriate for all facilities

and venues would be difficult. Any maximum number we establish would probably be inappropriately large for individual educators with smaller facilities. If the regulation does not establish a fixed limit on educational birds, then the number of birds a permittee may possess will be set on an individual case-by-case basis. What criteria should the Service use to determine whether an educator may acquire additional birds? Whether we establish an across-the-board limit on how many birds a permittee may possess, or we provide for the number to be established on a case-by-case basis, how should the permit regulation address birds that were formerly used in educational programs, but are no longer suitable because of age or other conditions?

(9) *Who should qualify as "public" under the Bald and Golden Eagle Protection Act?* This question pertains solely to the regulation of eagles. The BGEPA provides that—other than Native Americans, who may possess bald and golden eagles for religious use, and falconers—the only entities who may be granted permits for eagle possession are: "public museums, scientific societies, and zoological parks." The Service has never established regulatory definitions of those terms. Instead, we have relied on the regulatory definition of "public" found in 50 CFR part 10, which applies to all the Service's permit programs, not just to migratory bird and/or eagle permit regulations. That definition reads as follows:

Public as used in referring to museums, zoological parks, and scientific or educational institutions, refers to such as are open to the general public, and are either established, maintained, and operated as a governmental service or are privately endowed and organized but not operated for profit.

We have the opportunity to establish regulatory definitions for "public museum," "public scientific society," and "public zoological park." We are not seeking to redefine the definition of public found at 50 CFR part 10 because that undertaking would require a joint rulemaking process involving all the Service programs to which part 10 applies. Rather, we seek to define the three terms "public museum," "public scientific society," and "public zoological park" as part of the eagle permit regulations in 50 CFR part 22. The new definitions would apply only to eagle permitting regulations. Because an executive agency may never establish regulations that conflict with the statute or statutes that provide the authority for the agency's actions, the new definitions

must be in accordance with the BGEPA's intent to protect wild populations of eagles. At the same time, to the extent possible, we would like to make the definitions as broad as possible within that intent so that the maximum number of otherwise qualified individuals are able to use nonreleasable bald and golden eagles for conservation education.

We need to consider that the lawmakers who enacted the BGEPA and limited eagle permits to public museums, public scientific societies, and public zoological parks likely envisioned that the eagles in question would be taken from the wild, as opposed to being nonreleasable birds that are already removed from wild populations. While the Service cannot revise the BGEPA, we can attempt to define the terms "public museum," "public scientific society," and "public zoological park" in a manner that reasonably accommodates today's circumstances without conflicting with the BGEPA's spirit and intent.

The requirement in the 50 CFR part 10 definition of "public" that an institution must be privately endowed serves as a form of insurance. If an institution were suddenly to suffer from a loss of financial support, the endowment would help to insulate the museum's collection—including its live birds—from neglect, disposal, or abandonment. However well meaning this concept may be, we question whether it should remain a requirement for obtaining permits to keep eagles for purposes of education, in light of the fact that the eagles in question cannot humanely be released to the wild and may not otherwise be placed.

To help us define "public museum," "public scientific society," and "public zoological park," we seek public input on the following issues:

9a. Should endowment be a required condition for qualifying as a public museum, public scientific society, or public zoological park under the BGEPA?

9b. Should museums, scientific societies, and zoological parks be nonprofit in order to be considered "public" for purposes of obtaining an eagle exhibition permit?

9c. How many hours should an institution be open to the public in order to be considered "public" for purposes of obtaining an eagle exhibition permit?

9d. Should accreditation by a respected accrediting body be a requirement for public museums, scientific societies, and zoological parks, for purposes of obtaining an eagle exhibition permit?

We welcome comments on the issues described above and encourage the submission of new ideas and suggestions.

#### **Public Comments Solicited**

Interested persons are invited to submit comments on issues related to permitting possession and use of migratory birds for educational purposes. We request suggestions, materials, recommendations, and arguments from the public; permitted educators; avian trainers, ornithological organizations; environmental organizations; corporations; local, State, Tribal, and Federal agencies; and any other interested party. Please ensure

that any comments submitted in response to this request for comments pertain to issues presented in this notice.

Our practice is to make comments, including names and home addresses of respondents, available for public review by appointment during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all

submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

**Authority:** The authorities for this notice are the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. 703–712), and the Bald and Golden Eagle Protection Act (16 U.S.C. 668a).

Dated: October 3, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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